



**In the Matter of:**

**CYNTHIA RAE FERGUSON,**

**ARB CASE NO. 12-053**

**COMPLAINANT,**

**ALJ CASE NO. 2009-STA-047**

**v.**

**DATE: November 30, 2012**

**NEW PRIME, INCORPORATED,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Paul O. Taylor, Esq.; *Truckers Justice Center*, Burnsville, Minnesota**

***For the Respondents:***

**Charles A. Cox, III, Esq.; *Cox, Goudy, McNulty & Wallace, P.L.L.P.*; Minneapolis, Minnesota.**

**Before: Paul Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

This case is before the Board for a second time. Cynthia Rae Ferguson filed a complaint under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012), and its implementing regulations at 29 C.F.R. Part 1978 (2012). She alleged that her former employer, New Prime, Incorporated, terminated her employment in retaliation for activity protected under the Act. After a hearing on

the merits, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O) on March 15, 2010, finding that New Prime terminated Ferguson's employment because of her protected activity. The ALJ ordered the Complainant's reinstatement, back pay from the date of her termination to the day she receives a bona fide offer of reinstatement, compensatory damages in the amount of \$50,000, and punitive damages in the amount of \$75,000. On review this Board affirmed the finding of liability, the award of compensatory damages, and the order of reinstatement, but vacated the ALJ's awards of back pay and punitive damages, remanding both awards for further consideration.<sup>1</sup> The ALJ's subsequent Decision and Order on Remand (D. & O.), issued February 9, 2012, which again awarded back pay and punitive damages, is now before the Administrative Review Board for review.

### BACKGROUND

To briefly recapitulate the facts, Ferguson leased a truck from Success Leasing, Incorporated, on September 8, 2008, and was responsible for making a weekly rental payment of \$810 in addition to the truck's operating expenses. Respondent's Exhibit (R. Ex.) A. She contracted to lease the truck to New Prime, which had exclusive possession, control, and use of the truck. R. Exs. B, C. New Prime paid Ferguson seventy-two percent of the line haul revenue that New Prime received from its customers to which the Complainant transported freight. Ferguson authorized New Prime to take weekly deductions of \$810 plus \$0.045 per mile for the truck payment, operating expenses of \$159.66, \$0.015 per mile for a tire replacement expense, and \$0.02 per mile for a fuel and road use tax. Ferguson worked for New Prime for approximately 16 weeks, and drove an average of 1,699 miles per week. After the deductions taken per the lease agreement and payments on the advances given to her, Ferguson carried a negative balance for the entire 16 weeks. When New Prime terminated Ferguson's employment, she had a negative balance of \$5,000.

In December of 2008, Ferguson encountered severe winter weather that forced her to stop driving until the conditions cleared on several occasions. She testified that the fleet manager, Jeremy Thomas, called her cell phone and told her that she would be fired if she shut down again. Subsequently, Ferguson testified that she was forced to shut down again on December 24 in Laramie, Wyoming due to poor visibility and slow moving traffic. Joint Ex. at 48. After resuming driving at around 8:00 am, Ferguson encountered "very bad" weather conditions near Fernly, Nevada and checked ahead to determine the conditions in the Donner Pass. She received information that the pass was being shut down intermittently and was advised not to proceed because it was too hazardous. Therefore, on December 26, Ferguson notified Thomas that she had decided against driving through the pass until the weather improved. Joint Ex. 1 at 51. Thomas responded telling her to "chain up asap," which the Complainant interpreted as an order to drive the pass at that time. *Id.* On December 28, 2008, Thomas wrote an incident report noting the circumstances regarding the frequent breaks due to weather. He also complained about her attitude and noted that she had not made a paycheck since her arrival. On January 1,

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<sup>1</sup> *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (Aug. 31, 2011).

2009, Jack Ewing, New Prime's Fleet Manager, informed Ferguson that her lease was terminated and that she had two hours to pack up and leave.

Ferguson filed a complaint on March 3, 2009, with the Department of Labor's Occupational Health and Safety Administration (OSHA) alleging that New Prime had discharged her and discriminated against her in violation of the STAA's employee protection provisions. On June 2, 2009, OSHA issued a preliminary order concluding that no violation of STAA had occurred. Ferguson filed objections to the Preliminary Order and requested an ALJ hearing. As previously noted, the ALJ issued a Recommended Decision, in which he found that New Prime terminated Ferguson's employment because of her STAA-protected activity, ordered that Ferguson be reinstated, and awarded back pay, compensatory, and punitive damages.

New Prime appealed the ALJ's decision to the Board. Pursuant to its Decision and Order of Remand issued August 31, 2011, the Board held that the record fully supported the conclusion that Ferguson engaged in protected activity that was a contributing factor to her termination and that New Prime would not have terminated her employment absent the protected activity. Thus, the Board affirmed the ALJ's finding that New Prime violated the STAA when it terminated Ferguson's employment because of her protected activity. The Board affirmed the ALJ's order reinstating Ferguson to her former employment and the ALJ's award of compensatory damages in the amount of \$50,000. However, because the ALJ failed to provide a rationale or basis for his determination of the amount due for back pay and with respect to his award of punitive damages, the Board vacated the ALJ's back pay and punitive damages awards, and remanded the case for the ALJ's further consideration of both awards.

On remand, the ALJ calculated back pay based upon a weekly payment of \$509.70 per week, which was the average rate of the company drivers and the average amount Ferguson drove each week. Since Ferguson was out of work for 64 weeks, the ALJ found that her back pay award would be \$32,911.34, from which the ALJ subtracted \$5,000 in arrears, for a total back pay award of \$27,911.33. The ALJ awarded \$19,000 in punitive damages, finding that the Respondent's conduct clearly showed an intent that met and surpassed the threshold for an exemplary damage award because it went beyond "a bare statutory violation." D. & O. at 6. New Prime petitioned the ARB for review of the ALJ's calculation of Ferguson's back pay award.<sup>2</sup> For the following reasons, we affirm the ALJ's finding that Ferguson is entitled to back pay in the amount of \$27,911.53, and punitive damages in the amount of \$19,000.

## DISCUSSION

The purpose of the STAA's back pay remedy is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Assistant Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7 (ARB June 30, 2005). 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.*, No. 1990-STA-021, slip op. at 5 (Sec'y May 29,

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<sup>2</sup> New Prime does not contest the ALJ's award of punitive damages.

1991). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require “unrealistic exactitude.” *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 11-12, n.12 (ARB May 30, 1997). Any uncertainty concerning the amount of back pay is resolved against the discriminating party. *Clay v. Castle Coal & Oil Co.*, No. 1990-STA-037 (Sec’y June 3, 1994); *Kovas v. Morin Transp., Inc.*, No. 1992-STA-041 (Sec’y Oct. 1, 1993).

In determining the amount of Ferguson’s back pay, the ALJ adopted the Complainant’s contention that over the long term, she might have become profitable if she had not been improperly terminated and that it would be unreasonable to calculate her back pay on her short tenure. He also adopted the Respondent’s contention that it would be unfair to base her wages on the average number of miles the company drivers drove as they average more than she ever drove. Thus, the ALJ used the company drivers’ wage per mile multiplied by Ferguson’s average miles and calculated her back pay based on \$509.70 a week (\$.30 per mile multiplied by 1,699, Ferguson’s average miles per week). Multiplying this weekly rate by the total number of weeks that Ferguson was out of work, less the \$5,000 Ferguson owed New Prime in arrears, the ALJ awarded Ferguson back pay in the amount of \$27,911.33. The Board has held that the ALJ must only reach a reasonable approximation of what a complainant would have earned but for the discrimination. *Bryant*, ARB No. 04-014, slip op. at 7. As the ALJ considered the contentions of the parties and used a formula to compute Ferguson’s back pay that is supported by the evidence of record, we affirm the ALJ’s determination awarding Ferguson back pay at the rate of \$509.70 per week, for a total back pay award of \$27,911.33.

Finding that New Prime terminated Ferguson’s employment for refusal to drive in hazardous weather in reckless and callous disregard of her rights, the ALJ also awarded \$19,000 in punitive damages. This award, which New Prime did not contest on appeal, is summarily affirmed.

Finally, we address Ferguson’s petition for an award of attorney’s fees. On September 29, 2011, Ferguson’s attorney petitioned for attorney’s fees and costs pertaining to work performed before the Board in the initial appeal. The petition seeks attorney’s fees in the amount of \$9,538.75, representing 29.35 hours of services at the hourly rate of \$325.00, and \$55.89 in costs. The Respondent did not file objections to the fee petition.

A prevailing STAA complainant is entitled to be reimbursed for litigation costs, including attorney’s fees. “[T]he Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney’s fees) reasonably incurred by the complainant in bringing the complaint.” 49 U.S.C.A. § 31105(b)(3)(B). In accordance with Supreme Court precedent,<sup>3</sup> the starting point is the “lodestar” method of multiplying a reasonable number of hours by a reasonable hourly rate. See *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 10-11 (ARB Aug. 31, 2004); see also *Scott v.*

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<sup>3</sup> *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433-434 (1983).

*Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003). The party seeking a fee award must submit “adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,’ as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs.” *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 11 (ARB Nov. 13, 2002).

The Complainant has been fully successful in her prosecution of the case. Therefore, her attorney is entitled to an attorney’s fee to be paid by the Respondent. The fee petition was fully documented, the attorney hours expended were reasonably incurred in connection with litigation of the case before the Board, and the requested hourly rate of \$325 is reasonable. Accordingly, we grant the petition, and award attorney’s fees requested for work before the ARB from March 29, 2010 to September 26, 2011, in the amount of \$9,538.75 plus reimbursement of \$55.89 in costs.

### CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ’s award of back pay in the amount of \$27,911.53, and punitive damages in the amount of \$19,000. We **REAFFIRM** the ALJ’s award of compensatory damages in the amount of \$50,000 and order of reinstatement, pursuant to our August 31, 2011 Order. We **GRANT** the Complainant’s petition for the award of attorney’s fees in the amount of \$9,538.75, and costs in the amount of \$55.89. Ferguson’s attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney’s fee petition for costs and services before the ARB in connection with this appeal, with simultaneous service on opposing counsel. Thereafter, New Prime shall have 30 days from its receipt of the fee petition to file a response

**SO ORDERED:**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LISA WILSON EDWARDS**  
**Administrative Appeals Judge**