



Issue Date: 22 March 2019

OALJ No.: 2016-STA-00001

OSHA No.: 4-5070-15-024

In the Matter of:

ALEXANDER AWONUSI,
Complainant,

v.

**TORRES AND SONS EXPRESS, LLC,
AND HECTOR TORRES,**
Respondents.

**SUPPLEMENTAL ORDER AWARDING DAMAGES AND ATTORNEY'S
FEES**

This case arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 ("STAA") and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. These provisions empower the Secretary of Labor to investigate and determine whistleblower complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

PROCEDURAL HISTORY

Mr. Alexander Awonusi ("Complainant"), former employee of Torres & Sons Express, LLC ("Respondent"), filed a complaint under the STAA, with the Secretary of Labor on October 20, 2014, alleging Respondent retaliated against him in violation of the STAA. In brief, Complainant alleged that Respondent terminated his position as a truck driver in retaliation for raising numerous concerns about the operability and safety of the vehicle he was assigned to drive. On October 6, 2015, OSHA issued its findings that there

“is no reasonable cause to believe Respondent violated STAA” Complainant, through his counsel, filed objections and a request for hearing with the Office of Administrative Law Judges (“OALJ”) on October 6, 2015.

On April 19, 2016, the undersigned issued a *Notice of Hearing and Prehearing Order*, which notified the parties that a formal hearing for the above-captioned case was scheduled for June 1-2, 2016 in Washington, D.C. The Complainant and his counsel were present at the hearing; however, Respondent stated through a text message to the undersigned that he was not able to connect via teleconference at the hearing. On June 28, 2016, the undersigned sent a text message to the Respondent requesting Respondent’s current address and telephone number. Further, on February 22, 2017, the undersigned issued an *Order to Show Cause*, requesting Respondent’s current address or telephone number.

As of the date of this order, the undersigned still has not received any correspondence from the Respondent concerning his current address or telephone number. The Respondent has not provided any explanation as to why he did not respond to the undersigned’s request.

Respondent was advised in the undersigned’s order issued on February 22, 2017, that if no response was received in the timeframe prescribed, that a default decision and order would be rendered against it in accordance with 29 C.F.R. § 18.57(b). Notification that the requested correspondence had been produced in compliance with the orders of this Court would have been considered sufficient cause for avoidance of a default judgement.

On July 19, 2017, the undersigned issued an initial *Order and Decision Granting Default Judgment and on the Merit and Directing Parties to Address Damages*. I ordered that Complainant is entitled to a default judgment against Respondent and that Complainant’s counsel shall file proof of damages with Respondent having thirty days to respond. On August 24, 2017, Complainant filed Proof of Damages and Petition for Award of Professional Fees (“Complainant’s Petition”). Respondent did not file a response.

DISCUSSION

Remedies

Statutory remedies under the STAA include directing the employer to:

- (i) take affirmative action to abate the violation;
- (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment;
- and (iii) pay compensatory damages,

including back pay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. 49 U.S.C. § 31105(b)(3)(A). Relief may also include punitive damages in an amount not to exceed \$250,000.00. 49 U.S.C. § 31105(b)(3)(C).

In Complainant's proof of damages, Complainant stated the following in a signed affidavit:

- 1) Complainant worked as a truck driver for Respondent
- 2) Respondent never provided Complainant any IRS Form W-2, Form 1099, or paycheck stubs
- 3) Complainant's average weekly pay with Respondent was approximately \$800.00 per week
- 4) Complainant estimates he earned approximately \$9,200.00 during the roughly 11.5 weeks he worked for Respondent
- 5) Complainant was out of work for 21 weeks after his separation from employment with Respondent
- 6) Complainant seeks \$16,800.00 in back pay damages, calculated at \$800.00 per week x 21 weeks
- 7) Complainant found work on January 22, 2015 with FedEx and he earns more in that position than he did while working for Respondent
- 8) Complainant seeks compensatory damages for the stress he incurred as the result of his separation from Respondent
- 9) As a result of his separation from Respondent, Complainant fell behind on bills and was unable to provide financial support for his daughter
- 10) Complainant states he was brought to physical illness by noxious fumes from an exhaust leak in the truck he was assigned
- 11) Complainant states he seeks compensation for the stress, frustration, and anger he felt being left stranded by Respondent at a Petro Truck Stop in Atlanta, GA
- 12) Complainant asks for compensatory damages for mental pain and emotional distress and believes \$10,000.00 will adequately compensate him

Back Pay Damages

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.

Back pay awards to successful whistleblower Complainant's are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). 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. While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." Slip op. at 5-6 (some citations omitted).

To properly compute damages in current dollars, Complainant must also receive interest on this amount. The Secretary has explained, and the ARB has confirmed, that interest on awards under the Act be calculated according to the methodology for underpayments in 26 U.S.C. § 6621 (compounded daily). See *Laidler v. Grand Trunk W. R.R. Co.*, No. 15-087, 2017 WL 3953476 at *9-10 (ARB Aug. 3, 2017). Moreover, the regulations at 20 C.F.R. § 1982.109(d)(1) explain that such back pay will be compounded daily.

The Internal Revenue Service calculates the Applicable Federal Rate for short-term quarterly/monthly compounding periods each month. See Internal Revenue Service *Index of Applicable Federal Rates (AFR) Rulings*, <https://apps.irs.gov/app/picklist/list/federalRates.html> (last visited March 5, 2019). These interest rates can vary significantly depending on the date. See *id.* (compare RR-2018-19 *Applicable Federal Rates* (July 2018) with RR-2017-24 *Applicable Federal Rates* (Dec. 2017)).

To best and most accurately compensate Complainant, 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).

Therefore, taking into account Complainant's testimony at the hearing as well as his affidavit included in his proof of damages, combined with Respondent's lack of contestation, I award Complainant \$16,800.00 in back pay and \$2,141.82 in interest totaling \$18,941.82.

Compensatory Damages

The STAA does not define "compensatory damages." Black's Law Dictionary defines the term to mean "[d]amages sufficient in amount to indemnify the injured person for the loss suffered." Compensatory damages

is synonymous with "actual damages," which is the amount awarded to "compensate for a proven injury or loss; damages that repay actual losses." The purpose of a compensatory damage award is to make the complainant whole for the harm caused by the employer's unlawful act. Put another way, compensatory damages are meant to restore the employee to the same position he would have been in if not discriminated against. Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008).

In *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 08-030, ALJ No. 2008-STA-6 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of \$5,000 based on the Complainant's testimony that he suffered stress from the loss of insurance and other fringe benefits as result of the Respondent's wrongful adverse action. In *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the ALJ awarded \$10,000 in compensatory damages based on a finding that Complainant's testimony regarding his humiliation and emotional distress was unrefuted, credible and persuasive. On appeal, the Respondent contended that since no evidence supported the Complainant's bare allegations, the ALJ's award was erroneous. The ARB affirmed the ALJ, finding that he had evaluated the Complainant's testimony and provided a rationale that was supported by substantial evidence.

Considering the above precedential case law, combined with the relatively short timeframe Complainant was employed by Respondent, I find \$10,000 to be too high an amount to award for compensatory damages. While Complainant did not present any medical evidence, I do find his testimony and affidavit to be credible and therefore award \$5,000.00 in compensatory damages for the stress Complainant endured.

Attorney Fees

The Act provides for recovery by a successful complainant of her litigation costs, including reasonable attorney fees, and therefore the Complainant is entitled to such fees and costs in this matter.¹ The Complainant's counsel has stated that he himself has billed approximately 8.20 hours at a rate of \$375.00 per hour prior to January 1, 2016, and \$400.00 per hour after January 1, 2016, totaling \$3,244.50. Complainant's Petition at Exhibit A. Additionally, Claimant's counsel's paralegals billed 22.82 hours at a rate of \$185.00 per hour for paralegal Cassidy Nee, and

¹ 49 U.S.C.A. § 31105(a)(3)(B).

\$125.00 per hour for paralegals Luke Haqq and Wesley Samples, totaling \$3,522.88. *Id.* Counsel has also indicated that he has incurred \$46.53 in expenses. *Id.*

Next, it is necessary to determine whether the amount of hours indicated in the fee petition is reasonable. "Complainant's counsel is entitled to recover for those hours reasonably expended." *Michaud v. BSP Transport, Inc.*, 95-STA-29 (ALJ June 12, 1997). The Complainant's counsel requests reimbursement for a total of 31.02 hours spent on this matter. In support thereof, counsel submitted an itemized statement for the services rendered with the corresponding time spent. See Complainant's Petition. The period of representation extended from October 2014 to August 2017. *Id.* In support of the petition, Petitioner listed his credentials, which includes the handling of thousands of cases under the employee protections provisions of STAA before various courts. *Id.* Additionally, Petitioner provided multiple affidavits from other practitioners attesting to the rate sought by Petitioner. *Id.*

After consideration of the nature of the issues involved, the amount of time and work involved, and other relevant factors as discussed *supra*, it is concluded that the amount of \$6,813.81 (Fees: \$6,767.28, Expenses: \$46.53) is reasonable and the work done necessary. The fee petition is approved in the amount of \$6,767.28 for attorney's fees and \$46.53 for expenses totaling \$6,813.81.

ORDER

Accordingly, **IT IS ORDERED THAT:**

- 1) Complainant is entitled to \$16,800.00 in back pay and \$2,141.82 in interest totaling \$18,941.82;
- 2) Complainant is entitled to \$5,000.00 in compensatory damages;
and
- 3) Complainant's counsel is entitled to \$6,767.28 for services rendered in this matter and \$46.53 for expenses related to litigation, totaling \$6,813.81.

SO ORDERED.

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.

WSC/dce

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 issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents issued by the Board through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs, can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

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).

When 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, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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).