



Issue Date: 09 February 2011

Case No.: 2005-ERA-6

In the Matter of:

JAMES SPEEGLE,
Complainant

vs.

STONE & WEBSTER CONSTRUCTION, INC.,
Respondent

DECISION AND ORDER

This case arises under the whistleblower provisions of Section 211 of the Energy Reorganization Act of 1974 (ERA)¹ and the implementing regulations thereunder.² The matter was referred to the Office of Administrative Law Judges (ALJ) for a formal hearing that was held on June 21-24, 2005, in Huntsville, Alabama. On 09 Jan 06, the presiding Administrative Law Judge issued an order recommending the claim be dismissed. The claim was appealed to the Administrative Review Board (ARB), which reversed the finding as to liability and remanded for appropriate relief on the issue of damages.³ As the previous ALJ had retired, the case was subsequently assigned to me. On 17 May 10, the parties, through a joint motion, waived their rights to present evidence and make arguments in person and instead agreed to file written exhibits and briefs and hold a hearing on the record.

PROTECTIVE ORDER

On 17 Jun 10, Complainant filed an amended prayer for reinstatement, damages and other relief, and requested that subsequent related filings be placed under seal in a restricted access portion of the record. The exhibits include financial information relating to wages pensions, and back pay; labor agreements; deposition of Complainant and his spouse; affidavits, and psychiatric records.

¹ 42 U.S.C. §§ 5851 et seq.

² 29 C.F.R. Part 24.

³ *Speegle v. Stone & Webster Constr., Inc.*, 2005-ERA-6 (ARB Sept. 24, 2009).

Counsel relies upon 29 C.F.R. §18.46 and 18.56 in requesting that subsequent exhibits, documents, and other filings be filed under seal and placed in a restricted access portion of the record. Section 18.46 reads in pertinent part:

[I]t shall be proper for the administrative law judge to limit discovery or introduction of evidence or to issue such protective or other orders as in his or her judgment may be consistent with the objective of preventing undue disclosure of classified or sensitive matter. Where the administrative law judge determines that information in documents containing sensitive matter should be made available to a respondent, he or she may direct the party to prepare an unclassified or nonsensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.⁴

Section 18.56 states in pertinent part:

[T]he administrative law judge may direct that there be a restricted access portion of the record to contain any material in the record to which public access is restricted by law or by the terms of a protective order entered in the proceedings. This portion of the record shall be placed in a separate file and clearly marked to avoid improper disclosure and to identify it as a portion of the official record in the proceedings.⁵

I find §18.46 somewhat inapplicable in that there was no request to limit discovery and deny Respondent access to any information and the exhibits (although in some cases limited to extracted portions) have already been submitted on the record. As to §18.56, while I can attempt to limit the extent to which very personal and private psychological, financial, marital and emotional matters are disclosed in the decision and order for publication, such matters are very material and form the basis for Complainant's request for compensatory damages related to psychological and emotional suffering. Any cogent decision must include a thorough examination of the facts as presented on the record, and pursuant to the Administrative Procedures Act (APA) and Department of Labor regulations, that opinion shall be published.

Counsel were advised that the ultimate decision on the disclosure of any or all of the exhibits or other filings in the record is an agency responsibility, subject in large part to the Freedom of Information Act.⁶ Therefore, sealing is subject to review by the Agency in terms of an APA/FOIA analysis. Parties cannot bind the agency by stipulation

⁴ See 29 CFR §18.46.

⁵ See 29 CFR §18.56.

⁶ See 29 CFR Part 70 implementing 5 USC §552. 5 USC §522(a)(2)(A) states in pertinent part that "Each agency, in accordance with published rules, shall make available for public inspection and copying final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 USC §522(b)(6) states in pertinent part that "This section does not apply to matters that are personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." See also 29 CFR §18.43 which states that ALJ proceedings shall be open to the public except in unusual circumstances.

to close portions of trials because documents or information one party regards as confidential may be discussed.⁷ However, personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, may be exempted.⁸ “Unwarranted invasions of personal privacy” under exemption 6 have encompassed social security numbers, names of minor children, dates of birth, financial account numbers and home addresses. As such, a party requesting a filing under seal must file a redacted copy under public record.⁹ No redacted copies were filed. The published decision unavoidably contains some potentially embarrassing and private information. I have considered the concerns of the parties and have limited references to sensitive or private information or evidence to the maximum extent possible that still allows the decision to comply with the requirements of the APA. However, I hereby grant the Protective Order within the limitations previously specified with regard to those portions of the declarations and depositions of Complainant and his spouse and the depositions and reports of mental health experts and providers that relate to suicidal ideation or marital fidelity.¹⁰

STIPULATIONS OR MATTERS NOT IN DISPUTE¹¹

- 1) Complainant is entitled to back pay, including pension and health benefits, vacation and sick pay, and interest in an amount not to exceed \$142,843.48.
- 2) Respondent does not contest the removal of all negative employment actions related to his unlawful termination from his personnel files.

⁷ *Newport v. Calpine Corp.*, 2007-ERA-7 (ALJ February 12, 2008).

⁸ See 5 USC§522(b)(6).

⁹ *Newport v. Calpine Corp.*, 2007-ERA-7 at 8.

¹⁰ The parties and I discussed the possibility of excluding references to sensitive personal matters relating to Complainant. I have minimized such references to the extent I believe possible consistent with 5 U.S.C. §552(a)(2), but given the claim for compensatory damages related to emotional suffering, some discussion was essential to adequately explain the claim and award. Given that judicial determination, the possibility of preparing a second, redacted decision for publication and releasing the full unredacted decision only to the parties and appellate authorities was similarly discussed. That was a non-judicial policy decision that was discussed with senior OALJ staff, who determined that the circumstances did not justify application of the allowed exception for privacy interests to the general rule of disclosure. On 19 Jan 11, I informed the parties via a conference call that I had completed the decision and had minimized such references to the extent possible consistent with the law, but would not file for publication a second, redacted decision. In response, Complainant’s Counsel made a final specific oral motion that any published decision be redacted of any discussion of suicidal ideation or marital infidelity. Respondent had no opposition as long as the decision of record for appellate purposes contained a full discussion of the evidence. I agreed to accept the motion as made and denied it, but also agreed to issue the denial in writing and not publish the actual decision until Complainant had an opportunity to determine if an interlocutory appeal of the denial of the motion to redact was appropriate. He elected not to file such an appeal.

¹¹ See “Respondent’s Memorandum of Points and Authorities in Response to Complainant’s Second Amended prayer for Damages” page 3. Respondent’s stipulation was for the purposes of the remand proceeding only and it retains the right to appeal the ARB decision as to liability.

FACTUAL BACKGROUND

Complainant was a journeyman painter for Respondent, which was a construction contracting company performing work for the Tennessee Valley Authority (TVA) at the Browns Ferry Nuclear Plant in Alabama. Complainant was employed at the facility from 1993 until 1 Jun 04, the date of his termination. Respondent was under contract to perform paint coatings repair work inside the Torus I, a large doughnut-shaped vessel surrounding the reactor core which enables water to be flushed to the core in case of a nuclear meltdown. Painting crews were instructed to identify failed coating spots in each bay of the Torus, remove the failed coating, prepare the surface, and apply new coatings.

Prior to May 2004, Respondent had used only journeyman painters on the project. However, when the scope of the Torus painting job increased, Respondent announced it would soon certify apprentice painters. Complainant believed that using apprentice painters violated the G-55, the TVA-issued general engineering specification manual that set forth the requirements for the application of protective paint coatings at TVA nuclear plants.

After learning of the inclusion of certified apprentice painters, Complainant voiced his concerns on three occasions to his supervisors. At one safety meeting, Complainant told his supervisors that they should “stick the G-55 up [their] ass.” Complainant concedes that he may have also congratulated his supervisor for giving people’s jobs away. On 24 May 04, the decision was made to terminate Complainant, who was formally released from the payroll on 1 Jun 04.

ISSUES & POSITIONS OF THE PARTIES

Complainant seeks:¹²

- 1) \$142,843.48 in back pay and interest;
- 2) \$300,000 in damages for physical and mental suffering, including mental anguish, embarrassment and humiliation;
- 3) \$25,000 to cover the future cost of psychiatric counseling;
- 4) An order of reinstatement to the position he would have occupied with Respondent but for his termination;¹³ and in the alternative, front pay;
- 5) Removal of all negative employment actions related to his termination from his personnel files.

¹² Complainant originally also requested an unspecified amount exceeding \$10,000 for the reimbursement of medical costs incurred while unemployed and without medical coverage, but withdrew that request in his Reply Memorandum of Points and Authorities in Support of Complainant’s Second Amended Prayer for Reinstatement, Damages and Other Relief.

¹³ Complainant understands that Respondent is no longer performing work at Browns Ferry Nuclear Plant, but that Respondent continues to oversee large work construction projects throughout the region. Complainant would therefore accept a position comparable to the position he would have occupied at the Browns Ferry Nuclear Plant, but at another of Respondent’s work projects in the region.

Respondent concedes that Claimant is due back pay, together with overtime, vacation and sick time, pension and health benefits, along with interest in an amount not to exceed \$142,843.48. Respondent counters that with the exception of that back pay and the deletion of negative personnel file information, Complainant's demands are unsupported by the record and contrary to law. Respondent argues it is not responsible for Complainant's unaggravated preexisting psychological and medical issues or required to reinstate Complainant to a position that he would not have held even in the absence of his termination.

LAW

The remedies outlined under the Act have the primary purpose of making the injured employee whole from the injury incurred as a result of the wrongful termination.¹⁴ In the event that a respondent is found to have violated the ERA, "the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. . . ." ¹⁵ In addition, "the Secretary may order such person to provide compensatory damages to the complainant."¹⁶ Finally, the Secretary shall assess costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint.¹⁷

Back Pay and Interest

The purpose of back pay is to restore the employee to the same financial position he or she would have been in but for the discriminatory discharge.¹⁸ A successful complainant normally is entitled to back pay from the date of termination until reinstatement, less any interim earnings,¹⁹ plus interest. Complainants must also be reimbursed for any medical insurance or other benefits that were included as a condition of his employment and lost upon his termination.²⁰ Complainant bears the burden of proof establishing the amount of back pay owed,²¹ but uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party.²²

¹⁴ *DeFord v. Tenn. Valley Auth.*, 90-ERA-60 (ALJ Apr. 29, 1992).

¹⁵ 42 U.S.C. § 5851(b)(2)(B). *See generally Wells v. Kan. Gas & Elec. Co.*, 85-ERA-72 (Sec'y Mar. 21, 1991), slip op. at 17.

¹⁶ *Id.*

¹⁷ *Id.*; *DeFord v. Sec'y of Labor*, 700 F.2d 281, 288-289, 191 (6th Cir. 1983).

¹⁸ *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991).

¹⁹ *Sprague v. Am. Nuclear Res., Inc.*, 92-ERA-37 (December 1, 1994).

²⁰ *DeFord v. Tenn. Valley Auth.*, 90-ERA-60 at 24.

²¹ *Adams v. Coastal Prod. Operators, Inc.*, 89-ERA-3 (Sec'y Aug. 5, 1992).

²² *See Lederhaus v. Paschen*, 91-ERA-13 at 6-7 (Sec'y Oct. 26, 1992).

Because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay.²³

Compensatory Damages

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation.²⁴ Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the "proximate result" of a respondent's unlawful discriminatory conduct.²⁵ An act or omission is the proximate cause of a loss where there is no intervening, independent, culpable and controlling cause severing the connection between the wrongful act or omission and the claimed loss.²⁶ It is sufficient if it is established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result.²⁷

Complainant bears the burden of proving the existence and magnitude of any such injuries.²⁸ Emotional distress is not presumed; it must be proven.²⁹ "Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress."³⁰ To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm.³¹

Although a complainant may strengthen his case for entitlement to compensatory damages with medical and psychiatric expert testimony, it is not required.³² Administrative law judges may consider the compensatory damage awards in similar cases, in arriving at his recommendation for an appropriate measure of damages.³³ Damages which are uncertain, contingent or speculative in their nature cannot be recovered as compensatory damages.³⁴

²³ *Id.* See also, *Creekmore v. ARB Power Sys. Energy Serv.*, Case No. 93-ERA-24, ARB Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 11.

²⁴ *Thomas v. Ariz. Pub. Serv. Co.*, 89- ERA-19 at 13 (Sec'y Sept. 17, 1993)(ordering the respondent to retroactively promote the complainant).; *Lederhaus* at 6-7.

²⁵ *Blackburn v. Metric Constr., Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991).

²⁶ *Smith v. Littenberg*, 92-ERA-52 (ALJ Dec. 13, 1994).

²⁷ *Id.*

²⁸ *Lederhaus* at 7.

²⁹ *Moder v. Vill. of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-005, slip op. at 10 (ARB June 30, 2003).

³⁰ *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999).

³¹ *Gutierrez v. Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002).

³² See *Thomas*, 89-ERA-19 at 14; *Lederhaus*, 91-ERA-13 at 7.

³³ *Smith v. Esicorp*, 1993- ERA-16 at 2 (ARB August 27, 1998).

³⁴ *Littenberg* at 30.

Medical costs associated with or incurred because of a respondent's unlawful acts are fully recoverable.³⁵ The costs must be a consequence of a respondent's discrimination.³⁶ Complainants are not entitled to recover damages for conditions which are due entirely to a previous disease, but respondents may be liable for damages if their wrongful acts aggravated or exacerbated such preexisting disease or impairment of health.³⁷ Thus, a respondent is not exonerated from liability if, by reason of some preexisting condition, the complainant was more susceptible to injury. Complainants may recover such damages as proximately result from the activation or aggravation of a dormant disease or condition.³⁸ Sums for future psychiatric treatment may be awarded provided that the complainant actually availed himself of psychiatric counseling and subsequently presented the psychiatrist's bills to the respondent for payment.³⁹

Reinstatement

Reinstatement of complainants to their former or equivalent positions is mandatory under the Act along with any other "terms or conditions" such as pension and medical benefits that may have been part of the former position.⁴⁰ "[T]he general rule is that prospective damages are awarded in lieu of reinstatement when it is *not feasible* to reinstate the employee."⁴¹ Trial courts must "carefully articulate" reasons for awarding front pay in lieu of reinstatement.⁴² In cases where a respondent has a reduced contract or opportunity to reinstate employment, front pay in lieu of reinstatement may be appropriate.⁴³ The Act does not require that a prevailing complainant be reinstated to the precise position formerly occupied, only to a comparable position.⁴⁴ However, "a Respondent's liability ends when the employee's employment would have ended for reasons independent of the violation found."⁴⁵

³⁵ *DeFord v. Tenn. Valley Auth.*, 90-ERA-60 at 24 (ALJ Apr. 29, 1992).

³⁶ *Id.*

³⁷ *Smith v. Littenberg*, 92-ERA-52 (ALJ Dec. 13, 1994).

³⁸ *Id.*

³⁹ *Littenberg* at 5.

⁴⁰ *DeFord* at 23.

⁴¹ *Mt. Haskins v. City of Boaz*, 822 F.2d 1014, 1015 (11th Cir.1987) (noting that front pay "is an appropriate [equitable] remedy when reinstatement is impracticable or inadequate") (citation omitted).

⁴² *See Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1052 (11th Cir. 1989) (citing *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir.1983)).

⁴³ *Simmons v Fla. Power Corp.*, 89-ERA-28 & 29 (ALJ April 11, 1990).

⁴⁴ *Hobby v. Ga. Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001).

⁴⁵ *See Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991), slip op. at 4 (where the complainant was hired as part of a construction contract which would have terminated upon completion of the construction project). *See also Francis v. Bogan*, 86- ERA-8 (Sec'y Apr. 1, 1988), slip op. at 6.

Removal of Negative Employment Information

There are a number of available equitable remedies, including ordering respondents to expunge from the complainant's records all derogatory or negative information related to the failure to hire him; to provide neutral employment references; not to divulge any information pertaining to not hiring complainant or denying him unescorted access to a nuclear facility; and to post the agency decision.⁴⁶ The expunged material should be limited to the negative information related to the discharge and not to all negative reference contained therein.⁴⁷

Mitigation of Damages

Although not expressly required by the Act or regulations, complainants have a duty to mitigate damages by making a reasonable effort to find comparable employment.⁴⁸ An employee who is unlawfully terminated is required to mitigate damages by being "reasonably diligent" in seeking employment substantially equivalent to the position lost.⁴⁹ While a complainant must show reasonable diligence in attempting to mitigate damages,⁵⁰ respondents bear the burden of proving that the employee failed to mitigate.⁵¹ Respondents meet this burden by establishing that comparable jobs were available and that the employee failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment.⁵²

⁴⁶ See *Doyle v. Hydro Nuclear Servs.*, 89-ERA-22 (ARB Sept. 6, 1996).

⁴⁷ *Littenberg* at 5.

⁴⁸ *Littenberg* at 9 citing *Ford Motor Co. v. EEOC*, 458 U.S. 291, 102 S.Ct. 3057 (1982).

⁴⁹ See *Nord. v. United States Steel Corp.*, 758 F.2d 1462 (11th Cir. 1985).

⁵⁰ *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095, ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004).

⁵¹ *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005).

⁵² *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op. at 9 (ARB Feb. 9, 2001).

EVIDENCE⁵³

*Complainant's Computation of Back Pay and Interest states in pertinent part that:*⁵⁴

Claimant's back pay, consisting of wages, overtime, holidays, insurance and pension benefits, minus earned income from 24 May 04 through April 2007, was \$142,843.48.

*Complainant testified at deposition*⁵⁵ *and stated in declaration*⁵⁶ *in pertinent part that:*

He lives in Tuscumbia, Alabama and has been married since 1985. His wife is currently unemployed and they have three children. He is a journeyman painter, has worked in industrial painting for nearly 20 years, and has been a member of the Painters Local 1293 in Muscle Shoals, Alabama, since 1993. The majority of the painting jobs he has held through the union involve working for contractors/subcontractors of the TVA. He first started to work at the Browns Ferry Nuclear Plant in November 1993 and began working there for Respondent in or around September 1994. Except for sporadic layoffs, he worked primarily for Respondent at the Browns Ferry plant. He was hired as foreman in or around January 2004. He was suspended by Respondent on 22 May 04 and was fired on 24 May 04. In or around July 2004, Respondent was removed as a contractor and replaced by Williams Specialty Services, LLC., which completed the painting work on Unit 1 Torus. The makeup of the painting workforce remained mostly the same.

He has always been the primary breadwinner of the family. His wife earned \$11.50 per hour as a produce manager at a local food store and the insurance from her job only covered her. While he worked for Respondent, his health benefits covered most medical benefits for his children and when he was fired, they were without health benefits.

In or around June 2005, he was hired from the Local 1293 by another company as a journeyman painter. He was not hired there as a foreman painter and was paid at a lesser journeyman rate. The work was sporadic and light. He was often called a "narc" or "snitch" and workers would tell him to keep his mouth shut about safety issues at the plant. In or around January 2007, he was hired from the Local 1293 to a new job with EG&G, working at the military base located in Huntsville, Alabama that includes NASA installations.

⁵³ Claimant's exhibits are labeled heretofore as CX. Respondent's exhibits are labeled heretofore as RX. Since Complainant submitted a Second Amended Prayer for Damages and a Reply Memorandum with similarly labeled exhibits (albeit with different contents), I will refer to the Second Amended Prayer for Damages exhibits with the prefix of CX(1) and the Reply Memorandum Exhibits with the prefix of CX(2).

⁵⁴ CX(1)-A.

⁵⁵ CX(1)-E, CX(2)-D; CX(2)-E, CX(2)-F & RX-F.

⁵⁶ CX(1)-A.

Before he was terminated in 2004, he did his best to maintain a healthy and happy home life and attempted to never argue in front of the children. Before his termination, he was very involved in his children's lives, especially related to their sporting events. He volunteered in the football league, which he found emotionally rewarding and offered him a chance to mentor kids.

He derived significant satisfaction from his job and took his responsibilities as a foreman very seriously. The firing was emotionally devastating to him because he was no longer able to provide steady income for his family. The stress and worry about professional and financial consequences made it impossible for him to sleep for large portions of the night. They told their children that their father had resigned from his job, but the children later learned from their peers at school that their father had been fired. He felt humiliated and cried for the first time in front of his children.

In the latter half of 2004, when he could not find steady work, he began to experience feelings of desperation and began withdrawing from activities that he previously enjoyed. He avoided contact with others, including his wife and children. When he was not looking for a job, he spent a large majority of his time alone in his bedroom. Arguments with his wife became more frequent and heated and he began to worry that his marriage would fall apart.

In the fall of 2004, his son suffered a serious back injury while playing football, requiring a trip to the local hospital. Medical costs were estimated at \$4,000. At the same time, his daughter required bone graft surgery as part of continuing treatment following a very serious accident. In the spring of 2005, another son broke a collar bone while playing football and medical expenses were estimated at \$1-2,000. He himself suffered a slipped disc in his neck, and since he did not have medical insurance, was forced to pay these costs out of pocket.

Throughout his unemployment, Complainant was forced to drain his savings. His wife worked often seven days a week and the family was forced to use food stamps. They couldn't pay their bills, so they were sent to a collection service, which harassed them for payments.

As the financial crisis grew, Complainant began to contemplate suicide and family members removed the firearms from the home. He pawned his Camero to his brother in exchange for \$5,000, half of which he has paid back.

He believes that his termination and the resulting serious stress, humiliation and depression aggravated his hypertension and stomach problems. He began to experience an irregular heartbeat and increased blood pressure. In order to make ends meet, he took out a \$12,600 loan against his house.

He is a painter and has a name and it is not whistleblower. It's insulting for people to think that he would cause them trouble. It's humiliating because some people don't look at it like he helped his co-workers or looked out for their safety.

After the ALJ ruling he was pretty low and had suicidal thoughts somewhere in the middle of 2004. He did not have suicidal thoughts prior to that. He considered shooting himself or having a car wreck. The thoughts did not remain with him consistently throughout the year. He still had those thoughts in 2005 and 2006. He did not discuss them with anyone other than his wife. She assured him that everything would be fine and that they would work through their problems. He has two or maybe three firearms including a .22 and a shotgun. His wife had his brother and brother-in-law remove them. His brother has one and his brother-in-law has the other two.

He attended more meetings than his peers in the community, but that decreased after his termination. He thinks the two are related because he felt ashamed and embarrassed about what happened to him and was afraid that sooner or later someone was going to start asking questions. He didn't want to sit around and talk about it. So, avoiding everything was the next step.

The work he did on the side painting houses after he was terminated was similar to his regular employment and the hourly rate was similar. There is not as much house painting work as there used to be; it has fallen off drastically.

He has been laid off by Respondent before. He was laid off more than once; maybe more than twice. He was laid off for more than 30 and probably more than 90 days, but not more than 120 days. After Respondent laid him off in 1996, he went to work at Williams Specialty Services and he is not sure whether there was a period without work between those two. The contractors who worked at TVA would be furloughed once or twice a year for a week or so. Williams Specialty laid him off in 1999 and it may have been for a refueling outage. He does not recall that it was a temporary job. He worked for Coatings Unlimited for roughly a month. He did not work for Browns Ferry for ten years straight prior to his termination.

His employment documents reflect that he was unemployed at some time between 2001 and 2002. He has worked for GUMBK before and it's possible it was in 2002. He has been laid off by them. The most recent job he worked for them was four or five years ago. It's safe to say that there were periods of unemployment and some may have exceeded 90 days. During those periods he worked side jobs painting houses.

He was a journeyman painter for most of his career but was promoted to foreman and remained a foreman for approximately four months, until he was terminated in May 2004. As a member of the union, he receives basic health and welfare insurance when he is working. They bank hours that carry over maybe a month or so depending upon how

many hours he worked prior to that. During his times of unemployment he was concerned about not having insurance, but he was not anxious about finding another job because the union would find them jobs.

Dr. Evans has been his primary care physician since 2003 and he has been forthright in telling the doctor things about his health.

He lives in Colbert County and has attended Colbert County Commission meetings periodically, maybe once or twice. If something would come up, he would go and listen. He went to a TVA licensing meeting. He has been to two water board meetings because he had concerns about people who were reading the meters and water bills were going out of sight. If something concerned him, he would attend the meeting but he did not go to all meetings.

There were periods where he made \$10 an hour and his wife made \$11.50, so you could say she was the primary breadwinner at that point. He has never been fired from a job or asked to resign, but he has been laid off periodically.

Various colleagues have made comments like “here comes the whistleblower.” He cannot name one specific person but there were several. He never reported those comments. His business agent may know about the comments in general but he never told his business agent any names. He could not name any specific names or dates of people who called him a narc or snitch. He did tell his wife he was catching flack at work. He had the overall feeling that people were told to avoid him because they could get fired. People don’t want to get tied up with someone in the whistleblower category.

He felt he needed to explain his situation to his supervisors because he did not want anyone to retaliate against him or think that he would cause trouble. He needed to let some, but not all, of them know. It was humiliating to have those conversations because he should not have had to explain to anyone that they didn’t have to worry about him. He did not want to be labeled as a whistleblower or a troublemaker, so he felt it was important to let them know he was not there to cause problems. He was there to draw a check and make a living. He has a name and it is not whistleblower and it’s insulting that other people would think he would want to cause them trouble. He felt that he did the right thing at Browns Ferry so he didn’t want to be labeled as a whistleblower or a troublemaker. The issue has generated a lot of time and effort that most people don’t want to go through.

To the best of his recollection he never talked to his colleagues about his termination. He did a job or two for Acclaim Restoration Group, but did not have a financial interest.

He has three children. His relationship with his 23 year old son is not real good. They argue probably three or four times a week. They were very close from the son's birth until the termination. They had discussions, not arguments. The discussions were about bad grades, chores, and stuff like that. A discussion is where you discuss something rationally and an argument is where you scream and holler. He does not recall ever once screaming and hollering with his son before his termination. After his termination they argued about money and things he could not provide. Before the termination, if the kids wanted something and they felt they needed it or it was justifiable they made sure they got it. It is possible that before the termination, his son would ask for things and he would say he cannot afford it. His son was injured in 2004 on the football field and they thought he had fractured his back. They carried him to the emergency room, which referred him to a bone and joint specialist. He was worried and anxious to get his son home.

He and his middle son get along well. They have arguments about taking out the garbage and cutting the grass, but they have always gotten along well. His middle son sustained a football injury to his shoulder in 2005 and had to have surgery. The son had previously broken his collarbone. He goes to most of his children's practices and football games. He is still involved in his children's lives. He and his daughter get along great.

He and his wife also get along great. They have a friendship, have kids and a house together, but they argue and it's not always great. Before he was terminated, they would have minor arguments, but didn't do it in the living room. They would go to the other room, sit down and work the problems out. He loves her. She is a good woman and their relationship was good before all of this.

He's sure he had a conversation with his wife immediately following his termination but he does not recall what he told her or how she reacted other than asking what they were going to do. Prior to his termination, his wife never raised her voice in anger to him, even though they had heated discussions. Their discussions were about kids, household chores, and grades. When they discussed something, it was agreed upon by both parties and the discussion was over. It might take an hour or two to discuss and figure out the best way to approach the current situation. It was maybe once a month and generally about the kids.

He had a one-night-stand in late 2004 or early 2005. He doesn't remember the date and has basically moved on and tried to forget about it. He went to the store to pick up some beer. He had had one or two drinks and should not have been driving. He has no way of knowing whether he was over the legal drinking limit, but he made it safely to the store. There, he ran into a lady who he had seen around. They weren't buddies but he had seen her at social functions, the grocery store, and things like that. The woman is married with children and he knows of her husband. He sees the children at football games and walking around and her children know his children. She has two sons but he did not

coach them. He and she talked for a few minutes. He asked how she was doing, but remembers nothing more about the conversation. He doesn't recall whether he drove, but thinks they both drove. They both thought it was a good thing.

He guesses he then drove home. He knew it was wrong and that it shouldn't have happened. After the affair he avoided seeing her. Then he felt ashamed. Now he is ashamed and embarrassed. He found it difficult to be around his family afterward. He was sad and worried that his wife would find out. His wife and kids were the only thing that meant anything to him. He doesn't know if he felt depressed.

His wife found out about the affair because he told her in mid-2006. After he had the affair, he had occasional trouble being intimate with his wife, but not because he felt guilty. He does not think that the affair affected their intimacy level. But it did affect their intimacy levels a little immediately after.⁵⁷ It affected his ability to be in the same room as her immediately after. After he had the affair, he was not angry at himself or anyone else. He did not remember what got it started, but he carried his wife into the other room and told her that he had a one night stand. He had been drinking when he told her. He just decided it was time to tell her. She was angry at first and raised her voice and got loud. He probably raised his voice, too. She did not ask who he had the affair with or under what circumstances. He told her had a one night stand, that he wanted to apologize and try to make it right. He does not remember whether the children were home at the time, but it is possible they were. After he told her, it took awhile to regain her trust. Naturally, they did not have sex for a few weeks to a month. That was longer than they usually went without intimacy. After that, they just worked it out. It took about a month to heal after they sat down and talked about it. They don't discuss the affair anymore. The affair strained their relationship a little.

They continued to have arguments about financial issues but not the affair. There were no more arguments than usual. He did not consider a divorce, but he thinks she did. He now gets along with his wife. It was a small strain but they got through it. On a scale from one to ten, he would put the strain of the affair at a four or a five. At the time, they had already withdrawn socially. They have not sought marriage counseling. After his wife forgave him, they do not discuss it anymore. He does not recall telling Dr. Lango that his wife was using financial issues to get back at him for having an affair. He does not think that he would have had the affair if he had not been stressed, drinking and depressed. He loves his wife and would not have done that. He decided to have the affair but was under the influence of alcohol. To his knowledge he did not have erectile dysfunction prior to his termination.

⁵⁷ Inconsistencies in the original.

The number of hours he worked each year varied. Most of the time, he worked for Browns Ferry. There is a difference between being laid off and terminated. When he got laid off before, he knew he had a union rep looking for a job for him and could draw unemployment. When he got terminated he had to wait seven or eight weeks to get unemployment. Plus, it was going to be awhile before anybody would let him work on the job. The job that Respondent had going in 2004 was a long-term job refurbishing the entire Unit 1 from the torrents to the dry well and to get that thing back up and going online. It was going to be a long term job and was on a dramatically different scale. It was totally different to be terminated from this job because it was a long term job that was going to last awhile and that was a lot of income. To his knowledge, his job with Respondent is no longer available.

He wants to be put back on the job, to be paid for what he lost, to be paid compensation, and to have Seabourn Childers disciplined. He wants to be compensated for the pain and suffering, humiliation, embarrassment, and financial trouble he and his family have been through.

*Jim Mayfield's declaration states in pertinent part that:*⁵⁸

He has been the business agent for Painters Local 1293 since 2004. Prior to that, he was a painter for 25 years and worked at the Browns Ferry jobsite for almost 25 years, often serving as a job steward. As business agent, he represents the interests of union members at the local level and handles grievances and general local business, such as writing reports and maintaining local union files. He attends TVA union meetings and helps negotiate for higher wages. He also writes work referrals for union members for various union contracted jobs. Contractors and subcontractors contact local 1293 with requests for workers in certain job classifications for various work projects. It is his responsibility to write job referrals, so he must be familiar with the craft skills and work experience of every member of 1293. That way he can accurately provide contractors and subcontractors with the right type of worker who has the right kind of skills and work experience to meet the job specifications.

Having worked with him for many years, he is familiar with Complainant's craft skills. He has personal knowledge of Complainant's leadership and supervisory abilities and knows that he served as foreman painter for Respondent on Unit 1 Torus work until his termination in May 2004.

Jeremy Johnson has been a member of 1293 since 2003 and he is very familiar with Johnson's craft skills. Johnson served as a foreman painter at Respondent of Torus 1 and eventually became head foreman around April 2006. He believes that Johnson serves as the best comparison for how Complainant's career would have progressed had he never

⁵⁸ CX(1)-A, attachment 2.

been fired. Had Complainant not been fired, he would have been very strongly considered for the same promotion and earnings as Johnson. The wage schedule is contained in the PMMA which is revised at the beginning of the year.

In addition to an hourly wage, members earn a specific dollar amount for both pension and health care benefits for every hour worked in a given union job, paid by the contractor or subcontractor. According to the wage schedule, the hourly wage rate on TVA jobs in 2006 was \$16.95 for journeyman painters and \$18.65 for foreman painters. The head foreman earned \$20.52. The hourly pay in rate was \$2.60 hour for the pension fund and \$2.70 per hour for health insurance. According to the wage schedule, the hourly wage rate on TVA jobs for journeyman painters in 2007 was \$17.52 and \$19.27 for foreman painters. The head foreman earned \$21.20. The hourly pay in rate was \$2.90 hour for the pension fund and \$3.07 per hour for health insurance.

The IUPAT Industry Pension Office keeps track of total hours worked by its members and a member can view accumulated hours by getting a pension participation inquiry from the IUPAT office. It provides the most accurate picture of the hours worked by members.

2004-2007 Wage Schedules state in pertinent part that:⁵⁹

In 2004, lead based paint abatement workers and painters made \$16.07 per hour; painter foremen made \$17.68 per hour; and painter head foremen made \$19.45 per hour, with \$2.30 going into the health and welfare fund and \$2.20 going into the pension fund.

In 2005, lead based paint abatement workers and painters made \$16.59 per hour; painter foremen made \$18.25 per hour; and painter head foremen made \$20.08 per hour, with \$2.40 going into the health and welfare fund and \$2.40 going into the pension fund.

In 2006, lead based paint abatement workers and painters made \$16.95 per hour; painter foremen made \$18.65 per hour; and painter head foremen made \$20.52 per hour, with \$2.70 going into the health and welfare fund and \$2.60 going into the pension fund.

In 2007, lead based paint abatement workers and painters made \$17.52 per hour; painter foremen made \$19.27 per hour; and painter head foremen made \$21.20 per hour, with \$3.07 going into the health and welfare fund and \$2.90 going into the pension fund.

⁵⁹ CX(1)-A, attachments 6-9.

Estimated Back Pay Liability states in pertinent part that:⁶⁰

Inclusive of wages, overtime, pension and health benefits, Complainant is due:⁶¹

\$6,484.50 for the second fiscal quarter of 2004.
\$15,589.02 for the third fiscal quarter of 2004.
\$16,162.63 for the fourth fiscal quarter of 2004.
\$10,189.07 for the first fiscal quarter of 2005.
\$8,812.01 for the second fiscal quarter of 2005.
\$6,774.29 for the third fiscal quarter of 2005.
\$4,536.71 for the fourth fiscal quarter of 2005.
\$7,013.63 for the first fiscal quarter of 2006.
\$8,884.69 for the second fiscal quarter of 2006.
\$9,366.19 for the third fiscal quarter of 2006.
\$10,224.17 for the fourth fiscal quarter of 2006.
\$14,433.29 for the first fiscal quarter of 2007.

Applying quarterly interest, Complainant is due \$118,469.93 in back pay, totaling \$142,843.48 plus interest.

Linda Speegle testified at deposition⁶² ***and in stated in her declaration***⁶³ ***in pertinent part that:***

She has been married to Complainant since 1985 and they have three children. She is a homemaker. From 2000-2008 she worked as a produce manager at Foodland making \$11.50 per hour. She had health insurance for herself only through Foodland. In 2000, she worked 40 hours a week and was off Thursdays and Sunday. She worked longer hours sometimes on special occasions or holidays. In 2004, she began to sometimes work seven days a week three weeks out of the month. She worked ten or twelve hour shifts. She made \$10 an hour in 2000, \$11 in 2002, and \$11.50 in 2003. Prior to 2004, when she got vacation time she would take it and go on vacation. She got seven days. After 2004, she got two weeks and she worked though it and took the money on top of her paycheck.

She would be stopped in the supermarket by older men who had worked with her father in law. They would tell her about Charles or Chris and how their work had always been good. She doesn't remember their names because they were customers and she didn't know many of them. Her husband has painted for the owners of local restaurants who

⁶⁰ CX(1)-A, attachment 11.

⁶¹ Based upon a comparison to former co-worker Jeremy Johnson.

⁶² CX(1)-B, CX(2)-C & RX-J.

⁶³ CX(1)-C & CX(2)-F. After comparing the deposition testimony to the declaration, I found that although the concepts and ideas were similar, the wording and use of language was such that it was clearly not dictated by Mrs. Speegle. I therefore give the declaration limited credibility and instead rely on her deposition for the purpose of computing damages.

were told to get Complainant because he was the best painter. People would call the house to request that he paint their homes.

They didn't tell the children that Complainant had been fired because she did not want them to know their dad had been terminated because he had never been terminated from a job. It was her choice. Their daughter came home and asked if Complainant had been terminated because a friend whose dad worked at Brown Ferry told her that Complainant had been terminated and not laid off. Complainant then said they needed to sit the kids down and explain the situation. They asked the kids to come sit on the couch and she explained their father had been terminated for speaking his mind on safety issues because he thought safety was at risk. She didn't know exactly what Complainant said because she was upset and was trying not to cry in front of the kids, so she got up to go to the bathroom. She cannot be positive whether he told the kids he had told the boss to take the rulebook and shove it up his ass. They explained their financial situation, that things were going to get tighter and that money was going to be short. Her income was going to be their base income. Up to then, the kids were used to her income being for sports and playing. Complainant told them exactly what had happened and he cried. She now wishes she would have just told the children the truth from the get-go.

When she came back in, the kids were telling their father that they stand by him 100-percent and that they will do what they can to cut the costs. That was the first time she had seen her husband cry. She was bothered that she initially told her children that Complainant had been laid off because that was the first time they had lied to their children. She said let's just get it over with and be straight with them and Complainant agreed with her. She did not like having to tell them Complainant had been laid off but she did not want her kids to have the insecurity of thinking their dad wasn't going to have work. Her kids were very popular in school and were in all the sports activities. She was on the PTA. It was a private situation and she didn't feel the whole school should know.

She was not worried about telling the kids the truth because she knew the kids understood and she knew she was going to have to tell them eventually if work did not come in. She apologized for having them find out through school. This was the first time she had lied to her children.

Her husband's behavior changed after he was terminated. He withdrew from family. He had been president of Colbert High School football for ten years. He dropped out and told them that he was resigning. Her kids were not playing in the youth program because they were in high school by then. Complainant used to go to community meetings but he stopped and withdrew. He stopped going in June. He would go to the water board and board of education meetings. They would be involved in all the school activities, pageants, ball games, concession stands, and selling programs. He was well thought of and a mentor throughout Colbert Heights. He worked many hours and was someone who would take kids going down the wrong path and get them involved in football, baseball

and other sports. He would go and support the kids whether they were his kids or not. He encouraged kids on drugs to get counseling and kids who were drinking to stop drinking. He was highly respected in the community. She has heard many people talk about it. The coaches have told her that they miss Complainant and that the boys are not like they were since he has not been there.

Her house was more like an open house for anyone who wanted to spend the night. Kids who wanted to talk could call any time day or night. Complainant even got two boys that were not good at football and encouraged them to go out for band because they still wanted to be there. He was constantly encouraging kids to do something rather than run the streets. There was a kid who could not figure out the plays, so Complainant devised a system so that the child could play. The kid ended up being one of the best players in high school football.

He stopped being an advocate for young people and withdrew in 2004. He was only half-heartedly in it for the football season of 2004. He told the parents he would be resigning when the football season was over in January 2005.

After Complainant was terminated, he was angry, humiliated, disgusted, withdrawn, and brokenhearted. He would withdraw from her and the children and holler and cuss at them. Things got to him more. If the TV was too loud, he would holler. He had a short wick, which he had never had before. He had actually talked about suicide before, but he thought about it more frequently when he first got terminated in June or July. He figured life insurance would help her and the children. He said with no income coming in that he had life insurance and would be better off dead. She did not share this information with anyone. She did not tell the doctor and only told her brothers later. After they got the judgment on the first round of court she called her brothers and told them to get the weapons out of the house and they came and got the weapons. She took him seriously because he was like a totally different person from the first round to the second round. She never told Dr. Evans. She took his threats of suicide more seriously after the ALJ decision because he was more adamant about it and talked about it frequently. He talked in a take-notice tone. She would talk him out of it and told him that insurance would not pay if he committed suicide. After the ALJ decision, it was like a switch was off and life was gone. He quit doing everything. He got to the point where he didn't care when he saw that work wasn't coming. He got called on a job and thought there was hope and then he found out he had a red flag on him.

The kids used to be able to talk to Complainant about anything; school, sports, proms. It was so open. They worshipped their daddy and he was patient and loving. He tried very hard to instill good values in their kids. Her daughter especially had her father wrapped around her little finger. If she came up and asked about something, he would start screaming at her, I don't have the money. She would have to say stop, the kids are not used to that. Before his termination, his relationship with the children was excellent and

they could not have asked for a better father. He was there for anything that concerned his children,

More than anything, Complainant was proud of his ability to provide for her and the kids. They were blessed that his job as an industrial painter allowed them to live comfortably. If there were medical or dental visits, Complainant's work insurance and steady income made it so that they could pay for those things and live a good life. Complainant was very self reliant and never wanted to ask anyone for help when it came to supporting his family.

After his termination, her husband took a few meals in his bedroom and did not eat at the table as often as he once did. They always had family dinners where they talked with the kids about how their day went. Complainant was edgy, as if he could not sit still in a chair. He would be at the table tapping his foot and moving his leg. He had never shaken his leg before, he was always calm. He had always been laid back and easy to talk to, friendly to everybody.

She and Complainant had a good marriage and always tried to be respectful of one another. They had a standing rule not to go to bed angry at one another and would make a point never to argue in front of the kids. Before he was fired, Complainant almost never went to bed without telling her that he loved her and she never went to sleep without doing the same. They are both very strong willed and proud people but even when they disagreed, they always loved each other fiercely.

She first noticed that he had sleeping problems the day of his termination. He had finally gone to sleep around 12 -12:30 and she had dozed off on the bed and when she woke up he was walking back and forth across the bedroom. After that, he would often have problems sleeping. He would want to talk or would just sit there, sometimes in the dark, sometimes with the TV on. When she asked what he was doing, he would say thinking. She would ask what he was thinking about, he would say nothing. He would not open up to her and wouldn't talk to her. He would not have a lot to say. About five days a week she would wake up and he would be up. Sometimes she sat up with him. One night, she did not go to bed until two and then got up at 5. Sometimes they did not say a word. In late 2004, he had the same sleeping problems and he still can't sleep well today. He is not taking medication for his sleeping problems.

When she would leave for work he would be sitting and when she got home he would be in the same position. He would apologize to her when she would leave and go to work. She went from working 40 hours a week to working 65 to 70 hours a week. He would apologize for having her work so much. He did not have problems sleeping when her sisters passed away. After his mother died he had trouble sleeping for the first few nights.

She did not talk to Dr. Evans about Complainant's affair and she has no idea if he knows. Dr. Evans is her and Complainant's primary care physician. At the end of 2004, she spoke to a divorce attorney. She was considering a divorce because of Complainant's not being the same since his termination, withdrawal, not talking, screaming, hollering, and drinking. When he started hollering at the children and taking his anger out on them enough was enough. Then she changed her mind. She has not considered getting a divorce again since then.

She found out in 2006 that her husband had an affair. She wants to say it was in March. They were the only ones home. The conversation was prompted because he was distant and she was getting tired of it. She said they were going to sit there and talk and find out what the problem is and lay everything out. It started out as a normal, simple conversation. All she remembers is that he told her he had an affair, he was sorry and that it wouldn't happen again. She was hurt and angry and they talked it out all night. She growled a lot and he knew to stay shut up because she was mad. The conversation lasted all night and they discussed everything from him withdrawing, to the affair, to the children. They argued from 8PM until 6AM when she showered and went to work. She did not ask who or when and considers it a dead issue. It's between her and him and the woman. She doesn't even know if the woman knows she knows. She does not hold a grudge. It is a foolish thing that happened, he regretted it, and now it is over and done with. She does not believe that he has had an affair since then because he is more under her thumb now. She does not resent him for the affair because she does not feel it was like Complainant to do that. It was a totally different person.

The first time she ever saw him take a drink was at their wedding when he took a sip of champagne. In 2004, he brought a six pack of beer to her house. They had been to several parties like anniversary parties, dinner parties, outings, and family reunions and he would never drink. Two or three weeks after his termination was the first time beer had been in her refrigerator. He would drink maybe three beers a night, but since he was not used to consuming any, that was a lot. He could drink one beer and be tipsy. He could not handle his alcohol.

The collection agency activity made Complainant more depressed, like he was not providing for his family or doing all he could do. He would tell her all the time that he was sorry and that he hates that she had to work all those days. By the time she would get through working, she would grab a shower and run to an event. He got to the point where he would always stay home.

Their daughter plays everything. She runs track, and plays softball, basketball, and volleyball. She was always busy with the kids and sports and her husband had completely dropped out of the picture. On top of her working all these hours, she had to attend the kids' functions because he had withdrawn.

Her husband has not had any formal counseling or therapy since his termination and she would like to see him get counseling. It would benefit him and the whole family. She doesn't think he is going back to the way he was, but thinks it would improve the way things are now.

Prior to the termination, they talked with their children and did not yell. They would go to the living room and sit down and talk to them. Even when they were punished, grounded, or lost car privileges, Complainant never raised his voice at her or the kids. He would say to hand him the keys. His parents didn't have shouting matches so that's possibly why Complainant never does it.

Prior to the termination, Complainant's relationship with his children was excellent. You could not ask for a better father. After the ALJ issued a decision in 2006, his relationship was poor because he didn't communicate with any of them and withdrew from his family. He would always just say he was fine.

She was covered by both her insurance and her husband's insurance until he was terminated. Then her insurance covered her. She had the option of purchasing family insurance from Foodland but she couldn't afford it. It was \$89 a week. She worked at Foodland until 2008, when she got terminated because the doctor put her on light duty and Foodland said it did not have light duty. She was not supposed to lift more than five pounds. She has not been able to do anything since she left Foodland.

Her husband was not out of work often at all. The work was pretty steady and he was their main source of income. He went straight from Colbert Steam Plant to Browns Ferry Nuclear Plant. Between 2000 and 2004, he was unemployed an aggregate of 2 weeks. Before 2004, they had no financial problems or trouble paying their bills. They had never lost insurance before because they were covered by the painter's union.

Her husband reacted fine when he was unemployed before. He would do things with the kids and was very involved in the community. She didn't have to work extra hours because he wasn't laid off long enough. She would just tell the kids that their dad is laid off and he has a job coming next week. She knew her husband was often requested by name.

The day he was terminated, he called her at work and said they needed to talk when she got home. When she got home, they went into the bedroom he said he had gotten terminated. She asked why and he said that Rick Gayro and Sebourn Childers had decided he had been insubordinate. He said he would not allow his men to get injured and talked about the danger. They decided not to tell their children and to let them think that their dad had been laid off. She said that she would work longer hours.

When he told her, he was hurt and disgusted. The anger came later. He took real pride in his work. He showed his disgust in the way he was sitting, his posture, his tone, and how he acted. It just wasn't like him. He was in disbelief. He's a proud man and always sat up straight and looked people in the eye, but his head was down and his hands were on his knees and he said he couldn't believe it. She does not think he felt guilty. She knew he would get hired somewhere else, that his name was important and that he was good at being an industrial painter. He had never been fired or terminated before so she was really stunned.

Her husband never said they are going to get a good settlement or going to get back at Mr. Childers. The most she has heard about Sebourn Childers was during federal court.

There were two deaths in her family in 2002. His mother had passed away in 1999. Her husband was upset and hated the way that all three had died. It was a quick process for her sisters but a slow process for his mother. When his mother died he handled it like any normal son. He grieved, talked about the good times and that she was not in pain anymore. He did not withdraw during that time.

He was withdrawn after his termination but he got a little better when he thought he would be vindicated and they began working on his case in federal court. It was like he hit rock bottom when they found in favor of Respondent. He started drinking and became more withdrawn. They would never argue in front of the children but it got to where they were arguing out in the open. Complainant was hateful, snappy, really agitated. It was the lowest of the low. He was already low, but to get kicked like that really hit him hard.

Her husband takes blood pressure medicine. After the termination, she called Dr. Evans because Complainant's neck and face were red and he was having chest pains.

Her husband has a tendency to underestimate problems. He will tell you he's fine and he won't have a nickel in his pocket. He ate Thanksgiving and Christmas dinner in his bedroom. Her brother went in and asked him how he was and Complainant said fine, that he was just watching the game. Her oldest son does not have a senior portrait in the yearbook because they could not afford the package price.

Their daughter was injured while she was out riding a bike, presumably by a hit and run vehicle. The daughter had three bone graft surgeries. They took out a loan to pay for the second bone graft surgery at 29.9% interest. That was before Complainant's termination. They took out a loan against their home for the third surgery. She does not remember if the second surgery was after Complainant's termination. It was a long process and lasted until 2007.

Dr. George Evans testified in deposition,⁶⁴ medical records⁶⁵ and in a statement⁶⁶ in pertinent part that:

He has been Complainant's primary care physician since 2003. He has always known Complainant to be a decent and reliable patient whose initial visits were associated with gastroesophageal reflux and hypertension. On 23 Mar 03, Complainant complained of anxiety and depression over his sister-in-law's death and was given a mild antidepressant. On 9 Mar 04, Complainant had high blood pressure and reported abdominal pain suspected to be because of hyperacidity, which was treated with Maalox. On 15 Apr 04, he saw Complainant for a cystic lesion and continued abdominal symptoms. On 27 Jul 04, Complainant returned to the office complaining of shoulder pain and continued to have uncontrolled high blood pressure. On 16 Feb 05, he saw Complainant again for elevated blood pressure. On 14 Feb 06, Complainant was seen for elevated blood pressure and GERD symptoms. On 2 May 06, Complainant was seen for elevated blood pressure and allergies, but also complained about having been under a significant amount of stress for a few years. On 25 Sept 08, Complainant was experiencing chest discomfort, had an abnormal EKG and was evaluated for hypertension and neck problems. Following a cardiac stress test on 1 Oct 08, Complainant was referred to a cardiologist. On 23 Oct 08 he saw Complainant for hypertension and they discussed his performance on the treadmill and cardiologist follow-up appointments. He treated Complainant for hypertension on 24 Nov 09.

Complainant has discussed his stress over the past few years from the loss of his job and his ongoing legal battle with his former employer. Not having medical insurance made it difficult for Complainant to come to the office for his uncontrolled hypertension, depression and anxiety.

They live in a small community. He has seen Complainant informally around town and has heard comments from family members. He was aware that Complainant was upset about having lost his job and insurance. In spite of the fact that Complainant had hypertension before the termination and mentioned being depressed due to the death of his relative, those preexisting conditions made it even more likely the Complainant has suffered significantly both medically and emotionally from his termination and subsequent legal battles. Complainant's hypertension, GI problems, and depression have been made worse by his emotional state. Stress causes the body to release hormones which directly affect the heart, aggravate high blood pressure, increase the incidents of stomach ulceration and lipid levels, and affect normal bowel function.

⁶⁴ CX(1)-G, RX-H, & CX(2)-G.

⁶⁵ RX-G.

⁶⁶ CX(1)-F.

He doesn't remember ever discussing details with Complainant about his marriage. He remembers Complainant being upset. There was nothing in particular that was said, it was his tone. He saw Complainant mostly in passing and his nurse practitioner saw him on most visits. That's why he just noted that something was going on but did not really go into detail. Complainant never talked to him specifically about this case. The only thing he can honestly say is that he heard the word "whistleblower" used one time. If Complainant had stated he had had suicidal thoughts, he would have recorded it in the medical records, but there is no such record. Complainant would not come out every time and say he was depressed. The notes read "stressful at home." Complainant spoke of a stressful situation at home. He remembers that Complainant ended up having issues with chest pains and needed neck surgery but without insurance he could not consider doing it. He wanted Complainant to go to someone for his stomach but he could not afford it. At one time, Complainant reported to his office complaining of left side burning pain.

He believes, based upon his knowledge of Complainant and his training, that the termination caused Complainant significant emotional harm. He did not refer Complainant to a mental health professional.

Dr. Thomas Goldman testified at deposition⁶⁷ and in medical reports⁶⁸ in pertinent part that:

He diagnoses and treats patients with a broad spectrum of mental and emotional disorders. He does evaluations, medication work, psychotherapy and psychoanalysis. He did an evaluation of Complainant that included an interview lasting 3.5 hours on 27 Jan 10; a follow up interview with Complainant lasting 50 minutes on 27 Feb 10; a Beck Depression Inventory test taken by Complainant; a copy of Complainant's declaration to the DOL; the deposition of Complainant's wife; a copy of Complainant's amended prayer for damages; a copy of the ARB's decision; medical records from Dr. Evans; medical records/statements from Dr. Roddy; and medical records of Dr. Therese Lango.

He met with Complainant personally once for about three and a half hours at his office in Washington and talked with him by phone for about 50 minutes. When he first met with Complainant it followed a fairly standard format. Complainant was informed at the outset that he was not a treating physician, but was there only to consult and they talked about confidentiality. He then took a history, including general health, medical history, prior history of medical or emotional distress, family history, current family/domestic situation, work life, and quality of life. Complainant was serious, but pleasant and polite. Complainant was kind of down and serious and made it clear that he had been pretty well disturbed by the events of the past six years and that he had been struggling a great deal.

⁶⁷ CX(1)-H, CX(2)-H& I; RX-E.

⁶⁸ CX(1)-I & CX(2)-I.

But Complainant was very polite, treated him with respect, and ultimately told him talking to him was useful. Complainant was on the serious side but didn't show profound psychomotor retardation seen in someone who was profoundly depressed.

Complainant seemed kind of intense and aggrieved. He did not see any signs like tremors, rapid speech, or dancing around the room as would be seen in a severely anxious patient. Complainant came back to the theme that he had been seriously mistreated with serious consequences. He reported anxiety in a way that was credible. Complainant said he thought that someone might be following him or even thinking about hurting him, but it wasn't a flashback. Complainant said repeatedly that he thought he had been done an injustice and it was very important that the wrong be righted and that his family had been hurt and he was angry about that.

During that office visit, he gave Complainant a Beck Depression Inventory⁶⁹ and told Complainant to take it home and fill it out when his symptoms were most intense and mail it back to him. The test was provided by the Roche Pharmaceutical Company. The test is provided online as a service to the profession and is in the public domain. The test would not necessarily tell him how Complainant was feeling the day of the test and it would not tell him whether Complainant's mood had varied over time. The directions say that if several statements in the group seem to apply equally well, he should circle the higher number in the group, so if there are several close calls, someone consistently circling the higher number would result in a higher score. Complainant scored a 34 on the Beck test, which is consistent with a significantly depressive illness. A score over 30 shows significant symptoms consistent with major depression.

Complainant told him he filled out the form himself but he did not take steps to verify that. He does not know with certainty that Complainant did not discuss the form with attorneys, but he does not think he did. He did not think Complainant was the kind of person to "Google" the test answers. The Beck test is simple and therefore it does not generally tell you if someone is exaggerating his symptoms. Complainant stated that he was not depressed at any time prior to his termination, even when his sister-in-law or mother died.

In the initial consultation, Complainant told him that a dispute with his boss was the precipitating event for his firing. Prior to that termination, Complainant was in good physical and mental health, had gone through a bereavement in 2002 after the death of his wife's sister, but did not experience any major depressive symptoms. He had no prior history of significant anxiety, depression, or emotional disturbance. He considered himself to be a happy man with a good job and home life. The precipitating event of the decline of his mental and emotional health was his firing. Painting was a family tradition and he had a strong sense of pride in his ability and work ethic.

⁶⁹ RX-P.

After he was fired, he acquired a reputation for being a troublemaker and some people refused to work with him. He suffered a severe loss of income and was not able to provide for his family. He developed symptoms of depression and suffered gastrointestinal and cardiac stress reactions. He became socially withdrawn, struggled to get out of bed in the morning, and was unable to pay for things for his children. In a maladaptive response to his frustration and anger, Complainant had a brief sexual encounter with another woman that he has regretted since. When he finally told his wife, it created a further disturbance in their domestic life. He has suffered a loss of libido, sexual dysfunction, and has experienced suicidal thoughts. His anxiety symptoms include hyper-vigilance, where he worries that his former employer may be planning retaliation. He experiences panic, shortness of breath and flushing, and has increased his alcohol consumption. He experiences severe headaches, GERD, and stomach pain.

He believes Complainant suffered with symptoms of a major depressive and anxiety disorder and experienced exacerbations of his hypertension to the danger point, the worsening of his GERD, and the inability to treat his cervical disease. His quality of life and feelings of security have been compromised and many sources of pleasure have been lost due to depression. He no longer enjoys the relative prominence that he enjoyed while actively engaged in his children's sports and community activities.

Complainant has benefitted from antidepressant and anti-anxiety medications and would benefit from regular sessions with a psychotherapist. He should be seen at least once a week. He would also benefit from services of a psychiatrist to regulate his medication. Restitution to his employment could go a long way toward restoring his well-being. An adequate cash settlement would help him deal with his debts and financial insecurity, which should make it easier to get free of his current stress level.

Complainant had no serious mental or emotional problems before he was fired, but did have some psychological distress that he told his physician about and was prescribed Lexapro. Lexapro can cause a lack of sexual desire and erectile dysfunction. If you suddenly stop taking it, it can make you irritable. It's fair to say Complainant had a history of depression and of being prescribed medication to deal with it.

Complainant also had GERD and hypertension, although it may not have been treated. The psychological distress Complainant had prior to 2004 was not seriously incapacitating and Complainant managed to deal with it. If he were to write the report today he would phrase things a little differently and say that Complainant had experienced some minor depressive symptoms, had experienced grief over the deaths of his mother and had experienced some depression after his sister-in-law's death. He did not know Complainant had two sister-in-laws pass away. If someone has had major depression, you consider them to be at a higher risk than the general population with having a second episode of major depression.

Complainant obviously thought his boss was not showing appropriate respect for his knowledge and the fact that he was trying to maintain quality standards in a job for which he had responsibility.

Complainant told him he had never been fired before. He understood that Complainant's job was contractual, so he would not be surprised if he had periods of unemployment. The fact the Complainant eventually stopped attending his children's athletic events was a very marked and significant trend.

Regarding the extra-marital encounter, he did not question Complainant in detail about it but his impression was if there were more than one encounter, they were pretty close in time. It is possible that if a person had an affair, he may withdraw from social settings to avoid that person. The encounter could cause guilt, anxiety, worry, irritability, or avoidance of the spouse. When a wife finds out, she can feel betrayed and angry and it can affect intimacy levels. Complainant did not totally lose his sex drive but has some episodes of sexual dysfunction and while he was able to have sex, it was less frequent and enjoyable.

Sometimes a "bad act" can be an attempt to restore masculinity to say I am in control and I can do what I want. It was a choice that Complainant made in a context that was determined in large measure by his firing. He thinks the extra-marital encounter may have contributed to Complainant's depression because when you are depressed you can do things that are self-destructive. Whatever the cause of hypertension, it is generally acknowledged to be exacerbated by stress because stress causes certain hormones to be secreted.

Following the termination, he thinks Complainant felt emasculated because a man is supposed to earn a living, support his family and work a great deal. His identity and sense of self is tied up in his work so a man who cannot do these things feels less of a man. In fact, Complainant said that when he looked at his wrists, his wrists looked small.

Dr. Charles Ford⁷⁰ testified at deposition and in medical reports⁷¹ in pertinent part that:⁷²

He is a psychiatrist and focuses on the somatic manifestations of psychological conditions, which is a process by which an individual may transform or transfer various psychological states into somatic or bodily communications or preoccupations. His knowledge of whistleblowers is limited to what he sees in the newspaper. About 90-95% of the time he testifies for defendants.

⁷⁰ CX(2)-B is Dr. Ford's curriculum vitae.

⁷¹ CX(2)-K & L.

⁷² RX-D & CX(2)-A.

He issued a report on Complainant's condition on 10 Mar 10.⁷³ Complainant stated that his psychological problems stemmed from being terminated as a painter on a project for the TVA. After being fired, Complainant received unemployment benefits for nearly six weeks and then did various side jobs to earn more income. He indicated he had been black balled by his former employer who red flagged him regarding future work. By March or April of 2007, Complainant was able to find permanent employment at the Red Stone Arsenal in Huntsville, Alabama, and is receiving better pay than before, but it is a long commute of about 1.5 hours each way. He also has to work 5 days a week rather than four and does not get the overtime he once had.

Complainant stated that after being fired, he could not trust anyone, struggled to make ends meet, and could not pay for his children's needs such as his son's senior trip and class ring. He felt his wife and children had been deprived. He felt that everything he did was worthless, emotionally draining, and he took it out on his wife. He stated he was irritable, had difficulty coping, and felt depressed and guilty. He had disrupted sleep, decreased libido, decreased interests, gained weight but lacked appetite, lost interest in things, and did not finish projects. He had suicidal thoughts and thoughts of harming his supervisors. He has experienced an increase in blood pressure. Complainant said he never drank alcohol until being upset over the termination and since then has drunk on occasion and has had one sexual encounter with someone other than his wife. He continues to have disrupted sleep and high blood pressure and drinks alcohol at the level of 5-6 drinks per week.

During his interview, Complainant indicated that the extra-marital liaison had caused a great deal of difficulty in the marriage that he and his wife had resolved, but he continued to feel very guilty about it. Complainant also reported a great deal of distress over his termination. He does not believe that Complaint was being deliberately deceptive but may have remembered things somewhat different or had a spin on his symptoms. He believed Complainant believed what he related during the interview. He does not think Complainant was malingering.

He believes that there is evidence in the medical records that Complainant was experiencing stressors at home prior to his termination. They regard stress as something that one has to respond to. Some stress can be good but too much can lead to a breakdown of the system. He thinks everyone lives with stress at home from time to time. It would be highly unusual if Complainant had no stress at home before the termination, however, for stressors to be noted by a primary care physician is significant. He read the medical records after he interviewed Complainant, so he did not go back and

⁷³ Beginning on page 7, there are portions of the evaluation that the parties admit do not apply to Complainant, was inadvertently submitted and was possibly a part of a completely different person's file. This information is excluded in the subsequent, amended version submitted by Dr. Ford.

ask him about the stressors. Complainant had evidence of depressive symptoms, anxiety, hypertension, and multiple physical complaints prior to the termination based solely on the medical records.

Based upon the medical records, he believes that Complainant has rationalized, displaced, and/or projected all of his problems on that one event. Complainant was preoccupied with his termination. It is common with a severely wrenching event. If someone has the same stressors over and over again they may be somewhat accustomed to dealing with a stressor and know what to do when that occurs.

Complainant clearly had evidence of depressive symptoms, anxiety, hypertension and multiple physical complaints prior to his termination. There is evidence in the medical records that Complainant was experiencing stressors at home prior to his termination. A review of the medical records suggests that Complainant's mood and anxiety since May 2004 had been variable and at times relatively normal. This suggests that situational factors influence his emotional state to a degree not generally seen in major depressive disorder and an adjustment disorder diagnosis appears to be more appropriate. In addition, some of Complainant's symptoms, such as sexual acting out, use of alcohol, and verbal abuse of his son are behaviors that fit into the adjustment disorder diagnosis with mixed emotional and conduct features.

Dr. Evans' diagnosis of depressive disorder NOS appears to be appropriate in that there are some atypical features of the depressive syndrome, including what appear to be some features of somatization (non specific gastrointestinal and pain symptoms). That diagnosis was preexistent to Complainant's diagnosis. Complainant has completely focused on his termination and has rationalized, displaced, and/or projected all his problems into that event. The medical record suggests that other issues, which predated his termination, are also important.

Irrespective of the preexisting diagnosis, there can be little question that stressors such as termination (justified or not) and subsequent financial problems can exacerbate psychological symptoms. Similarly, blood pressure is affected by stressors. Complainant's symptoms are not likely to remit until legal issues are completely resolved in a manner that he regards as just. To some degree, Complainant's symptomatic course resembles a "justice neurosis" in which a victim feels that he has experienced an injustice and that for the scales to be balanced, someone must make restitution. Any recommendations for proposed treatment must be determined following the resolution of his legal issues. Complainant was prescribed Lexapro prior to his termination and it would not be improbable that he will similarly require such medication in the future. It must be kept in mind, however, that Lexapro and similar medications have significant sexual side effects including loss of libido and impaired sexual function. Complainant may benefit from psychotherapy, although he does not seem to be a candidate for insight oriented psychotherapy, because he is non-introspective. A brief course (10-20 sessions)

might help him focus on specific issues and reshape attitudes/motivations in a manner to help him resolve both family and occupational problems.

***Dr. William Roddy testified at deposition in pertinent part that:*⁷⁴**

Complainant did not indicate that he had any extra marital affairs. Such a thing could affect Complainant's mood depending upon the nature of the affair. If it was a rewarding, pleasant experience, it could have a pleasant affect on his mood. If it was an unpleasant affair fraught with marital troubles or consequences, it could certainly worsen his mood. If a patient had an affair and the spouse later learned about it, it could cause anxiety, nervousness, and sleeplessness. Often those who have affairs worry that their actions will be discovered. That can cause worry, anxiety, a decline in marital relations and sexual dysfunction. There can be legal repercussions and the loss of the marital relationship. The affair can lead to loss of trust and to the integrity of the family.

Had he known about the affair, it may have affected his diagnosis, depending upon how long ago it happened. If it happened within the past six months, it could be causing an adjustment reaction mixed with anxiety and depressed mood. An affair can have long term psychological consequences and be classified as a depressive disorder or a generalized anxiety disorder. The fact that Complainant had two sisters-in-law die recently could affect his diagnosis. If it happened less than six months ago, it can be classified as an adjustment reaction. If more than six months, it could be coded as major depression, single episode moderate or generalized anxiety disorder.

Complainant told him that being terminated would follow him the rest of his life. Following his termination, he experienced financial troubles and marriage difficulties. Complainant implied that things were very good financially before the termination and he took home \$1100 per week, which he seemed happy with.

Complainant was so focused on the wrongfulness of his termination it seemed pretty highly symptomatic or somatic. He was acutely aware of the change in the way he felt, whether it was anxiety, depression, or irritability. It's safe to say he focused more on any symptom following the termination. If he had the same symptoms before the termination, he may not have focused on them with the same energy. He did not get the impression that Complainant overstated his symptoms.

It is difficult to predict the impact of an event on one's psychological state without knowing significant facts related to the incident. The loss of a job that one has held for ten years resulting in protracted unemployment could be even more devastating than the death of the sister-in-laws. He diagnosed that Complainant had post traumatic stress disorder because the termination has had a large impact on Complainant's well-being.

⁷⁴ RX-I & CX(2)-M.

He has no reason, based upon his interactions with Complainant and reading his medical history, to doubt Complainant's truthfulness. He has also seen cases where an extramarital affair does not damage a marriage, but he has not actually seen circumstances where people have worked out a one night stand.

He believes Complainant could benefit from six months or more of psychotherapy, family therapy, and perhaps marriage counseling. The going rate is probably \$110 per hour. He could need possibly hundreds of sessions. He believes that Complainant suffered significant emotional distress because of his termination.

***Dr. Therese Lango's medical records state in pertinent part that:*⁷⁵**

Complainant presented on 4 Dec 08 with hypertension and an abnormal stress test. Complainant has a significant history of cervical disease and has been advised to have surgery but has been reluctant to do so, because he is the primary breadwinner for the family and is concerned about any potential disability that may ensue. He has been having problems on and off with blood pressure. His wife had concerns about sexual dysfunction and a certain medication was discontinued. It is fairly clear that he is under a great deal of stress in his personal life. Complainant has a chronic headache which may be a combination of cervical disease and problems with his blood pressure. He does not have stress at work but says stress is more predominant at home. There was some issue with an extramarital affair which he worked out with his spouse. However, there are some financial issues being brought up, possibly in retribution for the past.

***Delinquent medical bills show in pertinent part that:*⁷⁶**

Complainant, his daughter, sons and wife, amassed several thousands of dollars in medical charges since the date of Complainant's termination.

***Interrogatory answers dated 12 Feb 10 show in pertinent part that:*⁷⁷**

Respondent employed painters at Entergy's River Bend Nuclear Plant (St. Francisville, LA); Entergy's Waterford Nuclear Plant (Killona, LA); South Texas Nuclear Generating Station (Bay City, TX); Entergy's Grand Gulf Nuclear Station (Port Gibson, MS); Luminant's Comanche Peak Nuclear Plant (Somervell County, TX); and SCANA's VC Summer Nuclear Plant (Fairfield County, SC). There were anticipated openings at the Grand Gulf Nuclear Station, the South Texas Nuclear Generating Station, Luminant's Comanche Peak Nuclear Plant or AmerenUE's Callaway Plant. To be eligible for the Grand Gulf Nuclear Station, the South Texas Nuclear Generating Station, or AmerenUE's Callaway Plant, Complainant would have to obtain a referral from the local

⁷⁵ RX-K.

⁷⁶ RX-Q.

⁷⁷ RX-R & CX(2)-N.

union hall where each plant is located. Respondent has no control over this referral. Luminant's Comanche Park Nuclear Plant and SCANA's VC Summer Nuclear Plant are non-union projects.

*The General Presidents' Project Maintenance Agreement states in pertinent part that:*⁷⁸

There are several scheduled maintenance outages in 2011. There were requests for approval of manual employee compensation in February 2010 for AmerenUE—Calloway Nuclear Plant; Entergy's St. Francisville Plant; Entergy's Grand Gulf Facility; STP Nuclear Operating Company near Wadsworth, TX; and Entergy's Waterford 3 Facility.

The project maintenance agreement states in Article II(1)(C) that the unions understand that the contractor is responsible to perform the work required by the owner. Therefore, the contractor has the complete right and authority to hire and lay off employees as the contractor feels appropriate to meet work requirements and/or skills required. The contractor may hire employees by name who have special skills or have previous maintenance experience.

ANALYSIS

Equitable Remedies

Complainant seeks removal of all negative employment actions related to his wrongful termination from his personnel files. Respondent entered no opposition to that remedy. Accordingly, I find removal is warranted and hereby order Respondent to purge any documents related to Complainant's protected activity or dismissal.

More complex is the analysis of the issue of reinstatement, which is the primary default remedy for the wrongful termination of a whistleblower. Respondent claims that it has no current position that Complainant could reasonably be expected to have been occupying, had he not been fired. The parties concede that Respondent is no longer performing work at the Browns Ferry Nuclear Plant and that an independent company, Williams Specialty Services, has taken over those duties. However, the parties also agree that the workforce at Williams Specialty Services has remained consistent. Respondent is not required to provide Complainant with an identical job, only a comparable one. Complainant expressed a willingness to return to a comparable job with Respondent, even when the job is physically located in another state.

⁷⁸ CX(2)-O.

Complainant seeks to be reinstated to a position of head foreman and offers evidence that Jeremy Johnson, who had been a member of the Local 1293 since 2003 and in 2006 was promoted to head foreman. The declaration of Jim Mayfield⁷⁹ states that had Complainant not been fired, he would have very strongly been considered for the same promotion and earnings as Johnson. In support of his position, I find the phrase “would have very strongly been *considered*” to be operative, showing no evidence that Complainant would have definitively or automatically been promoted. Even though Complainant’s suggestion to his supervisors that they shove the rules “up their ass” was protected activity in the context of voicing concerns about safety, it still raises questions about the way in which he expressed those concerns, his ability to effectively communicate, and the likelihood that those supervisors would select him for promotion. Thus, I find his “but for” promotion to be sufficiently speculative to fall short of the more likely than not standard, and decline to order reinstatement at a higher supervisory level.

Respondent argues that union rules prohibit the hiring of non-local painters. However it appears that Respondent retains the ability to “call by name” or “hire by name” when an employee has previous maintenance experience. It is not unreasonable to anticipate that union membership for a Complainant who was a union member in good standing before being wrongfully terminated should not present an insurmountable barrier to reinstatement. I therefore order Complainant to be reinstated to a comparable position as foreman painter with Respondent at a facility in the southeastern region. If Respondent finds that the union refuses to accept Complainant or it is simply otherwise impossible to reinstate Complainant at a facility in the southern region, it must file a corresponding motion with supporting evidence.

Damages

Back Pay

Complainant claims \$142,843.48 in back pay, which includes overtime, vacation, sick time, pension, and health benefits. It also includes interest. Respondent did not contest back pay up to that amount. I agree that based upon the computation (Exhibit A) supplied by Complainant, the figure seems reasonable. I therefore award Complainant \$142,843.48 in back pay.⁸⁰

⁷⁹ CX(1)-A, attachment 2.

⁸⁰ This calculation is contingent upon the rendering of a final judgment by 31 December 09. Therefore I grant Complainant leave to file an amended computation solely on the back pay issue.

Compensatory Damages

The rest of the quantitative damages are in dispute. Complainant seeks compensatory damages in the amount of \$300,000 for physical and mental suffering, including mental anguish, embarrassment and humiliation. Complainant specifies the following as results of his wrongful termination: deterioration of his financial condition; decline of family and marital relationships; damage to his professional reputation; loss of job satisfaction; and diminished involvement in the local Colbert County community. Respondent counters that preexisting emotional, physical and personal problems were the root cause of Complainant's suffering and questioned Complainant's claims of financial stress when his job has historically been intermittent.

The record clearly shows that Complainant struggled personally and professionally after his wrongful termination on 24 May 04. It also shows that he had some preexisting problems. The central questions are how severe his post termination problems were and are; whether they were simply manifestations of preexisting conditions, neither precipitated nor aggravated by his termination; and in turn to what extent he should be compensated.

The most direct evidence on those points comes from Complainant and his spouse. Consequently, their credibility is of central importance. Their testimony in general was sufficiently believable to show that the termination caused at least some distress and exacerbated to some degree preexisting physical and psychological problems.

However, while it appears that they may subjectively believe almost every significant problem in their lives is due to the Respondent's wrongful action and honestly testified consistently with that belief, their testimony appeared understandably and unavoidably biased. At times, the statements of both Complainant and his wife seemed sufficiently contrived and self serving⁸¹ to cast doubt upon the credibility of significant portions of their testimony relating to the extent of the damage caused by the termination.

There was some inconsistency in the various statements of Complainant and his spouse. Complainant's wife touted Complainant's reputation in the community, but had trouble recalling the names of people who would stop her in the grocery store or even the names of children her husband had helped in the community. Complainant and his wife's testimony was not consistent regarding the details of Complainant's community participation. She stated her husband went to constant meetings. He stated he went to a Colbert County Commission meeting "once or twice, periodically," had been to two Water Board meetings related to an increase in the water bills, and a TVA licensing meeting. Complainant repeatedly states he was ashamed and embarrassed about what

⁸¹ Particularly in terms of comparing the declarations to the deposition testimony.

happened to him, yet is certain that he did the right thing by speaking out in defense of the public's safety. Complainant told his doctor he had withdrawn from his children's athletic events, yet testified that he went to most of his children's practices and football games.

Some of the statements described behavior that is simply unlikely. Complainant could not recall significant details of a once in a life time extra-marital encounter, but was able to recollect that he had had only "one or two drinks" that he suggested significantly impaired his ability to think clearly or drive. His wife rated her anger level at the discovery of the affair as a mere four or five and both said it was a dead issue, once they talked it out all night. However, in 2008 Dr. Lango noted there were still pressures at home, possibly in "retribution for his actions of many years ago."⁸²

Complainant's wife testified that in nearly 20 years of marriage, her husband has never as much as raised his voice in her presence other than to cheer at a child's football game. It seems somewhat incongruent that the same man would tell his supervisors to shove their rulebook up their ass. I therefore find particularly the testimony related to Complainant's esteem in the community and his idealized family and marital conditions to be less than convincing.

Prior to his termination, Complainant had told his doctor that things were stressful at home. Complainant himself testified there were discussions at home with both his wife and his son, although he claims unconvincingly that voices were never raised. If his home life was not turbulent before, Complainant undoubtedly created significant problems at home with his drinking and an extramarital affair, which he blames on the stress he felt because of his termination. While Complainant blames his work-related stress for a loss of libido and sexual dysfunction, the stress of adultery might likewise lead to a loss of libido and sexual dysfunction.

Complainant's claims that the unfair termination caused havoc with his relationships at home are qualitatively reasonable, but appear quantitatively rationalized. Respondent's counter that Complaint had domestic difficulties prior to the termination and that his subsequent extramarital affair was a more significant cause of Complainant's emotional distress is also a rational interpretation of the evidence.

The evidence shows Complainant and his family clearly suffered other than strictly financial damages from the wrongful termination. Complainant's treating physician testified that the preexisting depression from the death of relatives and hypertension made it more likely that Complainant suffered significantly, both medically and emotionally, from his termination. Complainant's wife was forced to work additional shifts. They lost their insurance, were unable to pay for their medical costs,

⁸² RX-K.

and subsequently, they were sent to a collection agency. That understandably caused Complainant stress and he began to withdraw from normal family and community activities, experienced problems sleeping, and discussed the possibility of suicide with his wife. Although Complainant experienced regular periods of unemployment by the very nature of his work and his wife would periodically assume the role of primary breadwinner, those were sporadic and temporary layoffs. That differs from a firing where his personnel file permanently reflects an adverse action.

On the other hand, the weight of credible evidence also indicates their pre-termination life was not as idealistic as they now seem to recall and that Respondent is not responsible for all of Complainant's post-termination choices and problems. That is consistent with Dr. Ford's assessment that although Complainant believes what he is saying, he does tend to rationalize, displace or project all of his problems on the event of his termination. It is also consistent with Dr. Roddy's opinion that Complainant did not overstate his symptoms, but focused more on his symptoms following the termination.

In light of the clear financial and emotional repercussions of the termination, some compensatory damages are in order. In order to determine the quantum, it is appropriate to compare damage awards in similar cases. Respondent cites *Lederhaus v. Donald Paschen & Midwest Inspection Services, Ltd.*⁸³ as a case that most closely mirrors the instant case, with an award of \$10,000 in compensatory damages. In *Lederhaus*, the complainant was unemployed for 5.5 months, he and his wife were harassed by bill collectors, and their house was in the beginning stages of foreclosure. He became depressed, began to withdraw and have health problems.

Complainant cites as a more appropriate case for comparison *Hobby v. Ga. Power Co.*⁸⁴, where \$250,000 in compensatory damages was awarded. However, in *Hobby*, the complainant's very promising career was largely destroyed.⁸⁵ He went from being a nuclear power executive to accepting a position as a file clerk in order to pay his basic living expenses. In the instant case, Complainant's union assisted him with finding a position and he eventually secured a job in the same industry, making even more money.

I find *Tipton v. Indiana Michigan Power Co.*⁸⁶ to be most analogous. In *Tipton*, the complainant claimed \$150,000 in compensatory damages for emotional distress, significant financial concerns, depression, shame, relationship difficulties, loss of professional reputation, and embarrassment. He was suffering nightmares and sought mental health counseling. The *Tipton* court found damages based upon humiliation and embarrassment, but found testimony that his co-workers spurned him too vague to

⁸³ 91-ERA-13 (Sec'y 26 October, 1992).

⁸⁴ 90-ERA-30 (ARB February 9, 2001).

⁸⁵ See Id at 31.

⁸⁶ 2002-ERA-30 (ALJ June 29, 2004).

warrant an award due to a damaged professional reputation. The court awarded \$25,000 in compensatory damages.

Similarly, in this case, I find that Complainant has not made a sufficient case that “comments” made by others at work caused him extensive emotional harm and significant damage to his professional reputation. Complainant testified that he felt he had done the right thing and there is no evidence other than his own testimony or feelings that his co-workers thought any differently. Complainant was unable to name any specific persons who called him a whistleblower even though he claimed there were several people who had made comments. However, much like in *Tipton*, Complainant was unemployed for several months and endured significant financial and emotional strain. I therefore find the *Tipton* analysis most applicable. However, in recognition of the fact that the *Tipton* award was in 2004, an increase reflecting inflation over that time is appropriate, I therefore award Complainant \$50,000 in compensatory damages.

Future Psychiatric Counseling

Additionally, Complainant requests \$25,000 to cover the future cost of psychiatric counseling. Respondent argues that Complainant has not shown that the termination was the proximate cause for Complainant’s need for counseling and that the award is excessive. Complainant, his wife, and his treating physician testified extensively about the long-term negative effect the termination has had on Complainant’s self esteem and outlook. I find it reasonable to grant Complainant’s request for future psychiatric counseling. However, consistent with *Smith v. Littenberg*⁸⁷, I award one year of psychiatric counseling, not to exceed the cost of \$25,000, provided that Complainant actually avails himself of weekly or bi-weekly counseling sessions and presents the psychiatrist's bills to Respondent for payment.

Attorney Fees

Complainant’s Counsel is hereby allowed 14 days from the date of service of this decision to submit a supplemental motion for attorney’s fees. Respondent has 14 days following the receipt of such motion to file any objections thereto. In the event Respondent elects to file any objections, Complainant’s Counsel shall have 14 days from service to file an answer thereto.

⁸⁷92-ERA-52 (ALJ Dec. 13, 1994) at 5.

Accordingly, it is hereby **ORDERED** that Respondent:

1. Reinstate Complainant to a position in the southern region corresponding to his former position without loss of benefits or other privileges;
2. Purge Complainant's employment file of any reference to his protected activity and discharge;
3. Pay Complainant \$142,843.48 for lost back pay through 31 Dec 10 and a supplemental amount to the date of reinstatement. Such supplemental amount will either be determined by the agreement of the parties and submitted in a joint motion for approval or by a supplemental order following submission of briefs and supporting exhibits
5. Pay Complainant \$50,000 in compensatory damages.
6. Pay for future psychiatric counseling consistent with this decision for not more than one year from this order and not to exceed \$25,000.

So ORDERED this 9th day of February, 2011, at Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Department of Labor, Office of

Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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. With your supporting legal brief you may also submit 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.

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. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor.

If a timely petition for review is filed with the Board, and the Board issues an order notifying the parties that the case has been accepted for review, this Decision and Order will be inoperative unless and until the Board issues an order adopting my decision. However, that portion of my Decision and Order that orders relief (except any order awarding compensatory damages) is effective immediately upon receipt and will remain effective while review is conducted by the Board, unless the Board grants a motion by the Respondent to stay the order based on exceptional circumstances. *See* 29 C.F.R. §§ 24.109(e) and 24.110.