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Issue Date: 17 June 2021

OALJ Case No.: 2013-STA-00050

OSHA Case No.: 5-3100-11-008

In the Matter of:

**ASSISTANT SECRETARY OF LABOR FOR
OCCUPATIONAL SAFETY AND HEALTH,**

Prosecuting Party,

and

MICHAEL BECKER,

Complainant,

v.

SMITHSTONIAN MATERIALS, LLC,

Respondent.

Appearances:

Brooke E. Worden, Esq.
Arsalan Nayani, Esq.
U.S. Department of Labor
Office of the Solicitor
Chicago, Illinois
For the Prosecuting Party

Mark P. Murphy, Esq.
Law Office of Mark P. Murphy
Milwaukee, Wisconsin
For the Respondent

DECISION AND ORDER ON REMAND

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (“STAA” or “Act”), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978. The pertinent provisions of the Act prohibit the

discharge, discipline of, or discrimination against an employee in retaliation for the employee engaging in certain protected activity.

PROCEDURAL HISTORY¹

I held the first formal hearing in this matter on May 14-15, 2014, in Milwaukee, Wisconsin, at which all parties were afforded a full and fair opportunity to present evidence and argument as provided by law and applicable regulations. The parties submitted Joint Stipulations (“2014 J. Stips.”), and at the hearing I admitted the following evidence: 2014 ALJX 1-2; 2014 CX 101, 104-112, 115, 117-120, 124, 129-133, 134-2 and 134-3, 136; and 2014 RX 4, 6, 10, 12, 18, 23, and 24. 2014 Tr. at 4-5. On July 31, 2015, I issued a Decision and Order Awarding Damages (“July 2015 D. & O.”).

On August 14, 2015, the Assistant Secretary of Labor for Occupational Safety and Health filed an appeal with the Administrative Review Board (“ARB”). Upon reviewing the record and my July 2015 D. & O., the ARB issued a Decision and Order of Remand (“ARB D. & O.”). The ARB D. & O. affirmed in part and vacated in part my July 2015 D. & O. Specifically, the ARB affirmed my determination that Smithstonian Materials, LLC (“Smithstonian” or “Respondent”) violated the STAA by retaliating against Mr. Becker for engaging in protected activity. However, the ARB vacated my determination that Smithstonian did not discharge Mr. Becker from employment, and remanded the matter for further consideration consistent with the ARB D. & O.

On August 29, 2018, I issued a Notice of Assignment and Briefing Schedule, allowing the parties to file additional briefs within sixty days. Respondent and the Prosecuting Party filed briefs, and on June 25, 2020, I issued an Order on Remand (“June 2020 Order”).² In my June 2020 Order, I determined that Smithstonian retaliated against Mr. Becker by constructively discharging him and that Mr. Becker was entitled to an updated calculation of damages. June 2020 Order at 10. I gave Respondent 30 days from the date of my June 2020 Order to provide evidence on the calculation of back wages, or to request a supplemental hearing on the issue of back wages. *Id.*

On July 22, 2020, Respondent requested a supplemental hearing on damages. I issued a Notice of Hearing on February 26, 2021, setting this matter for a virtual hearing on March 16, 2021. The parties submitted Joint Stipulations (“2021 J. Stips”), and at the hearing I admitted the following exhibits: 2021 RX 1-4 and 2021 CX 137-148. 2021 Tr. at 8, 10, 13-15, 90, 120. The Prosecuting Party and Respondent both filed closing argument briefs (“2021 C. Br.” and “2021 R. Br.,” respectively). The findings and conclusions that follow are based on a complete review of the entire record in light of pertinent precedent, arguments of the parties, and

¹ The following abbreviations will be used for the exhibits: “2014 Tr.” for the May 2014 hearing transcript; “2021 Tr.” for the March 2021 hearing transcript; “2014 ALJX” for an ALJ exhibit from the 2014 hearing; “2014 CX” for a Complainant’s exhibit from the 2014 hearing; “2021 CX” for a Complainant’s exhibit from the 2021 hearing; “2014 RX” for a Respondent’s exhibit from the 2014 hearing; and “2021 RX” for a Respondent’s exhibit from the 2021 hearing.

² My June 2020 Order is incorporated by reference. *See* June 2020 Order at 10.

applicable statutory provisions and regulations. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision.

ISSUES

At the hearing, I summarized the issues that are to be adjudicated:

1. Whether Mr. Becker properly mitigated his damages with his employment with Rodriguez Landscape, *i.e.*, whether Mr. Becker's termination from Rodriguez Landscape was for gross or egregious misconduct, or conduct constituting a willful violation of company rules;
2. The nature of Mr. Becker's efforts to obtain employment from May 15, 2014 to September 2014, and from April 15, 2015 to September 1, 2015, and whether comparable or substantially equivalent employment was available to Mr. Becker during these time periods; and
3. The amount of back pay owed to Mr. Becker.

2021 Tr. at 16-17.

FACTUAL BACKGROUND

2021 Hearing Testimony

Michael Becker

Mr. Becker testified about his employment since the previous hearing in May 2014. 2021 Tr. at 19. Mr. Becker testified that he was unemployed from April 2014 to September 7, 2014, because he had been laid off from Winter Services. *Id.* Mr. Becker was told that he would return to Winter Services in September 2014, but in the interim he received unemployment and looked for other work. *Id.* After filing for unemployment with the Job Service of Wisconsin, Mr. Becker was required to conduct a minimum of four job searches per week, but he testified that sometimes he would do five or six searches per week.³ *Id.* at 19-20, 22. Mr. Becker also searched for skilled labor positions on Craigslist, asked people he previously worked with about potential job opportunities, and visited job sites to speak with the foreman or superintendent about any openings. *Id.* at 20, 22. Mr. Becker testified that he was not offered a job from April 2014 to September 7, 2014, nor did he decline any job offers during that timeframe. *Id.* at 23.

On September 8, 2014, Mr. Becker returned to work for Winter Services as a plow truck/salt truck driver. *Id.* at 23-24. On September 23, 2014, Winter Services promoted Mr. Becker to area manager. *Id.* at 24-25. Mr. Becker testified that he had to be available "24/7" while working for Winter Services, and his hours varied weekly depending on the snowfall. *Id.*

³ Mr. Becker explained how the Job Service of Wisconsin works: "you put your resume in on Job Service, a list of qualifications, the types of jobs you're looking for, and then you have the option of hitting other employers up that are looking for people, or they have the option to see your resume, your background, and then call you." 2021 Tr. at 21.

at 26. Mr. Becker testified that his employment relationship ended with Winter Services because “[w]hen I brought up the back pay of the overtime that was due, it became a situation where they basically stopped calling me in and after a while I just went and found a different job.”⁴ *Id.* at 28. Mr. Becker received \$1,547.64 for his work with Winter Services in 2014. *Id.* at 27.

After Winter Services, Mr. Becker worked for Villani Landshapers from November 22, 2014, to March 23, 2015, earning \$30/hour. *Id.* at 28-29. Mr. Becker described his position at Villani as “somewhat of an area manager and plow truck driver, salt truck driver, quality control making sure the jobs were done, that everybody did their job: sidewalks were cleared, garage doors were cleared, things like that.” *Id.* at 29. Mr. Becker testified that he was a seasonal worker and was required to make himself available 24/7. *Id.* at 29-30. Mr. Becker earned \$1,207.50 while working for Villani in 2014 and \$5,587.50 in 2015. *Id.* at 30. Mr. Becker stopped working for Villani on March 23, 2015, because there was no more snow work. *Id.* at 29; 2021 CX 142 at 1.

Mr. Becker was unemployed from March 24, 2015, to August 30, 2015, and he testified that he utilized the same job search efforts as when he was unemployed in 2014. *Id.* at 30. Mr. Becker testified that he made 10 resumes, which he circulated on Craigslist and handed out when he went to job sites. *Id.* at 32. Mr. Becker accepted a job with Pro-Seal in late August 2015 after visiting the job site and speaking with the owner; Mr. Becker did not receive or turn down any other job offers from March 24, 2015, to August 30, 2015. *Id.* at 32. Mr. Becker earned \$25/hour, \$13,081.27 in total, working for Pro-Seal as an asphalt truck driver in 2015. *Id.* at 33. Mr. Becker left Pro-Seal to work for Poblocki Paving because Pro-Seal did not have any winter work and Poblocki offered him more money. *Id.* Mr. Becker started working for Poblocki in November 2015 earning \$30/hour as a truck driver. *Id.* at 33-34. Mr. Becker testified that he worked his way onto the “concrete crew” and then “[o]nce they found out I had more capabilities, the owner utilized me to his best interest and that’s to do pretty much anything and everything he asked me to do.” *Id.* at 34. Mr. Becker worked for Poblocki for five years; in 2015 he made \$5,748.75, and in the ensuing years he earned \$70,000 per year, on average. *Id.* Mr. Becker testified that he is not seeking back wages for any time after January 1, 2016. *Id.*

Mr. Becker testified about the events leading up to his termination from Rodriguez Landscape (“Rodriguez”) in November 2012. *Id.* at 35. Mr. Becker testified that on November 27, 2012, he told his boss, Raul Rodriguez (“Mr. Rodriguez”), that he found some five-gallon containers of diesel on a vacant property that they needed to clean up. *Id.* at 36. Mr. Becker went to pick up the diesel on November 28, 2012, and he testified “this was probably under Raul’s direction to pick this up on that day if it was deemed usable, and it was.” *Id.* at 36-37. Mr. Becker met “the crew” at the property on the 28th and they loaded the containers into the back of a pickup truck. *Id.* Mr. Becker testified that on his way back to Rodriguez, the containers tipped over and started spilling fuel onto the street. *Id.* at 37. Mr. Becker pulled into an alley then “positioned the truck so the front was high and the fuel would cascade out of the back of the truck.” *Id.* Mr. Becker testified that there was a woman smoking a cigarette on her porch while he was dumping the fuel out of the bed of the truck, and he told her, “don’t throw that cigarette this way, I have diesel fuel spilling out of the back of my truck.” *Id.* In the process of dumping out the fuel, Mr. Becker was “getting covered with diesel fuel on my face, in my

⁴ The parties have stipulated that Mr. Becker was not terminated from Winter Services. *Id.* at 28.

mouth, in my eyes, on my hands.” *Id.* at 38. Mr. Becker testified that he told the woman on the porch that he would come back to put oil dry or sawdust on the street to soak up the fuel, and they exchanged phone numbers. *Id.* Mr. Becker then asked the woman if he could wash his face and hands in her house, and she agreed. *Id.* Mr. Becker testified that he saw a young girl doing homework at the kitchen table when he entered the house, but he did not speak to her. *Id.* at 39. Mr. Becker testified that after he used the woman’s kitchen sink to wash up, she asked him for money. *Id.* at 38. Mr. Becker told the woman he did not have any money, then he again told her that he would be back to clean up the fuel and he “got out of there as fast as I could.” *Id.* at 38-39. Mr. Becker testified that he never had sex with the woman, he never asked the woman to have sex, the woman never asked him to have sex with her, and she did not tell Mr. Becker her name. *Id.* at 39.

Mr. Becker testified that he called Mr. Rodriguez when he got back into the pickup truck and told him about the fuel spilling in the alley and that he was on his way back to the shop. *Id.* at 40. When Mr. Becker returned to the shop and relayed to Mr. Rodriguez that he had told the woman he would come back to clean up the fuel, Mr. Rodriguez responded, “don’t even bother, it’s going to rain in a couple of hours,” and they “blew it off.” *Id.* Mr. Becker testified that he only had an hour of work left for the day, so Mr. Rodriguez let him go home early to clean the fuel off of himself. *Id.* Mr. Becker testified that on his way home, “I called the young lady, or the homeowner, and I tell her that I’m not going to be able to make it back today and that I will get to it right away in the morning.” *Id.* at 40-41. Mr. Becker testified that the woman “got very upset” and told Mr. Becker that she was going to clean up the fuel and he needed to pay her. *Id.* at 41. Mr. Becker then told the woman that he was not going to come back, and “[s]he was very demanding that I come back and either pay her for the cleanup or clean it up.” *Id.* The woman also told Mr. Becker that she had already cleaned up the fuel. *Id.*

Mr. Becker testified that the following day, November 29, 2012, Mr. Rodriguez told Mr. Becker that a homeowner called and “made an accusation.” *Id.* at 42. Mr. Becker testified that he suspected the homeowner to whom Mr. Rodriguez referred was the woman from the day before, so he called her:

Then I went on with my day, and I called the number that I was given the day before, the woman that I called, and told her that I would not come back and clean up the mess. And I called her and I said, “Are you out of your mind? Did you just call a room full of cops⁵ and tell them that you were this underage prostitute? And what the hell are you doing, you’re going to get me fired from my job.” And she ranted and hung up and that was the end of the conversation.

Id. at 43. Mr. Becker testified that he never threatened the woman during this phone call. *Id.*

Mr. Becker testified that around 3:00 p.m. that afternoon, Mr. Rodriguez and Laure Joncas, the office manager, approached him and Mr. Rodriguez asked for his resignation:

⁵ Mr. Becker testified that he said “a room full of cops” because Mr. Rodriguez is a former Milwaukee police officer, and he would hire other former officers to work at Rodriguez. 2021 Tr. at 43.

In the process of that, Raul and Laure Joncas came into the office, and Raul was holding a piece of paper and said, “We got to talk.” And I said, “What’s up?” And he said, “Well, I’m asking for your resignation.” I said, “What is this all about?” And he goes, “Well, the phone call that came in.” And at this time, Laure says the woman called back and recanted everything she said the day before, meaning that she’s not underage, that she’s not a prostitute, and that’s why I don’t think she gave her real name. And he used it as “sign this document of resignation and I won’t proceed investigating the call.” And I said, “Well, they already recanted so what are you investigating? I thought we were good after that.” And he said, “No, either way I’m going to—you’re going to go home on unpaid suspension until I look at this.” And I’m still arguing the fact that she recanted everything, how can you keep this going? So then I packed up everything, got in my truck. He asked for my keys. I turned in my keys and I went home.

Id. at 43-44. Mr. Becker testified that he did not sign the letter of resignation, and Mr. Rodriguez never told him that he was terminated that day. *Id.* at 45. Mr. Becker did not find out he was fired until he received an email or a letter from Mr. Rodriguez on December 6, 2012, stating that he had been terminated effective November 29, 2012. *Id.* at 46. Mr. Becker testified that his termination letter stated that he had been fired for misconduct, that he was having relations with an underage prostitute during work hours, and that he was having relations with a prostitute, regardless of age, during work hours. *Id.* at 47. Mr. Becker denied talking to “a known prostitute outside a company issued vehicle,” he denied associating with prostitutes during work hours, and he denied telling Mr. Rodriguez that he was familiar with prostitutes in the Milwaukee area. *Id.* at 54. Mr. Becker testified that his termination letter did not list deleting information from a company computer or making threats as reasons for him being fired, and he denied ever deleting information from a company computer. *Id.* at 45, 48. Mr. Becker testified that Mr. Rodriguez never reported him to the police, nor was Mr. Becker ever contacted by the police about the allegations in his termination letter. *Id.* at 48-49. There was an unemployment hearing in January 2013, and Mr. Becker was ultimately awarded benefits; Mr. Rodriguez did not appeal. *Id.* at 49-54.

On cross-examination, Mr. Becker testified that he did not have any additional documents memorializing his job search efforts in 2014. *Id.* at 56-57. Mr. Becker testified that his having a job lined up with Winter Services in September 2014 did not influence his job search from April to August 2014, but he agreed that his deposition testimony was accurate when he said “even though I didn’t have to get a job because I had a job promised to me, I went on Craigslist and that was about it, Craigslist and the Job Center.” *Id.* at 57-58. Mr. Becker testified that he was unable to find a job comparable to his position at Smithstonian through his job searches in 2014 and 2015. *Id.* at 56, 59. Mr. Becker testified that he continued to perform job searches while he was on a family vacation in Florida from the end of March 2015 until the middle of April 2015. *Id.* at 60, 62-63.

Sean Mullins

Sean Mullins is an investigator with the Department of Labor, Occupational Safety and Health Administration (“OSHA”), and he conducted the investigation into Mr. Becker’s complaint. *Id.* at 65. Mr. Mullins used Mr. Becker’s W-2s from 2010 to 2015 to calculate his back wages, starting from the week ending December 4, 2010, which is the Saturday following Mr. Becker’s termination from Smithstonian on November 30, 2010. *Id.* at 68. Mr. Mullins testified that he calculates back wages on a weekly basis because it is “the most accurate accounting of the loss of wages,” and interest is calculated daily with the IRS underpayment penalty serving as the interest rate. *Id.* at 66-67. The underpayment rate is “the best rate given to banks, the best banks on a daily basis plus three percentage points.” *Id.* at 67. Mr. Mullins testified that the underpayment rate changes quarterly, and he used a range of three to six percent when calculating the back pay owed to Mr. Becker. *Id.* Mr. Mullins used an 8-hour workday and a 40-hour workweek to calculate Mr. Becker’s back pay. *Id.* at 69. Mr. Mullins testified that there are no back wages owed to Mr. Becker after January 2, 2016, because “his interim earnings were higher than his losses he would have had at Smithstonian.” *Id.* at 70. Mr. Mullins determined that the total back pay plus interest owed to Mr. Becker is \$141,138.43. *Id.* at 71.

Sarah Holmes

Sarah Holmes is a vocational rehabilitation counselor who testified as vocational expert witness on behalf of Respondent. *Id.* at 77, 83. Ms. Holmes testified that she “provide[s] individuals assistance with job searches and schooling and such, and I also render opinions regarding employment, impact on employment, etc.” *Id.* Ms. Holmes has over 20 years of experience in her field and has testified as an expert witness “hundreds” of times. *Id.* at 78.

Ms. Holmes authored a vocational assessment report dated March 8, 2021, regarding Mr. Becker’s efforts to mitigate his damages while he was unemployed. *Id.* at 78. Ms. Holmes testified that she reviewed pages 14-41, 64-66, 102-105, and 122-129 of Mr. Becker’s 2014 deposition testimony, a two-page resume from Mr. Becker, Mr. Becker’s job search efforts in 2014 and 2015, the Department of Labor *Dictionary of Occupational Titles*, O*Net, the February 26, 2021 Notice of Hearing, and the Job Center of Wisconsin website prior to rendering her opinion.⁶ *Id.* at 84, 95-96, 105. Ms. Holmes testified that Mr. Becker was a field supervisor while working for Smithstonian, which is equivalent to a first line supervisor of groundskeepers in the general labor market. *Id.* at 85. Ms. Holmes testified that Mr. Becker did not conduct a diligent job search while he was unemployed in 2014 and 2015. *Id.* at 86. Ms. Holmes defined a “diligent job search” as “surpassing that which is required by the unemployment requirements,” which would include “maintaining a detailed log of job searches to someone specifically, reference where they had applied, who they had spoken to; you know, kind of outlining all of their applications and telephone interviews, in-person interviews, and follow ups.” *Id.* 87. Ms. Holmes testified that networking, using a variety of job search engines, contacting companies of interest, and following up with employers is also part of a diligent job search. *Id.* Ms. Holmes recommends that her clients treat their job search as a full-time job and conduct daily job searches. *Id.* at 88.

⁶ Ms. Holmes testified that all materials she reviewed were provided by counsel for Respondent, and she was not provided a copy of Mr. Becker’s March 2021 deposition transcript. *Id.* at 98.

Ms. Holmes testified that the majority of hiring in the landscaping industry is conducted in the spring. *Id.* at 89. Ms. Holmes testified that based on the May 2016 Occupational Employment Statistics Survey (“OES Survey”), published by the Department of Labor Bureau of Labor Statistics, there were 600 first line supervisor of landscape workers positions in Milwaukee from November 2013 to May 2016. *Id.* at 89, 103. Ms. Holmes noted that 600 was the total number of people working as first line landscape supervisors in the Milwaukee area, not the number of vacancies. *Id.* at 89, 104. Ms. Holmes testified that “[t]here’s absolutely no way” to state the exact number of comparable jobs that were available to Mr. Becker in 2014 and 2015. *Id.* at 89. However, Ms. Holmes testified that Mr. Becker was qualified to work as a first line landscape supervisor and “it’s my opinion that with a diligent job search as I defined, full-time effort, lots of in-person contact using a variety of sources, that he should have been able to secure that employment to work during those seasons.” *Id.* at 90.

On cross-examination, Ms. Holmes testified that she based her assessment of Mr. Becker on a records review only, and she did not speak to him before rendering her opinion. *Id.* at 94-95. Ms. Holmes testified that the OES Survey is the only source she consulted to determine the availability of comparable jobs in 2014 and 2015 because “all of the others sources crosswalk with that survey, as far as number of jobs that are available.” *Id.* at 103. The OES Survey does not contain unemployment numbers, and Ms. Holmes does not know how many first line landscape supervisor positions are vacant at any given time. *Id.* at 104. Ms. Holmes testified that she did not review the Job Opening and Labor Turnover Survey prior to preparing her report, and she tried to review job bank data to determine if there were landscape supervisor positions available in 2014 and 2015, but it was not possible to find past job openings. *Id.* at 105-106. Ms. Holmes also did not contact the Wisconsin Department of Workforce Development, and she tried to review the job outlook for first line supervisors of groundskeepers but she was unable to access it. *Id.* at 106. Ms. Holmes testified that she does not know how often first line supervisors of groundskeepers positions become vacant or how many of the 600 jobs are vacant at any given time, but “[t]here’s average growth in the 10-year period for these occupations.” *Id.* at 107-108. Ms. Holmes testified does not have any specific data that states how long it takes a first line supervisor of groundskeepers to find a job. *Id.* at 113-114. Ms. Holmes did not look at comparable employees similarly situated to Mr. Becker, nor did she conduct a labor market survey to determine the hiring practices of employers who hire first line supervisors of groundskeepers. *Id.* at 108. Ms. Holmes testified that she determined the majority of landscape hiring is done in the spring by looking at hiring trends, which is based on her knowledge of the labor market; she does not have any specific data or studies to support that determination. *Id.* at 114-115.

Regarding whether Mr. Becker conducted a diligent job search, Ms. Holmes testified that she has “volumes of material” defining what a diligent job search is, but she does not have any data or studies.⁷ *Id.* at 115. Ms. Holmes testified that what constitutes a diligent job search and

⁷ Ms. Holmes clarified the “volumes of materials” to which she was referring:

You know, all of the materials that I use with my clients. I mean, I don’t have like a specific study that says “do x, y, and z,” but all of the handouts and things that I have and provide, and different books and sources that I deem valuable. You now, one of them that I use, *What Color Is Your Parachute?*, things that talk about informational interviewing and the best—the different methods that can be used to find work. They aren’t things that I just

the documentation requirements of a diligent job search varies by occupation, but “within the landscaping trade though, the expectation [of a job search log] would be name of company, who someone spoke with, kind of where you left that interaction.” *Id.* at 118.

Mr. Becker’s 2021 Deposition Testimony

Mr. Becker was deposed by Respondent on March 5, 2021. 2021 RX 4. Mr. Becker testified that he started working for Winter Services on November 19, 2013, and he “worked that season, then was told I was coming back in September of ’14, I think.” *Id.* at 7-8. Mr. Becker returned to Winter Services on or about September 23, 2014, and was promoted to manager. *Id.* at 8. As a manager, Mr. Becker was assigned to oversee the North Side area, which covers 2 million square feet and encompasses 60 properties. *Id.* Mr. Becker worked part time at Winter Services because he was only called to work when there was a snow event. *Id.*

Mr. Becker testified that while he was unemployed from April 2014 to August 2014, he was searching for management and sales jobs that were equivalent to his position as a sales supervisor with Smithstonian. *Id.* at 8-9. Mr. Becker conducted job searches “pretty much daily” through the Job Service of Wisconsin, but he testified that he does not have any documents memorializing his searches or the dates on which they were conducted. *Id.* at 9, 12. Mr. Becker searched for skilled labor positions on Craigslist but he was unable to find a job because the majority of postings were for entry-level positions rather than supervisors. *Id.* at 12-14. Mr. Becker testified that he also occasionally asked around to see if anyone he knew was hiring or knew of any leads. *Id.* at 14.

Mr. Becker testified that from roughly April 15, 2015, through August 2015, he searched for jobs on the Job Service of Wisconsin website approximately every other day, he sent out roughly 10 resumes, and he visited various job sites. *Id.* at 16-20. Mr. Becker was offered and accepted a job with Pro-Seal after he visited their job site. *Id.* at 17-18.

Mr. Becker testified that he was unable to find a job comparable to his position at Smithstonian while he was unemployed from May to August of 2014 and May to August of 2015. *Id.* at 21. Mr. Becker described the sales aspect of his job with Smithstonian as, “Mr. Smithstonian had a lot of tunnel rock, and I would go around and stop at job sites periodically and ask them if they needed fill. And try and find dumpsites for him on a general basis.” *Id.* at 26-27. Mr. Becker testified that the laborers he supervised worked all over Milwaukee, and he was responsible for repairing any equipment they were using that broke down. *Id.* at 30-31. Mr. Becker testified that he is capable of operating and repairing⁸ the following equipment: CDL Class B required trucks, quad axels, plow trucks, dump trucks, skid steers with attachments, backhoes, front-end loaders, excavators with attachments, hydraulic equipment, compactors, forklifts, bulldozers, air compressors, all landscape equipment, hand tools, concrete saws,

came up with off the top of my head. I have guidelines and handouts and things that I use with my clients who I’m helping to find work.

Id. at 119.

⁸ Mr. Becker elaborated that he “can repair almost anything given the right tools,” but “if something majorly internal went wrong with [the equipment], no.” 2021 RX 4 at 23-24.

jackhammers, *etc.* *Id.* at 22-25. Mr. Becker testified that he has never had a job where his job title was “mechanic,” he was not hired by Smithstonian as a mechanic, and he never received formal training at Smithstonian as a heavy duty mechanic. *Id.* at 37-38.

Affidavit in Lieu of Testimony of Raul Rodriguez

Respondent submitted an Affidavit in Lieu of Testimony from Mr. Rodriguez outlining the reasons Mr. Becker was terminated from Rodriguez Landscape. 2021 RX 3. Mr. Rodriguez states that a woman (“Ms. Johnson”) called the office on November 28, 2012, claiming that she was an underage prostitute who had sex with Mr. Becker, and Mr. Becker refused to pay her. *Id.* at 1. Ms. Johnson assumed that Mr. Becker solicited her during his work hours, as he parked a company truck outside of her house. *Id.* When Mr. Rodriguez asked Mr. Becker about the allegations, Mr. Becker said that it was a prank call and that he refused to pay a woman for letting him wash his hands in her house. *Id.* Mr. Rodriguez gave Mr. Becker the option to resign or be placed on unpaid suspension while he investigated Ms. Johnson’s allegations. *Id.*

The following day, November 29, 2012, Ms. Johnson called again and said that she was 19, not underage, and she was going to have sex with Mr. Becker after he solicited her but she changed her mind after he “disrespected her.” *Id.* at 2. Ms. Johnson also claimed that Mr. Becker had called her and threatened to physically harm her if she contacted Rodriguez Landscape about the incident. *Id.* at 2. Mr. Rodriguez found Mr. Becker in his office deleting information from a company computer and terminated his employment. *Id.* Mr. Rodriguez later discovered that Mr. Becker used a company phone to make calls to and receive calls from the same phone number that Ms. Johnson used to call the office. *Id.*

Mr. Rodriguez, a former Milwaukee police officer, stated that a current officer told him that “an individual matching Mr. Becker’s description was seen talking to a known prostitute outside a Company issued vehicle on the south side of Milwaukee.” *Id.* Mr. Rodriguez also stated that Mr. Becker previously told him that he was familiar with prostitutes in Milwaukee, and Mr. Rodriguez had been informed by current and former employees that Mr. Becker was “known to associate with prostitutes during the work day.” *Id.* Mr. Rodriguez stated that these allegations factored into his decision to terminate Mr. Becker, and he “ultimately concluded that Mr. Becker had failed to carry out his job duties and had engaged in misconduct (through the potential commission of a crime on one or more occasions) while on work time and while using Company resources (a Company truck and cellphone).” *Id.*

DISCUSSION

I. Mr. Becker’s Termination from Rodriguez Landscape

A wrongfully discharged complainant has a duty to mitigate his or her damages by exercising reasonable diligence to seek substantially equivalent employment and by acting reasonably to maintain such employment. *Cook v. Guardian Lubricants, Inc.*, No. 97-055, ALJ No. 1995-STA-00043, slip op. at 5 (ARB May 30, 1997) (citations omitted). The burden is on the employer to establish that the complainant failed to mitigate his or her damages through the pursuit and retention of interim employment. *Id.* (citations omitted). Any failure of proof

regarding whether an employee has failed to retain alternative employment operates to the employer's detriment. *Id.* at 6. A complainant's failure to mitigate damages through the retention of subsequent employment will reduce the back pay award to no less an amount than what the complainant would have made had he or she retained the interim employment throughout the remainder of the back pay period. *Id.* at 5 (citations omitted). If an employee is terminated from interim employment for misconduct, only misconduct that is gross, egregious, or constitutes a willful violation of company rules will serve to toll the discriminating employer's back pay liability. *Id.* at 6 (citations omitted). An employee's termination from interim employment for such misconduct reduces the back pay award to zero until new interim employment is secured. *Johnson v. Roadway Express, Inc.*, No. 01-013, ALJ No. 1999-STA-00005, slip op. at 11-12 (ARB Dec. 30, 2002).

The Prosecuting Party argues that I should disregard certain portions of Mr. Rodriguez's affidavit as unreliable hearsay. 2021 C. Br. at 5-7, 9. As the Prosecuting Party has recognized, and as I stated in my March 17, 2021 Evidentiary Order, formal rules of evidence do not apply to STAA claims before the Office of Administrative Law Judges. 29 C.F.R. § 1978.107(d); March 17, 2021 Evidentiary Order at 1. Hearsay is not prohibited, but evidence that is immaterial, irrelevant, or unduly repetitious may be excluded. *Id.* The hearsay statements in Mr. Rodriguez's affidavit are relevant as to whether Mr. Becker's conduct leading up to his termination rises to the level of gross, egregious, or a willful violation of company rules. As such, I do not find the statements to be immaterial, irrelevant, or unduly repetitious, and I decline to exclude them from evidence.

The Prosecuting Party also argues that the inconsistencies between Mr. Rodriguez's affidavit and his testimony at the 2013 Wisconsin unemployment hearing render the entire document unreliable. 2021 C. Br. at 6-7. While I agree that there are some minor differences between Mr. Rodriguez's affidavit and the summary of facts in the Wisconsin unemployment decision (*i.e.*, whether Mr. Becker was given the option to resign or go on unpaid suspension on November 28 or November 29, and whether Ms. Johnson said she was 18 or 19 the second time she called the office), I do not find that these inconsistencies wholly undercut the credibility of Mr. Rodriguez or the reliability of his affidavit. More importantly, Mr. Rodriguez's reason for terminating Mr. Becker has remained the same since 2012.

In my two prior decisions in this matter, I found Mr. Rodriguez to be a credible witness and Mr. Becker to not be a credible witness. June 2020 Order at 7-9; July 2015 D. & O. at 27. I do not disturb those findings here. Mr. Rodriguez has nothing to gain by lying about why he terminated Mr. Becker, and he only testified at the 2014 hearing because he was subpoenaed. 2014 Tr. at 330. Mr. Becker, on the other hand, has a host of credibility issues.

In my July 2015 D. & O., I noted that Mr. Becker's credibility was impeached on several collateral matters. July 2015 D. & O. at 27. Mr. Becker's credibility was impeached regarding instructions he received on the Beres Builders job and whether he was reprimanded for not following those instructions. *Compare*:

Ms. Worden: And did Smith ever give you an explicit instruction to hand-dig?
Mr. Becker: No.

Ms. Worden: Now, you were never disciplined for that, correct?
Mr. Becker: No.

2014 Tr. at 165 *with*:

Mr. Murphy: I'll ask you what were they told in terms of how they were to proceed with digging on the property.
George Loomans: Well, anywhere they were close to the electrical lines that were marked, they had to dig by hand so that we didn't come in contact with that wire. That's normal practice.
Mr. Murphy: And did you tell that to Mr. Becker?
Mr. Loomans: Yes.
Mr. Murphy: Were those instructions followed?
Mr. Loomans: No.

Id. at 313 *and*:

Mr. Murphy: Did you receive instructions from the owner on how to handle the excavation on that job site?
Mr. Smith: Yes
Mr. Murphy: And did Mr. Becker receive the same instructions?
Mr. Smith: Yes.
Mr. Murphy: Were you together when you both were being instructed?
Mr. Smith: Yes.
Mr. Murphy: And who gave you the instructions?
Mr. Smith: George Loomans, Mark Beres, and the—I don't want to call him the owner, but the manager of the Veolia for that particular facility.
Mr. Murphy: And what were the excavating instructions?
Mr. Smith: One area was painted out into a square where the power boxes were . . . And that specific area was stated to be hand dug, and they emphasized it numerous times that high-voltage wires and lines were here. It had to be hand dug because they didn't want to take any chances for us blowing up the building, anybody getting hurt. Apparently, those instructions weren't followed.

Judge Almanza: . . . As a result of this incident, Beres Builders, did you reprimand Mr. Becker?
Mr. Smith: Oh, yes.
Judge Almanza: Was it verbally or in writing?
Mr. Smith: Verbally.

Id. at 347.

Mr. Becker's credibility was also impeached by his inconsistent statements regarding whether he thought Mr. Smith terminated him on November 30, 2010. July 2015 D. & O. at 27; *compare* 2014 RX 23 at 36:10-16:17 (“[u]nderstandably when I walked out, handed in my

phone, I didn't know it would be my last day. I thought I'd be back in a week") *with* 2014 Tr. at 174 ("I knew I just had gotten fired, but I really thought he'd reconsider").

Mr. Becker has also given shifting explanations regarding his termination from Rodriguez. At the 2014 hearing, Mr. Becker testified that he was terminated because Rodriguez Landscape's city contracts were ending:

Ms. Worden: I want to talk to you briefly, very briefly, about Raul Rodriguez and your employment there. I think there was some confusion. You said that you were fired because the city contract was ending, correct?

Mr. Becker: Let go, yeah.

Ms. Worden: That's my fault. So it was your belief that that was why you were let go?

Mr. Becker: Yes.

Ms. Worden: Did Mr. Rodriguez come into your office at some point in those days prior?

Mr. Becker: Yes.

Ms. Worden: And what did he say?

Mr. Becker: Well, he said that he wanted me to either resign or take an unleave[d] [sic] suspension while he did an internal investigation on a prank phone call that came into the office . . . Come the 6th, I get a letter stating that my employment has been terminated by his attorney due to the fact that the caller that called into the office had called back and recanted everything that they said the day before. So within 12 hours of the prank phone call Raul had the truth, but yet made the decision to terminate my employment due to the fact that on the 30th, we lost half of our jobs in the city that I maintained, and I supervised 30 guys on that. He cut the workforce down to 15, and I was one of those that got cut. There was a huge layoff the same time I got sent out.

2014 Tr. at 178-179. This explanation has been contradicted by other evidence. As an initial matter, the termination letter Mr. Becker received did not say that he was terminated because "the caller that called into the office had called back and recanted everything that they said the day before." Nor did it mention anything about Rodriguez's city contracts expiring. The letter states:

On November 29, 2012, I gave you the option of accepting an unpaid suspension while I conducted an internal investigation into the allegations that you were (1) having relations with an underage prostitute during work time; and (2) you were having relations with a prostitute, regardless of her age, during work time. Alternatively, I stated that the Company would accept your resignation, effective immediately. It was my understanding that you voluntarily resigned on November 29, 2012. However, it has come to my attention that you are now claiming that you either were on suspension or were involuntarily terminated. Evidently, you now either wish to retract your resignation or did not intend to resign on November 29.

In either case, [employer] hereby informs you that your employment is terminated for misconduct effective November 29, 2012. Your final paycheck reflects this termination date.

2021 CX 148 at 3. Mr. Rodriguez also flatly denied that Mr. Becker's termination was related to his city contracts expiring:

Mr. Murphy: If Mr. Becker testified that your city contracts were ending, so that's the reason why he was let go, would that be true?

Mr. Rodriguez: No, it's not.

2014 Tr. at 326.

Mr. Becker then gave a different answer as to why he was terminated from Rodriguez at the 2021 hearing:

Ms. Worden: Is what's stated here an accurate quote from the letter you received on December 6, 2012?

Mr. Becker: Yes.

Ms. Worden: And it also talks about allegations that you were having relations with an underage prostitute during work time, and you were having relations with a prostitute, regardless of her age, during work time. Do you see that?

Mr. Becker: Yes.

Ms. Worden: Is that your understanding of why, or at least the reason Mr. Rodriguez was giving for your termination at this time?

Mr. Becker: Those allegations were recanted so, no, they couldn't have had any bearing.

Ms. Worden: Okay. But that's not what I'm asking. What's written here in this letter, is that your understanding of the reason Mr. Rodriguez was providing at that time for your termination?

Mr. Becker: Right, yes. Yes, he was.

2021 Tr. at 47-48.

Mr. Becker has also given inconsistent statements about whether he knew the name "Queena Johnson." During a February 24, 2021 conference call, Mr. Becker stated that he was unfamiliar with the name:

Judge Almanza: Was Queena Johnson the person involved?

Mr. Murphy: She was the person that was making the complaint to Rodriguez that Mr. Becker, on company time, was fraternizing with her basically.

Judge Almanza: Got it . . . I'm familiar with the allegations, but I wasn't familiar with the name of the actual individual so it wasn't ringing a bell. Thank you.

Mr. Becker: Just for the record, I wasn't familiar with the name of the individual either.

Judge Almanza: Who just spoke?

Mr. Becker: I did. Mike Becker.

Judge Almanza: Mr. Becker?

Mr. Becker: Yes. I did not know the name of the person that made the accusation.

February 24, 2021 Conference Call Tr. at 17-18. But three weeks later Mr. Becker testified that he had known the name "Queena Johnson" since the 2013 Wisconsin unemployment hearing:

Ms. Worden: And when was the first time you heard the name "Queena Johnson?"

Mr. Becker: In the unemployment hearing.

2021 Tr. at 49; *see also* 2021 CX 148 at 2, 4 (Wisconsin unemployment decision specifically referencing the name "Queena Johnson").

Taken as a whole, Mr. Becker's credibility has been severely damaged, and I give little weight to his version of the events resulting in his termination from Rodriguez. Crediting Mr. Rodriguez's affidavit and discounting the testimony of Mr. Becker, I find that Mr. Becker was terminated from Rodriguez Landscape for gross or egregious misconduct.⁹ Accordingly, Mr. Becker's back pay award is reduced to zero from the date he was terminated from Rodriguez Landscape, November 29, 2012, until he secured other interim employment.

II. Mr. Becker's Efforts to Obtain Comparable or Substantially Equivalent Employment

A wrongfully discharged employee is required to make a reasonable effort to mitigate damages. An employer may prove that the complainant did not mitigate damages by showing 1) that substantially equivalent positions were available and 2) that complainant failed to exercise reasonable diligence in finding substantially equivalent and otherwise suitable employment. *Dale v. Step 1 Stairworks, Inc.*, No. 04-003, 2002-STA-00030, slip op. at 7 (ARB Mar. 31, 2005). "A 'substantially equivalent position' offers the same promotional opportunities, compensation, job responsibilities, working conditions, and status" as the job from which the complainant was terminated. *Id.* Respondent must prove both prongs of the test to establish that Mr. Becker failed to mitigate his damages. *See Johnson v. Roadway Express*, No. 99-111, ALJ No. 1999-STA-00005, slip op. at 14 (ARB Mar. 29, 2000) (citing *U.S. v. City of Chicago*, 853 F.2d 572, 578 (7th Cir. 1988); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983)).

⁹ There is no evidence in the record regarding Rodriguez Landscape's company rules; therefore, I do not find that Mr. Becker's misconduct constituted a willful violation of company rules.

Availability of Substantially Equivalent Positions

Ms. Holmes detailed Mr. Becker's employment history in her March 8, 2021 Vocational Assessment Report of Mr. Becker. In the late 1990s, Mr. Becker became a journeyman bricklayer. 2021 RX 2 at 2. Mr. Becker has been self-employed at MDB Projects, LLC since 1999, and his job duties include contracting, masonry, flat working, stamping, real estate investing, and auto buying. *Id.* Mr. Becker has also been self-employed in the concrete business, and from 2004 to 2009, he was self-employed as a mortgage broker. *Id.* Mr. Becker worked as a landscape supervisor at the Milwaukee Community Service Corps before he began working for Smithstonian. *Id.* From 2008 to 2010, Mr. Becker worked full-time in sales and as a field supervisor at Smithstonian, earning \$20.00 per hour and averaging seven hours of overtime per week. *Id.* at 1-2. Ms. Holmes described Mr. Becker's position as a field supervisor as requiring light physical exertion, and his transferable skills are supervising others, maintaining equipment, and sales. *Id.* at 2. Mr. Becker also has experience in auto sales and possesses a commercial driver's license. *Id.*

Ms. Holmes described Mr. Becker's job searches in April to August 2014 and April to August 2015 as checking the Wisconsin Department of Workforce Development website almost daily, searching on Craigslist, sending out resumes, visiting job sites, and using word of mouth recommendations. *Id.* Ms. Holmes stated that she was not provided with job search logs or email confirmations of the resumes Mr. Becker circulated. *Id.* at 3.

Ms. Holmes stated that Mr. Becker's position as a field supervisor at Smithstonian is equivalent to a first line supervisor of groundskeepers in the general labor market. 2021 RX 2 at 3; 2021 Tr. at 85. Ms. Holmes stated that there were 600 first line supervisors of groundskeepers in the Milwaukee area from April to August 2014 and from April to August 2015, with an average wage of \$25.11 per hour. RX 2 at 3. Ms. Holmes testified that the bulk of landscape hiring is conducted in the spring, but she said it was not possible to determine the exact number of comparable jobs available to Mr. Becker in 2014 and 2015. 2021 Tr. at 89. Ms. Holmes testified that the landscape industry had an average 10-year growth, but she does not know how often first line supervisor of groundskeeper positions become available, nor does she know how many of the 600 positions are vacant at any given time. *Id.* at 107-108.

I find that Respondent has not established the availability of substantially equivalent positions from May 15, 2014, to September 2014, or from April 15, 2015, to September 1, 2015. Respondent has offered no specific evidence regarding the availability of comparable employment, other than Ms. Holmes' assertion that there are 600 first line supervisor of groundskeepers positions in Milwaukee and that peak hiring is done in the spring. Ms. Holmes offered no particulars as to what percentage of the Milwaukee job market these positions constitute, whether any of the positions were actually vacant during the relevant timeframes, how many vacant positions are available at any given time, how long people stay employed in those positions, or how long it takes to obtain one of the positions. Additionally, Ms. Holmes could not point to any data to substantiate her claim that peak landscape hiring is done in the spring, other than to say it was based on her knowledge of the labor market and "looking at hiring trends." 2021 Tr. at 114-115. These general assertions are not enough to carry Respondent's burden as to the availability of substantially equivalent employment. *See Johnson*, No. 99-111,

slip op. at 14 (“the bald assertion that there was a need for drivers is not the sort of specific proof” that is sufficient “to show that there were substantially equivalent positions available”) (citing *Kawaski Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 528 (9th Cir. 1988)). Accordingly, Respondent has not met its burden to establish that Mr. Becker failed to mitigate damages.

Reasonable Diligence in Seeking Substantially Equivalent Employment

As outlined above, I have found that Respondent has not met its burden to establish that Mr. Becker failed to mitigate damages because Respondent has not established the availability of substantially equivalent positions. I also find that Respondent has not met its burden to establish that Mr. Becker failed to mitigate damages because Respondent has not established that Mr. Becker did not use reasonable diligence in seeking substantially equivalent employment.

A complainant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. *Johnson*, No. 99-111, slip op. at 16, n. 14 (citing *Rasimas*, 714 F.2d at 624). A complainant may satisfy the mitigation requirement by demonstrating a continuing commitment to be a member of the workforce, such as by checking want ads, registering with employment agencies, and discussing job opportunities with friends and acquaintances. *Id.* (citing *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 411 (7th Cir. 1989); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975)).

Ms. Holmes concluded that Mr. Becker failed to conduct a “diligent job search” from May 15, 2014, to September 2014, and from April 15, 2015, to September 1, 2015, which she defined as “maintaining detailed documentation of all job search efforts including applications, telephone interviews, in-person interviews, and follow ups.” RX 2 at 3. Ms. Holmes also stated that networking, using multiple job search engines, and contacting companies of interest are part of a diligent job search. *Id.* While Ms. Holmes detailed what she considers to be a diligent job search, she did not explain how Mr. Becker failed to meet that standard. Mr. Becker checked the Wisconsin Department of Workforce Development website almost every day, he searched on Craigslist, sent out resumes, visited job sites, and asked people he used to work with if they knew of any job opportunities. 2021 Tr. at 19-22, 30, 32; RX 4 at 9-20. Mr. Becker also found his job with Pro-Seal by visiting the job site. 2021 RX 4 at 17-18. Mr. Becker’s undertakings demonstrate a “continuing commitment to be a member of the work force.” *Donnelly*, 874 F.2d at 411. Although Ms. Holmes included the maintenance of job search logs as one of the criteria of a diligent job search, I decline to find that Mr. Becker’s lack of such records constitutes a failure to exercise reasonable diligence. Nor do I find that Mr. Becker going on a family vacation in April 2015 evidences a lack of reasonable diligence. *See* 2021 R. Br. at 9. Respondent cited no case law stating that reasonable diligence requires a complainant to physically remain in the city in which he or she is looking for interim employment for the entirety of the job search period. Furthermore, Mr. Becker testified that he continued to search online for jobs while he was in Florida. 2021 Tr. at 60, 62-63.

In considering the issue of whether Respondent has established that Mr. Becker failed to exercise reasonable diligence in seeking substantially equivalent employment, I have considered Mr. Becker’s diminished credibility. Mr. Becker’s testimony concerning his job search efforts is at least partially corroborated in that he did, in fact, obtain subsequent employment. More

importantly, however, I have considered that Respondent has the burden to show that Mr. Becker did not use reasonable diligence in seeking substantially equivalent employment and Mr. Becker does not have the burden to establish that he did.

I find that Respondent failed to establish that Mr. Becker did not use reasonable diligence in seeking substantially equivalent employment. Accordingly, Respondent has failed to establish that Mr. Becker did not mitigate his damages from May 15, 2014, to September 2014, and from April 15, 2015, to September 1, 2015.

III. Reinstatement

Under the STAA, reinstatement is an automatic remedy. *Dale*, No. 04-003 at 4. However, circumstances may exist in which reinstatement is impossible or impractical. *Cefalu v. Roadway Express, Inc.*, No. 08-110, 2008 WL 5454142 at *2 (ARB Dec. 10, 2008) (citing *Assistant Sec’y & Bryant v. Bearden Trucking Co.*, No. 04-014, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005)). For example, “reinstatement may be inappropriate where the parties have demonstrated ‘the impossibility of a productive and amicable working relationship.’” *Id.* (citing *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-024, slip op. at 9 (Sec’y Feb. 14, 1996)).

At the 2014 hearing, Mr. Becker testified that he was not seeking reinstatement because “Mr. Smith has shown there’s no peace. I think reinstatement would be a bad thing.” 2014 Tr. at 105. However, in light of the fact that reinstatement is an automatic remedy under the STAA, I note for the record that given the events that have transpired between Smithstonian and Mr. Becker, I find that the possibility of an amicable working relationship between the parties is remote. Moreover, although front pay in lieu of reinstatement may be appropriate where the parties have demonstrated “the impossibility of a productive and amicable working relationship,”¹⁰ Mr. Becker testified at the 2021 hearing that he was making more money at Poblocki than he was earning at Smithstonian, and he is not seeking back wages after January 1, 2016. 2021 Tr. at 34. Accordingly, there is no need for an award of front pay.

Therefore, I find that Mr. Becker’s reinstatement is impracticable, and front pay in lieu of reinstatement is unnecessary. I therefore decline to order reinstatement.

IV. 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.” *Jackson v. Butler & Co.*, Nos. 03-116, 03-144, 2004 WL 1955436 at *6 (ARB Aug. 31, 2004) (citing *Assistant Sec’y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec’y Jan. 6, 1992)). Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* See *Dale*, No. 04-003 at 6.

¹⁰ See *Dale*, No. 04-003 at 5.

Mr. Becker is seeking \$141,138.43 in back pay and interest from November 30, 2010, until January 2, 2016, when his wages at Poblocki exceeded what he would have earned at Smithstonian. 2021 C. Br. at 18. Respondent argues that Mr. Becker is only entitled to \$44,854.53 in back pay, which is the amount accrued when he was terminated from Rodriguez Landscape; Respondent claims that Mr. Becker should not receive any back pay after his termination from Rodriguez Landscape as a matter of public policy. 2021 R. Br. at 9. Alternatively, if Mr. Becker is entitled to back pay after his termination from Rodriguez Landscape, Respondent argues that Mr. Becker’s back pay should be limited to \$63,964.53. *Id.* at 10, n.9.

As I have found that Mr. Becker was terminated from Rodriguez Landscape for gross or egregious misconduct, his back pay award is reduced to zero from November 29, 2012, until he secured other interim employment. The parties stipulated that Mr. Becker was unavailable to work from November 29, 2012, until August 1, 2013, and that Mr. Becker worked for Birchwood Snow & Landscape in 2013, earning \$529.87. 2014 J. Stips. Nos. 41, 42. Cross-referencing the 2014 Joint Stipulations with the Prosecuting Party’s back pay calculations, it appears Mr. Becker secured interim employment with Birchwood the week ending on November 30, 2013. *See* 2021 CX at 146-4 (\$529.87 entered into the “Interim Earnings” column for week of November 30, 2013). Accordingly, Mr. Becker’s back pay is reduced to zero from November 29, 2012, to November 30, 2013.

I have determined that Mr. Becker is entitled to \$95,687.70 in back wages as follows:

Year	Lost Wages	Interim Earnings	Back Wages Owed
2010	\$3,510	\$600	\$2,910
2011	\$53,530	\$31,740	\$21,790
2012	\$48,480	\$41,200	\$7,280
2013	\$5,050	\$3,516.55	\$1,533.45
2014	\$52,520	\$21,488.85	\$31,031.15
2015	\$42,420	\$11,465.65	\$30,954.35
2016	\$1,010	\$821.25	\$188.75
Total	\$206,520	\$110,832.30	\$95,687.70

See 2021 CX 146.

Interest

To properly compute back pay in current dollars, Mr. Becker is also entitled to interest on his award. Interest will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and will be compounded daily. 29 C.F.R. § 1978.109(d)(1).¹¹

¹¹ These regulations are the result of a revision effective in 2012. *See* 77 Fed. Reg. 44,121 (July 27, 2012). Prior to that revision, the regulations did not specify how often interest on back pay was to be compounded. *See* 53 Fed. Reg. 47,676 (Nov. 25, 1988) (providing for back pay and not addressing interest); 75 Fed. Reg. 53,544 (Aug. 31, 2010) (providing for back pay with interest but not specifying compounding). The ARB applied quarterly compounding before the 2012 revision. *See Dalton v. Copart*, 1999-STA-046 (ARB July 1, 2005) (stating that “such interest is to be compounded quarterly”).

The Applicable Federal Rate for short term quarterly/monthly compounding periods is calculated by the Internal Revenue Service each month. *See* INTERNAL REVENUE SERVICE *Index of Applicable Federal Rates (AFR) Rulings*, <https://apps.irs.gov/app/picklist/list/federalRates.html> (last visited June 15, 2021). These interest rates can vary significantly depending on the date. *See id.* (compare RR-2018-30 *Applicable Federal Rates* (December 2018) with RR-2017-24 *Applicable Federal Rates* (Dec. 2017)).

To properly compensate Mr. Becker, I apply daily compound interest using the average rates for each year. While this result may not be perfectly accurate, it is a reasonable way to account for the fluctuations in the interest rate. Upon determining that value, I then round the rate to the nearest full percent. *See* 26 U.S.C. § 6621(b)(3). Starting from the date of Mr. Becker's termination, I find that he is entitled to an additional \$36,560.42 in interest.

Therefore, with interest, I find that Mr. Becker is entitled to \$132,248.12 in back pay.

CONCLUSION

I find that Mr. Becker failed to mitigate his damages by being terminated from Rodriguez Landscape for gross or egregious misconduct, and his back pay award is reduced to zero from November 29, 2012, to November 30, 2013. However, Respondent has not established that Mr. Becker failed to mitigate his damages by seeking interim employment from May 15, 2014, to September 2014, and from April 15, 2015, to September 1, 2015. Mr. Becker is entitled to \$132,248.12 in back pay, in addition to the \$2,000.00 in punitive damages and the injunctive relief ordered in my July 2015 Decision and Order.

SO ORDERED.

PAUL R. ALMANZA

Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fourteen (14) days** of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1978.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/EFILE.DOL.GOV>.

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Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

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Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

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After an appeal is filed, all inquiries and correspondence should be directed to the Board.

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Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.