

U.S. Department of Labor

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Issue Date: 14 February 2014

Case No.: 2013-LCA-00017

In the Matter of

GEETIKA MALIK

Prosecuting Party

v.

KNACK SYSTEMS LLC

Respondent

APPEARANCES: Colin M. Page, Esq.
For the Prosecuting Party

Rena Thakkar, Esq.
For the Respondent

BEFORE: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER

Background

This matter arises under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(n) (2005) (“INA” or “the Act”), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, C.F.R. § 655.700 et seq.¹

Procedural History

This matter involves a complaint the Prosecuting Party, Geetika Malik, filed with the Wage and Hour Division, U.S. Department of Labor, in August 2012, against the Respondent, her former employer. The Prosecuting Party, who was employed by the Respondent under a Labor Condition Application (“LCA”) up to November 30, 2011, alleged that the Respondent failed to pay “bench pay” (time the employee was not working). She also alleged that the Respondent had imposed an illegal penalty, after she terminated the employment relationship. Form WH-4, dated Aug. 31, 2012. Specifically, the Prosecuting Party asserted, the Respondent had filed a lawsuit against her, seeking damages related to her termination of employment. Id.

¹ Unless otherwise specified, citations to federal regulations are to Title 20, Code of Federal Regulations.

After an investigation, by letter dated March 26, 2013, the District Director, Wage and Hour Division (“WHD”), acting on behalf of the Administrator, determined that the Respondent had failed to pay wages in the amount of \$6,186.25 to the Prosecuting Party, but had since repaid the full amount due. WHD Determination Letter, dated Mar. 26, 2013. The District Director did not make any determination regarding the allegation of an improper penalty. Id.

On April 9, 2013, through counsel, the Prosecuting Party requested a hearing on the issue of an “illegal penalty,” and asserted that the Administrator’s representative had erred by failing to find that the Respondent was “attempting to impose an illegal penalty.” Appeal Letter, dated Apr. 9, 2013. The Prosecuting Party stated that the Respondent had sued her in New Jersey state court, seeking damages for fraud, tortious interference and breach of contract. Id. Such action, the Prosecuting Party stated, constituted “an attempt to assess a penalty for ceasing employment before an agreed-upon date.” Id.

The hearing was held before me on July 18, 2013, in New York City. At the hearing I admitted the Prosecuting Party’s Exhibits (CX) 1-6 and the Respondent’s Exhibits (RX) 1-4 and 6-9.² Hearing Transcript (T.) at 6, 9, 125. I also received the testimony of Ms. Malik, the Prosecuting Party, and Ashoo Tuli, an official of the Respondent company.

Both the Complainant and the Respondent submitted post-hearing briefs.

Issues

Based on the assertions the parties made at the hearing and the parties’ filings, including their post-hearing briefs, I find the issues to be determined are as follows:

- *Whether, in accordance with the Employment Agreement between the two parties, the Prosecuting Party owes “damages” to the Respondent, because she terminated the employment relationship between the two parties without giving sufficient notice?*
- *Is the provision of the Employment Agreement in which the Prosecuting Party agreed to pay “reimbursable expenses” to the Respondent in the event of her premature termination of the employment relationship permissible as liquidated damages under the Act, as Respondent asserts? Or, as the Prosecuting Party asserts, is it impermissible as a penalty, and also a violation of New Jersey law?*
- *In the event that the contractual provision constitutes liquidated damages, is the amount the Respondent seeks to recover from the Prosecuting Party (via a lawsuit in New Jersey state court) in any way limited by the Act?*
- *Can the Respondent recover attorney’s fees or obtain other non-monetary relief (such as injunctive relief) from the Prosecuting Party due to her premature termination of employment?*

² There is no RX-5. See T. at 7.

- *Does the Respondent's status as a registered consulting firm and/or Temporary Help Service Agency in New Jersey prohibit it from charging any fees or costs to the Prosecuting Party?*

Documentary Evidence

The Prosecuting Party's Exhibits are summarized as follows:

- CX-1: Civil Complaint, filed by Respondent against Prosecuting Party in Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-1653-12, stamped "filed and received" March 8, 2012.
- CX-2: Employment Agreement, signed by Prosecuting Party and a representative of the Respondent. The signatures are not dated, but the first sentence of the Employment Agreement indicates it is effective March 10, 2011.
- CX-3: Extract from Respondent's website (www.knacksystems.com) describing the company and its business; listing of "damages" the Respondent seeks against the Prosecuting Party in the New Jersey state court lawsuit.
- CX-4: Copy of Certificate, New Jersey Office of the Attorney General, Division of Consumer Affairs, certifying Respondent's registration as a "Consulting Firm/Temp" for the period from July 1, 2011 to June 30, 2012.
- CX-5: E-mails between representatives of Sparta Consulting and the Respondent, dated from November 29, 2011 to December 2, 2011, relating to Prosecuting Party's availability to work.
- CX-6: E-mail from Respondent's counsel to Prosecuting Party's counsel, dated March 27, 2013, in which Respondent's counsel asserts that the Respondent lost profits for three weeks and its business reputation was damaged, due to the Prosecuting Party's breach of contract; additionally, the Respondent incurred attorney's fees.³

The Respondent's Exhibits are summarized as follows:

- RX-1: Copy of Employment Agreement, signed by Prosecuting Party and a representative of the Respondent. This exhibit is duplicative of CX-2.
- RX-2: E-mail from Prosecuting Party, dated November 30, 2011, to Rajiv Sharma, official at Respondent company, informing him of her resignation, effective immediately.
- RX-3: Letter from Wage and Hour Division District Director, dated April 18, 2013, confirming that Respondent paid the \$6,186.25 in wages set forth in the Determination Letter of March 26, 2013.
- RX-4: Civil Complaint, filed by Respondent against Prosecuting Party, in Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-1653-12, stamped "filed and received" March 8, 2012. This exhibit is duplicative of CX-1.
- RX-6: Respondent's counsel's "Certification of Services," listing fees and costs incurred in conjunction with suit filed New Jersey Superior Court (CX-1/RX-4). Incurred costs

³ The e-mail also conveyed a settlement offer in which Respondent offered to forego litigation in exchange for a payment of \$20,000 from the Prosecuting Party.

totaled \$9,621.50 as of the date of the certification, June 26, 2013. Counsel also stated she anticipated incurring an additional \$1,760.00 in fees, and therefore requested that fees and costs totaling \$11,021.50 be paid.

- RX-7: E-mails, dated November 15-16, 2011, and November 17-22, 2011, regarding Prosecuting Party's availability for work with two other companies.⁴
- RX-8: E-mails, dated November 8-10, 2011, reflecting that Prosecuting Party was being considered for work. E-mail dated July 2013 reflecting that the Prosecuting Party was selected for work at billing rates of \$105 to \$115 per hour.
- RX-9: Receipt for Airline Ticket, issued March 11, 2011, British Airways, flights on March 14, 2011 – Delhi, India to Newark, New Jersey. E-mail from Prosecuting Party, dated August 1, 2011, stating that she stayed "at the hotel" in San Diego for 14 days only.

In this Decision, I have considered all the evidence of record, including the documentary evidence, whether or not I have specifically discussed the item of documentary evidence at issue. I also have considered the testimonial evidence, and the post-hearing arguments of the parties.

Stipulated Facts

At the hearing, the parties stipulated to the following facts:

- The Prosecuting Party, Geetika Malik, was employed by the Respondent from March 10, 2011, to November 30, 2011;
- On November 30, 2011, Ms. Malik gave the Respondent notice of her termination of employment;
- The Respondent filed suit against Ms. Malik in Superior Court in New Jersey, on March 8, 2012;
- The Employment Agreement at issue was entered into by both parties;
- The Respondent has paid all back wages that the U.S. Department of Labor determined to be due.

T. at 16-18.

I find these stipulated facts are supported by the evidence of record, and I accept the parties' stipulations.

Testimonial Evidence

Geetika Malik

The Prosecuting Party, Geetika Malik, testified under oath. She stated that she has a degree in computer science and a software engineering background and worked for almost five years in India before she came to the United States as an employee for the Respondent. She indicated she learned about the Respondent in 2008, and the company filed an H-1B petition on

⁴ These e-mails appear to have been forwarded to Respondent's counsel in June 2013, shortly before the hearing.

her behalf at that time. The witness stated that she did not have a visa interview until 2010; she said she was denied a visa at that time, because to her understanding, she needed a “client letter” indicating that a job was available for her before a visa could be approved. She stated that she made herself available to work for the Respondent in January 2011, and worked for the Respondent in India for about a month and a half before coming to the United States in March 2011, at which time she signed her Employment Agreement. T. at 19-23.

Ms. Malik recounted her employment with the Respondent and stated that she worked at CareFusion in San Diego, a position placed through a third party consulting company, Sparta Consulting, and this job extended through the end of October. Ms. Malik stated that for the first two weeks of this project, she stayed at a hotel paid for by the Respondent, and then she rented an apartment at her own expense. She also remarked that while working on an earlier project, for Sharp Electronics, she was asked to stay at a guest house owned by the Respondent’s CEO, Rajiv Sharma. She stated that she was not charged rent at the time, and that she traveled back and forth from the guest house to the work site by taxi, for which the Respondent reimbursed her. T. at 24-29.

The witness stated that her work for CareFusion was billed at an hourly rate, and reiterated that her work at that company ended on October 28, 2011. She stated that she communicated to the Respondent that she planned to go to India for several weeks in January 2012 for her wedding, and she needed a client letter in order to ensure she would be able to return to the United States. She said that the Respondent did not have any work for her, and she was still in San Diego and was not working. Eventually, she said, the Respondent found a long-term assignment for her which was to start sometime in January 2012. Ms. Malik remarked that she had gone through a bad experience in the past, where she had been denied a visa because she did not have a client letter. She said that she was concerned she would not be able to get a client letter, so she decided she needed to look for a different employer who could give her such a letter, to ensure she would be able to re-enter the United States. She said she found a job with Capgemini, but they told her that if she wanted to take several weeks off in January she would need to start working immediately, and so she resigned her employment and joined that company. She stated that she tendered her resignation on November 30, 2011 and spoke with Ashoo Tuli, one of the Respondent’s managers, about it. She stated he told her they had secured an assignment for her that was supposed to start in December or January, but she told him that would not be suitable, because she would not be able to get the client letter she needed before she left for India. T. at 30-36.

Ms. Malik stated that while she was in India she received an e-mail from the Respondent’s attorney stating that the Respondent had incurred losses because of her resignation and would file a lawsuit if she did not pay damages. Then, she stated, in March the company filed its lawsuit. She stated that after the Respondent filed its lawsuit, she filed a complaint with the Department of Labor, asserting that the Respondent was attempting to obtain an improper penalty from her.⁵ She stated that she requested the Respondent provide a statement of its

⁵ Ms. Malik testified that she also informed the Department of Labor that the Respondent failed to pay her “bench pay” for November 2011. She stated that after the Department of Labor determined she was entitled to back wages, the Respondent paid her those wages. T. at 36-38.

damages but it failed to do so until just a few before the hearing. Ms. Malik stated she understood the Respondent is asserting that it lost profits because of her resignation and that its business reputation was harmed. Additionally, she testified, the Respondent asserted that its damages exceeded \$20,000 and it offered to withdraw the lawsuit if she paid \$20,000. T. at 36-39.

Regarding the Respondent's asserted damages, Ms. Malik stated that she was not told, prior to her resignation, that the Respondent had an assignment for her. She recalled she received airline ticket from India to the United States. Regarding taxi fare for the time period when she was working on the Sharp Electronics project, which the Respondent asserted was \$2,705, she stated she was not aware of the cost. She stated she did not know the basis for the Respondent's charge of \$1,125 for her stay in the guest house from March to May, 2011, and was not aware whether the Respondent was ever reimbursed for its payment for her hotel expenses in San Diego. T. at 39-40.

On cross-examination, Ms. Malik stated that she signed an initial employment agreement with the Respondent in 2008, when her visa petition was initially filed. Additionally, she stated, she signed another employment agreement in India in 2010, in which the terms of employment were the same except the salary had increased by \$5,000. She stated that none of the employment agreements indicated starting dates. She indicated that the Respondent paid her airfare from India to the United States, but said she did not know the cost of the airline ticket. Ms. Malik acknowledged that the Respondent paid for her visa and also applied for a visa extension for her, at its expense; she indicated the visa extension was approved in November 2011. T. at 40-43.

Regarding the Employment Agreement, Ms. Malik stated that she had seen it before because she had signed earlier versions, in 2008 and 2010. She acknowledged she reviewed the Employment Agreement before signing it and that had the opportunity to show the document to an attorney, but did not do so; she also noted, however, that she did not receive the document until after she had arrived in the United States, and did not know what would have happened had she refused to sign. She remarked that it was expected that she sign the document. Ms. Malik said that the document was given to her at the Respondent's offices; she took the document with her overnight and signed it the next day. The witness stated that the document "has a lot of legal language" but stated "I think I understood most of it." T. at 43-47.

Regarding the Respondent's guest house, Ms. Malik stated she was not aware of any company policy regarding its use. She indicated she stayed at the guest house alone, for the duration of her assignment with Sharp Electronics, which was a little more than one month. Regarding the two-week hotel stay in San Diego, Ms. Malik stated the Respondent offered to pay for her accommodations because she was going to a new city. Ms. Malik acknowledged that after the CareFusion project ended, the Respondent attempted to find a new job placement for her; she stated that she had an interview and was accepted for a position with a company called Midas, but the start date for that assignment, supposedly in January, was not fixed. She stated that she did not have any work after the CareFusion project ended. T. at 47-51.

Ms. Malik stated that the Respondent's officials encouraged her to postpone her plans to travel to India in January, saying that visas were being denied and it was not a good time to travel. Based on paragraph 6.1 of the Employment Agreement, Ms. Malik testified, she understood that her employment was at-will, which meant she was free to leave at any time but was supposed to give three weeks' notice. She stated she did not give the required notice because she could not change her travel plans to India, and could not leave the United States without a job because she was concerned, based on her past experience, that she could not get back into the country without a client letter. She said she thought her only other option was to go with Capgemini, which was willing to hire her but needed her to start work on December 6. Ms. Malik also stated that no one from the Respondent's company called her after her resignation, to tell her that they had placed her with another job for December. She stated that the Respondent did not have a client letter for her because they had not placed her with a job; she acknowledged that the Respondent placed her in a job beginning in January, but she stated she was sure she could not get leave right after joining. Additionally, she remarked, she really needed to be on a job and working to get a client letter. She reiterated she was sure she would not have been able to get a client letter from the position that the Respondent had secured for her, and stated she wished that the Respondent had been able to get an assignment for her in November, but that did not happen. T. at 51-57.

Ms. Malik reiterated that the assignment the Respondent had secured for her was supposed to start in mid-January, which to her was not helpful, because she was supposed to go to India in January. She stated that her understanding of paragraph 10.1 of the Employment Agreement was that if she terminated her employment before two years had elapsed, she was supposed to pay reimbursable expenses up to \$15,000. She remarked that the provision stating that the terms of the Employment Agreement are reasonable and necessary to protect the legitimate business interests of the company is a provision that is in favor of the Respondent, and she also acknowledged that she understood the provision before signing the document. She acknowledged that on the day she resigned, she had a conversation with Ashoo Tuli in which he told her that he had a project that was supposed to start in mid-January, but denied that Mr. Tuli confirmed that the project had been secured. She acknowledged that she requested the Respondent use premium processing when requesting her visa renewal, which is more expensive. She stated her base salary for the Respondent was \$85,000 per year and her salary with Capgemini was \$120,000. T. at 57-62.

On re-direct examination, the Prosecuting Party explained that her wedding celebrations were scheduled to take place over several days and that about 500 people had been invited to the event. She noted that officials at the Respondent company were also of Indian heritage, and thus, were familiar with the size and complexity of weddings in India, but nevertheless tried to get her to change her plans and not travel to India. Regarding the reimbursable expenses that the Respondent claimed (in CX-3), Ms. Malik stated that no one from the Respondent requested that she repay the expenses, and she was not aware of the amounts the Respondent claimed as reimbursable expenses until a few days prior to the hearing, when she saw the document. In response to my questions, Ms. Malik stated that a client letter is required to get a visa, because it verifies there is work available. She stated that her visa had been extended, and the visa extension required new documentation every time she left the United States. T. at 62-66.

On further cross-examination, Ms. Malik stated that the client letter is mandatory, and reiterated that earlier she had been denied a visa because she did not have a client letter. She again stated she was almost certain she would not have gotten a client letter from Midas (the company with which the Respondent had placed her), because that job was not going to start until January. She stated that Capgemini immediately started the visa transfer process in the third week of November, using premium processing, and that when she joined the company she was placed on a project with a client. She stated that she interviewed with Capgemini two days before the company started transferring her visa. T. at 67-70.

Ashoo Tuli

Ashoo Tuli testified under oath as a witness on behalf of both the Respondent and the Prosecuting Party.⁶ On examination from the Respondent's counsel, he stated that he is the Associate Vice President of Business Development for the Respondent, and has been employed by the Respondent for five years and six months. At the time of the Prosecuting Party's employment, he stated, he was the Respondent's Director of Sales. Mr. Tuli confirmed that the Respondent hired Ms. Malik when she was in India. He stated that she was given an employment agreement while still in India, and then was given a new agreement when she arrived in the United States. As for the new agreement, Mr. Tuli stated that Ms. Malik had the opportunity to read and review it, did not have any questions about it, and did not request any changes. He also stated Ms. Malik was not pressured or forced to sign the Employment Agreement, and he indicated that if she wanted to have counsel review it before she signed it, she was free to do so. T. at 71-75.

Mr. Tuli confirmed that RX-2 was an e-mail, dated November 30, 2011, containing Ms. Malik's resignation. He stated that she did not indicate, prior to that date, that she intended to resign or that she was looking for other employment. Mr. Tuli testified that the Respondent extended Ms. Malik's visa on her behalf and that, even before assignment for CareFusion ended, it was making efforts to secure another project for her. He stated that company officials informed her of this on a regular basis. Regarding the Midas project, Mr. Tuli stated that it was initially supposed to start the first week of December, but in mid to late November the Respondent received indications it might get postponed to January. He stated that for that reason, he secured a short-term project for Ms. Malik with Sparta, which was confirmed on November 30. He stated he attempted to contact her about it but was not able to get in touch with her. T. at 75-80.

The witness confirmed that Ms. Malik was required to give three weeks' notice of termination of employment and did not do so. He stated that he was unable to get another person for the project that was supposed to start in December [the Midas project]. Mr. Tuli stated that Ms. Malik's billable rate to the client was \$115 per hour; he stated the company is seeking payment for the lost profits for the three weeks for which she did not give notice, as well as for certain expenses that the Respondent incurred on her behalf. He agreed that Ms. Malik agreed to

⁶ By agreement of the parties, Respondent's counsel conducted the initial examination of Mr. Tuli. T. at 71.

pay such damages, as well as attorney's fees, in the Employment Agreement. Mr. Tuli stated that the Respondent company is registered in New Jersey as a consulting company. T. at 80-82.

Mr. Tuli stated that a client letter is not mandatory, and he said it was an option for a company to provide a client letter. He acknowledged that Ms. Malik told him that she planned to go to India for her wedding, but stated she did not indicate there were any fixed dates. He confirmed that the Respondent paid Ms. Malik's airfare to the United States. He also confirmed that CX-3 lists the damages that the Respondent is seeking in the related state court action. T. at 82-86.

On examination from the Prosecuting Party's counsel, Mr. Tuli stated that Ms. Malik billed for her work on an hourly basis; he stated he believed she billed at \$100 for Sharp Electronics, \$110 for CareFusion, and \$115 for the Midas project. He confirmed that CX-4 shows the company's certification as a consulting/temporary services firm, and stated he was not aware whether the company had approval from the state of New Jersey to charge fees to its employees. He stated that he was unaware that under New Jersey law, consulting firms and temporary services firms are not permitted to charge fees to their employees. Mr. Tuli also stated he was unaware that the Respondent may have withdrawn money from Ms. Malik's account after she resigned, or that the Department of Labor ultimately found that the Respondent owed her back wages. T. at 86-92.

Regarding CX-3, the witness explained that the Respondent had suffered lost profits when Ms. Malik resigned, in the amount of \$8,800 (representing her billing rate of \$115 per hour for 120 hours, less the salary owed to her). He stated that the project for which she was slated to work was a four-week project. Regarding CX-5, the witness confirmed it was a record of e-mails between him and a representative from Sparta Consulting, regarding the project to which Ms. Malik was to be assigned. He indicated the e-mails discussed an hourly rate of \$107 and this was the agreed-upon rate; he also stated that the assignment was confirmed early in the day on November 30, before the e-mail in which he told Sparta that Ms. Malik could start immediately. As for the different hourly rates at issue, Mr. Tuli stated that the \$107 rate was for the short-term assignment with Sparta and the \$115 rate was for the Midas project that was to begin in January. T. at 92-98.

Regarding amounts the Respondent claimed in CX-3, Mr. Tuli stated he was not aware of any specific documentation regarding the cost of Ms. Malik's airline ticket, and confirmed that the taxi fare was an expense that the Respondent had earlier paid but now wanted reimbursement. Regarding paragraph 10.1 of the Employment Agreement (CX-2/RX-1), Mr. Tuli agreed that expenses involving bringing Ms. Malik to the United States would be considered reimbursable expenses, and he conceded that the taxi and lodging expenses involved costs incurred after Ms. Malik arrived in the United States. He also conceded that this provision of the Employment Agreement capped reimbursable expenses at \$15,000. He also agreed that paragraph 6.1 of the document stated that the employee agreed to be responsible for any damages related to its failure to give the company three weeks' notice, but this provision did not list a specific amount of damages for which an employee might be responsible. T. at 98-101.

Mr. Tuli conceded that the expenses for which the Respondent sought reimbursement possibly could increase over time, because an employee would have been working for a longer period. He stated, however, that these expenses were the employee's responsibility, and he also remarked that employees may be better able to bear such costs themselves, the longer they are employed. Regarding the action the Respondent filed against Ms. Malik in New Jersey state court (CX-1/RX-4), Mr. Tuli acknowledged that the action did not mention liquidated damages or reimbursable expenses. He stated that Ms. Malik breached her contract because she resigned before the contractual period of two years, and because she did not give at least three weeks' notice. Regarding RX-6, Respondent's counsel's certification of fees in the state court action, Mr. Tuli testified that he was not aware how much of the fees had already been paid; he also stated he did not know whether the fees were to increase, but indicated he understood that the Respondent would continue to seek fees associated with its legal action against Ms. Malik. He acknowledged that the Employment Agreement does not mention whether the Respondent is entitled to seek legal fees for defending against actions relating to the Department of Labor. T. at 101-16.

As to CX-6, an e-mail exchange between Ms. Malik's counsel and Respondent's counsel, Mr. Tuli stated he agreed with Respondent's counsel's assertion that the Respondent lost profits due to Ms. Malik's breach of contract. He also agreed that Ms. Malik's actions caused harm to the Respondent's business reputation because the Respondent was unable to fulfill a contract with a new customer (the Midas project customer) or increase its services to the new customer. He stated that because Ms. Malik was unable to join the project, the Respondent was unable to do further business with the client, with whom it hoped to place eight to 10 consultants for up to five years. He stated that the Respondent continues to assert that it suffered damages to its business reputation. T. at 116-21.

In response to my questions, the witness confirmed that the Midas project was the project that Ms. Malik was to start in January, and also stated that the Respondent did not get anyone else to work on that project. He stated he was unaware whether the Respondent attempted to get Ms. Malik to reimburse it for its expenses before it sued her in state court. T. at 121-23.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statutory and Regulatory Framework

The Act's H-1B visa program permits American employers to temporarily employ nonimmigrant aliens to perform specialized occupations in the United States. 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To hire an H-1B nonimmigrant alien, an employer must first receive permission from the U.S. Department of Labor. To receive permission from the Department of Labor, the Act requires an employer to submit a Labor Condition Application ("LCA") to the Department. § 8 U.S.C 1182(n)(1).

The Department has promulgated detailed regulations setting forth requirements implementing the statutory provisions. The regulations state that the employer is not permitted to require, either directly or indirectly, that the employee pay a penalty for terminating employment prior to an agreed date. § 655.731(c)(10)(i)(A). However, the regulation permits the employer to receive bona fide liquidated damages from an employee who ceases employment prior to an agreed-upon date. § 655.731(c)(10)(i)(B).⁷

The distinction between a liquidated damages payment, which is permitted, and a penalty, which is not permitted, is based on state law. § 655.731(c)(10)(i)(C). This regulatory provision also sets out the following general guidance:

- State laws recognize that liquidated damages are amounts which are fixed or stipulated by the parties at the beginning of the contract and which are “reasonable approximations or estimates of the anticipated or actual damages caused to one party by the other party’s breach of the contract”;
- Fixed amounts which are not reasonable approximations or estimations of such damages may be penalties;
- State laws require that the relation between the parties and the purposes of the agreement be taken into account, so that a payment would be considered to be a penalty if it is the result of fraud or cloaks oppression;
- As a general matter, the sum stipulated must take into account whether the contract breach is total or partial (i.e., the percentage of the employment contract that has been completed).

§ 655.731(c)(10)(i)(C). The regulation also cites, as general guidance, Restatement (Second) of Contracts, § 356 (cmt b) and 22 Am. Jur. 2d Damages §§ 683, 686, 690, 693, 703. Id.

Applicable New Jersey Law

The New Jersey statutes have adopted the Uniform Commercial Code provision on liquidated damages, which states as follows: “Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.” N.J.S.A. 12A:2-718. Section 356(1) of the Restatement (Second) of Contracts contains identical language. Restatement (Second) of Contracts § 356(1) (1981).

⁷ If such damages are to be paid via deduction from the employee or a reduction in the payment of the required wage, the requirements of § 655.731(c)(9)(iii) must be fully satisfied. These requirements state, in general, that the employee must authorize the deduction in writing; that the deduction must be for matters principally for the benefit of the employee; is not a recoupment of the employer’s business expense; is not excessive; and does not exceed 25% of the employee’s weekly disposable earnings. § 655.731(c)(9)(iii). I find this provision is not applicable to the instant matter.

In Wasserman's Inc. v. Township of Middletown 137 N.J. 238 (1994), the leading New Jersey case on liquidated damages clauses, the state Supreme Court held that the standard for determining whether a liquidated damages provision is enforceable is whether it is reasonable. Wasserman's, 137 N.J. at 250-51. The court also stated that liquidated damages clauses are presumptively reasonable, and the burden is on the party challenging the clause to establish that it is not reasonable. Id. at 253.

New Jersey courts have established a two-prong test to determine whether a liquidated damages clause is enforceable. First, the court will contemplate whether the specified amount represents a reasonable forecast of just compensation for the harm caused by the breach. Then, the court will weigh the difficulty of ascertaining actual damages. Wasserman's, 137 N.J. at 250. When assessing damages, courts will evaluate enforceability by considering multiple factors, including intent of the parties, actual damages sustained, and the relative bargaining power of each party. However, none of these factors is determinative. Id. at 250-54, 258; see also MetLife v. Washington Ave. Assoc., 159 N.J. 484 (1999). Rather, the court will look to the totality of the circumstances. MetLife, 159 N.J. at 495; see also 5907 Blvd. LLC v. W. N.Y. Suites, LLC, No. A-3709-11T4, slip op. at 18-19 (N.J. Super., App. Div., July 19, 2013).

The regulation indicates that comment (b) to § 356 of the Restatement (Second) of Contracts may provide guidance on the enforceability of a liquidated damages clause. § 655.731(c)(10)(i)(C). This provision also focuses on reasonableness and, in large part, follows New Jersey law, as set out in Wasserman's and its progeny. It states that a fixed amount is reasonable “to the extent that it approximates the actual loss that has resulted from the particular breach, and also is reasonable to the extent it approximates the loss anticipated at the time of the making of the contract, even though it may not approximate the actual loss that might have been anticipated under other possible breaches.” Restatement of Contracts (Second), § 356(a), cmt. b (1981).

Regarding the difficulty of proof of loss, the Restatement's comment states that the greater the difficulty either of proving that loss has occurred or establishing the amount with requisite certainty, the easier it is to show that the amount fixed is reasonable. Id. The comment goes on to state that if the difficulty of proof of loss is great, then considerable latitude is allowed in the approximation of anticipated or actual harm; but if the difficulty of proof of loss is slight, less latitude is allowed. Id. The comment also indicates that, if it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable. Id.

Discussion of the Evidence, and Findings of Fact

There is no question that Ms. Malik breached the Employment Agreement (CX-2/RX-1). She breached the Employment Agreement by failing to give at least three weeks' notice of her resignation, as required under Article 6.1. This provision of the Employment Agreement stated that the employee agrees that “it (sic) will be responsible for any damages related to its (sic) failure to give Company notice in accordance with this sub-paragraph.”

Ms. Malik also breached the Employment Agreement by terminating her employment before the end of 24 months. Article 10.1 states that the employee agrees to reimburse the Respondent company up to \$15,000 for specific expenses paid on the employee's behalf, in the event the employee leaves the company before "twenty-four months from the effective date of this agreement." In Ms. Malik's case, she entered into employment in March 2011 and terminated her employment on November 30 of that same year.

The Respondent's suit in New Jersey state court includes, among other things, an action against Ms. Malik for breach of contract.⁸ CX-1/RX-4. The action seeks to recover compensatory damages, punitive damages, and attorney's fees and costs, and also asserts that injunctive relief is appropriate. CX-1/RX-4. The Respondent has asserted that its damages total \$26,593.50; of this, \$8,800 is lost profits, \$6,772 is expenses paid on Ms. Malik's behalf, and \$11,021.50 is attorney's fees. CX-3; see also RX-6 (certification of attorney's fees). Recognizing that the Department of Labor's regulations govern enforcement of the Employment Agreement, the parties have stayed the state court suit, pending my adjudication in this matter. Respondent's brief at 17.

Article 6.1 (Damages)

The applicable regulation does not specifically state whether an employer may require an employee to give notice prior to terminating employment, but clearly states that an employee cannot be subjected to any penalty for terminating employment prior to an agreed date. § 655.731(c)(10)(i)(A). I find that the provision in Article 6.1 permitting the Respondent to recover "damages" related to the failure to give three weeks' notice is not a liquidated damages clause: to the contrary, it intends to enforce the payment of actual damages against an employee. Further, it is intended to penalize an employee for specific conduct – that is, failing to give adequate notice, as defined in the contract, of termination of the employment relationship. Because the regulation prohibits such penalties, I find this provision of the Employment Agreement is not enforceable.

Article 9 (Restrictions) and 11 (Attorney's fees)

Article 9 of the Employment Agreement is titled "Covenants and Restrictions." In sum, this article prohibits the employee from competing with the Respondent and from taking actions that interfere with the Respondent's business. Additionally, Article 11 states that the employee agrees that "restrictions imposed by this agreement are reasonable and necessary to protect the legitimate business interests of the company." (Art. 11.1). Under Article 11.2, the employee also agrees if she breaches "any of the restrictions imposed by this Agreement," the Respondent is entitled to injunctive relief, plus court costs and reasonable attorney's fees. And, in addition, Article 11.3 states that the employee agrees that if she breaches any of the restrictions in the agreement, the Respondent can recover damages for breach.

⁸ The suit also includes counts alleging "tortious interference," "breach of duty of good faith and fair dealing," and "misrepresentation and fraud," but the basis for all allegations is the Prosecuting Party's premature termination of her employment.

On my review of the Employment Agreement, I find that the term “restrictions” is used only with regard to the issues listed in Article 9, such as the employee’s promise not to compete with the Respondent. Accordingly, I find that the provision in Article 11 in which an employee agrees that if she breaches “any of the restrictions” imposed by the agreement, the Respondent is entitled to injunctive relief, court costs and attorney’s fees, in addition to damages, is limited to situations in which the employee breaches the provisions of Article 9.⁹ In the instant matter there is no allegation that Ms. Malik breached any of the Article 9 provisions: to the contrary, her only breaches of the Employment Agreement were that she did not give requisite notice and terminated her employment before the end of the 24-month term.

Moreover, even if Article 11 were to be construed to cover all breaches of the Employment Agreement, any provision entitling the Respondent to recover unspecified damages and attorney’s fees would clearly be a penalty, and prohibited under the Department of Labor regulation. Accordingly, I find that the Respondent is not entitled to enforce Article 11 against the Prosecuting Party.

Article 10.1 (Liquidated Damages)

Because the Prosecuting Party terminated the employment relationship before the end of two years (24 months) from the date of the agreement, Article 10.1 also applies. Under this provision, an employee agrees to reimburse the Respondent for funds “expended on Employee’s behalf during and prior to Employee’s employment” up to a maximum of \$15,000. The evidence establishes that the parties entered into the Employment Agreement in March 2011. CX-2/RX-1 at 1; see also T. at 21-22, 44. Ms. Malik, terminated the employment relationship on November 30, 2011. RX-2; see also T. at 16-17.

As discussed above, an employee cannot be subjected to any penalty for terminating employment prior to an agreed-upon date. § 655.731(c)(10)(i)(A). But a bona fide liquidated damages provision for early termination is permissible. § 655.731(c)(10)(i)(B). Determining whether a provision is a bona fide liquidated damages provision is determined in accordance with applicable state law. § 655.731(c)(10)(i)(C). The parties agreed in the Employment Agreement that New Jersey law applies. CX-2/RX-1 at Art. 12.3.

Article 10.1 does not contain the term “liquidated damages.” However, it bears some indicia of a liquidated damages provision. Chiefly, it caps the employee’s maximum liability for early termination of employment at \$15,000. I will presume, based on the inclusion of \$15,000 as a specific amount capping the Respondent’s recovery, that the parties intended Article 10.1 to be a liquidated damages provision, notwithstanding that this article does not use the term “liquidated damages” or any similar term. I find that the burden, then, is on the Prosecuting Party, who is challenging the provision, to establish that it is not reasonable. See Wasserman’s, 137 N.J. at 252-53.

⁹ I note that, under the applicable regulation, an employee is free to terminate the employment relationship at any time. See § 655.731(c)(7)(ii). Accordingly, injunctive relief to keep an H-1B employee, such as the Prosecuting Party, from terminating the employment relationship except if certain conditions are met, is also prohibited.

As New Jersey law has recognized, a liquidated damages provision is an advance estimate of actual damages. Wasserman's, 137 N.J. at 248-49. Such a provision is enforceable if it is a reasonable forecast of the provable injury resulting from the breach of the contract and it is not possible, or is very difficult, to estimate the actual harm. Id. at 249-50. Among the factors to consider in determining whether a liquidated damages provision is reasonable are the following: the difficulty in assessing the intention of the parties; the actual damages sustained; and the relative bargaining power of the parties. Id. at 250-54.

Under New Jersey law, the more uncertain the damages caused by a breach, the more latitude courts permit the parties regarding their estimate of damages. See MetLife, 159 N.J. at 498. However, the fact that the amount involved is a fixed sum does not necessarily establish that it is a liquidated damages provision. If the liquidated damages provided for in a contract are grossly disproportionate to the employer's actual loss, then a court will usually conclude that the parties' original expectations were unreasonable, and will void the provision. Wasserman's, 137 N.J. at 251.

It is difficult to ascertain the specific intention of the parties regarding liquidated damages from the language of Article 10.1, because it is not artfully drafted. Clearly, though, in the event of breach, the Respondent intended to recoup various specific expenses it had expended on behalf of the employee. Notably, however, Article 10.1 does not state that the Respondent intends to recoup all expenses; rather, it lists the expenses that Respondent would recoup, and then puts a cap of \$15,000 on this amount.

The Prosecuting Party points out that the Respondent's expenses on behalf of an employee would be expected to rise during the course of employment, so the amount that the employee would be required to repay may be substantially greater if the employee resigned toward the end of the 24-month period, rather than toward its inception. Prosecuting Party's brief at 18-19. Under the regulation, a factor to be considered in assessing the enforceability of a liquidated damages clause is whether the liquidated damages for breach is the same whether the breach is toward the beginning or the end of the contract performance. § 655.731(c)(10)(i)(C). As Article 10.1 is structured, the Respondent's expenses – and hence the liquidated damages as well – are likely to be greater toward the end of the contract period. At the hearing, Mr. Tuli admitted this would be the case. T. at 103. However, he did not explain why the provision was structured in this way.

As to the actual damages sustained, I find that the evidence adduced at the hearing establishes that the Respondent suffered losses as a result of Ms. Malik's breach. At a minimum, the Respondent suffered a direct loss of profits, in that it was unable to receive the profits due it for three weeks (the amount of time between Ms. Malik's resignation and the end of the requisite notice period). Presuming that Ms. Malik billed at the rate of \$115 per hour, and was paid \$41 per hour, the net profits lost would be approximately \$74 per hour.¹⁰ Presuming lost profits at

¹⁰ Ms. Malik's work was billed at rates up to \$115 per hour. T. at 88. Based on an annual salary of \$85,000, as stated in the Employment Agreement (Article 2) and as testified to by Ms. Malik (T. at 61), and presuming 2080 hours in a calendar year (52 weeks x 40 hours per week), I calculate her hourly wage at \$40.86 per hour.

the rate of \$74 per hour, \$15,000 represents 202.7 hours, or approximately five weeks, of lost profits. Though this exceeds the amount of lost profits directly attributable to Ms. Malik's resignation without the requisite three weeks' notice, of itself it is not so large as to be disproportionate to any such loss.

The calculation of direct lost profits, as set forth above, does not include any damages related to loss of reputation or other intangible damages the Respondent may have suffered. Notably, Mr. Tuli testified that the Respondent suffered losses to its business reputation because of Ms. Malik's resignation. T. at 117-18. He also testified that the Respondent suffered a loss of its hoped-for future business, due to Ms. Malik's resignation; because it was unable to place anyone with the client for the Midas project in January 2012, he stated, the Respondent was not able to obtain the client's other business Id. Mr. Tuli's testimony on these issues is uncontradicted. Accordingly, I find that the Respondent suffered a loss in reputation as well as a loss of potential future business, as a result of Ms. Malik's premature termination of her employment.

I find that loss of business reputation and the loss of future business are the types of losses for which it is difficult to anticipate the quantum of damages. I also find, based on the facts in the specific matter before me, that the Respondent's asserted loss of future business exceeds its actual lost profits attributable to Ms. Malik's resignation, because the Respondent lost a significant amount of hoped-for future business relating to the Midas project. Though not articulated in the Employment Agreement, I find that the provision in Article 10.1 whereby an employee who resigns toward the end of the term may face a higher liquidated damages payment than an employee who resigns earlier in the period may be designed to remedy the harm to the Respondent's business reputation or other indirect losses, which are likely be larger in cases where the Respondent is losing a highly-experienced employee.¹¹ Accordingly, I find that the provision that requires an employee to reimburse the Respondent for its expenses is not perforce unreasonable. I also find, because the Respondent may suffer both direct damages (lost profits) and indirect damages (loss of future profits and loss of business reputation), a liquidated damages provision requiring an employee who breaches the contract to pay up to \$15,000 is not per se unreasonable.¹²

Regarding the parties' relative bargaining power, Ms. Malik testified that she was provided the opportunity to review the Employment Agreement before she signed it. T. at 44-45. She testified that she kept the unsigned document overnight. T. at 46. Also, Ms. Malik admitted she could have had the document reviewed by an attorney, but chose not to do so, and she also stated that she had a good understanding of the contract's terms. T. at 45-47. Because Ms.

¹¹ Additionally, I note that the provision in Article 10.1 whereby the Respondent will recoup training expenses, though not applicable in this case, reimburses the Respondent for its costs in enhancing an employee's skills; an employee for whom the Respondent incurred significant training expenses is likely to be a more valuable employee, whose departure may cause greater loss to the Respondent.

¹² The record indicates that the Respondent paid Ms. Malik \$85,000 per year and she resigned to take a job paying \$120,000. T. at 61-62. I find that a liquidated damages provision of up to \$15,000, when applied to Ms. Malik, is not so onerous as to constitute a penalty.

Malik did not express any reservation at the time she signed the Employment Agreement and did not ask to have any terms amended, it is uncertain what the Respondent's reaction would have been had Ms. Malik resisted the Employment Agreement's terms as written. I therefore find that the Prosecuting Party has failed to establish that she was forced to sign the Employment Agreement or had no option but to sign it. Accordingly, I do not conclude that Article 10.1 is unreasonable, based on any disparity in the parties' bargaining power.

Notably, Article 10.1 of the Employment Agreement lists the reimbursements for which an employee would be required to repay the Respondent in the event of a premature termination. They are as follows: costs to obtain visa and other immigration approvals; travel costs to the United States; hotel accommodation costs in the United States; expenses related to training for the employee.¹³ The Employment Agreement does not indicate that the Respondent will seek reimbursement of all expenses, but limits the recoupment to the types of expenses listed, subject to the ceiling of \$15,000.

The Respondent now asserts that Article 10.1 entitles it to reimbursement of other expenses, in addition to those listed in the Employment Agreement: specifically, taxi fare (\$2,705) and guest house accommodation (\$1,125). CX-3. The Respondent drafted the Employment Agreement. See T. at 75. In Article 10.1, the Respondent could have listed additional expenses for which it would seek reimbursement, such as the cost of transportation within the United States, but chose not to do so.

It is a well-settled principle of contract law that all language must be construed against the drafting party. See Restatement of Contracts (Second) § 206 (1981).¹⁴ Further, a purpose of a liquidated damages provision is to provide notice to a party of what its potential liability may be, in the event the party breaches the contract. Wasserman's, 137 N.J. at 249. In light of these principles, I find, for the liquidated damages provision to be reasonable – and thus enforceable – the Respondent's reimbursement must be limited to the expenses listed in Article 10.1 for which the Department of Labor does not prohibit an employer from recovering from an employee.¹⁵ These are as follows: the cost of airfare to the United States (\$1,251) and the cost of the hotel accommodations in San Diego (\$1,690.50).

¹³ Article 10.1 also states that the employee agrees that the obligation to repay the employer's expenses creates a debt, and the employee agrees to execute any documents necessary "to evidence this debt" and to pay the debt immediately. I presume that the Prosecuting Party's failure to do so provided the Respondent with its basis for filing the pending lawsuit in New Jersey state court.

¹⁴ § 206 states: "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."

¹⁵ Article 10.1 stated that the Respondent could recoup the cost of obtaining a visa "and other immigration approvals." Under the applicable regulation, however, an employer is prohibited from seeking reimbursement of the H-1B filing fee. § 655.731(c)(10)(ii).

Accordingly, I find that the total liquidated damages for which the Prosecuting Party is responsible under Article 10.1 of the Employment Agreement is \$2,941.50. I further find that the Respondent is not entitled to recoup expenses paid on behalf of the Prosecuting Party that are not listed in Article 10.1: that is, taxi fare (\$2,705) and guest house accommodation costs (\$1,125).

The Parties' Additional Arguments

The Prosecuting Party asserts that the Respondent should be precluded from any recovery, because of its status as a "Temporary Help Service Firm." Prosecuting Party's brief at 19-21. Under New Jersey law, she asserts, such an entity is prohibited from obtaining any fee from an employee. Id. at 20; see also CX-4. I reject this argument. I find that the evidence does not establish that the Respondent is solely a "Temporary Help Service Firm," because its license from the State of New Jersey indicates it also is a consulting firm. CX-4. I also find that the New Jersey statutes permit Temporary Help Service firms that do not charge fees to operate without licenses, but require other types of employment agencies to be licensed by the state. N.J.S.A. 34:8-47, 34:8-52. This suggests, contrary to the Prosecuting Party's contention, that licensed entities may charge fees or liquidated damages. Assuming *arguendo* that the Respondent is a Temporary Held Service Firm, the record in this case indicates that the Respondent is licensed. CX-4.

Citing Administrator v. Novinvest, LLC, Case No. 2002-LCA-00024 (ALJ Jan. 23, 2003), aff'd Case No. 03-060 (ARB July 30, 2004), the Prosecuting Party asserts that the Respondent is precluded from any recovery whatsoever.¹⁶ In Novinvest, the employer charged employees fees of up to \$5,000 (which it characterized as reimbursement for costs associated with hiring, processing and training and then deducted over time from the employees' pay). In the event an employee terminated employment early, the employee was responsible for a pro-rated portion of the unpaid fee. Additionally, the employer secured judgments in civil court against employees who had prematurely terminated the employment relationship. The administrative law judge found that there was no evidence in the record to substantiate a finding that the \$5,000 fee represented liquidated damages under applicable state (Georgia) law, and he found that the employer did not provide any receipts or other substantiation of the fee. Novinvest, slip op at 21. He stated: "Because Novinvest did not provide any information as to how it arrived at the \$5,000 figure, Novinvest has failed to satisfy the Georgia requirements for an enforceable liquidated damages provision, which necessitates that the sum be a reasonable pre-estimate of a probable loss." Novinvest, slip op. at 22.

Of course, in this matter I must apply New Jersey law, rather than the Georgia law that the administrative law judge applied in Novinvest.¹⁷ As discussed above, I find that the evidence

¹⁶ In Novinvest, the Administrative Review Board affirmed the administrative law judge's findings on the issue of the \$5,000 termination fee, but found that some of the administrative law judge's calculations regarding back wages were incorrect. Administrator v. Novinvest, LLC, Case No. 03-060, slip op. at 4 (ARB July 30, 2004).

¹⁷ I also note that the matter before me does not involve a deduction from pay, an issue which is subject to additional scrutiny in the Department of Labor's regulations. See § 655.731 (c)(9)(iii).

adduced in the case before me reflects that, under New Jersey law, the liquidated damages provision is enforceable when it is a reasonable mechanism for stipulating damages, where damages such as loss of business may be difficult to quantify. The administrative law judge's decision in Novinvest focused on the employer's failure to address how it arrived at the \$5,000 liquidated damages figure; it did not address the issue of whether actual damages were reasonable or were difficult to quantify. In this instant case, it is apparent how the liquidated damages were to be calculated: they are the sum of the Respondent's listed expenses, up to a specified ceiling. CX-3. On this basis, I find that Novinvest is distinguishable from the case before me.

In contrast, the Respondent urges that I follow the course of the administrative law judge in Administrator v. Greater Missouri Medical Pro-Care Providers, Inc., No. 2008-LCA-26 (ALJ Oct. 18, 2011).¹⁸ In that case, the employment contracts for H-1B workers contained two provisions relating to early termination: one that required the employee to repay the employer's expenses, and another that set out the employee's obligation to pay pro-rated liquidated damages (with higher damages the earlier the premature termination). The administrative law judge found that the liquidated damages provisions were not unconscionable as a matter of law, and further found that they constituted valid liquidated damages provisions under Missouri law. Greater Missouri, slip op. at 80, 82. She also found that, in accordance with Missouri law, the early termination liquidated damages provisions were a reasonable forecast of the harm caused by an employee's early termination, and the harm was of a type that is difficult to ascertain.¹⁹ Id. at 86.

What the Respondent in this case seeks, however, is not only my concurrence that Article 10.1 is a lawful liquidated damages provision but also a determination that its state court lawsuit to recover actual damages (lost profits) under Article 6.1, plus its recovery of attorney's fees under Article 11.2, is permissible. I find to the contrary. As set forth above, I have found that the provisions of Article 6.1 and 11.2 are clearly penalties, and are not enforceable under the Department of Labor's regulations. However, as discussed above, I also have found that the Respondent may recover liquidated damages consistent with Article 10.1, but limited to the expenses listed in that Article for which the Department of Labor permits reimbursement. On review, I find that my decision is not inconsistent with the administrative law judge's determination in Greater Missouri, where the administrative law judge permitted liquidated damages provisions to be enforced.

¹⁸ On January 29, 2014 the Administrative Review Board issued its Decision affirming in part and reversing in part the administrative law judge's decision. Administrator v. Greater Missouri Medical Pro-Care Providers, Inc., ARB No. 12-015, ALJ No. 2008-LCA-26 (Jan. 29, 2014). The Administrator did not appeal the administrative law judge's finding regarding the liquidated damages provision, except with regard to the employer's deduction of liquidated damages from wages. Slip op. at 5 n. 7. Consequently, the Administrative Review Board did not address whether the liquidated damages clause was in accord with the regulation.

¹⁹ Additionally, the administrative law judge found that Missouri law permitted a party to recover both actual damages and liquidated damages when both were provided for in the contract, and consequently she found that the employer could recoup its expenses as well as obtain liquidated damages, as per the contract. Greater Missouri, slip op. at 90.

Conclusion

I find that the Respondent may not enforce Article 6.1 or Article 11 of the Employment Agreement against the Prosecuting Party, Ms. Malik, because these provisions constitute penalties, and are prohibited under the Department of Labor's regulations. See § 655.731(c)(10)(i)(A).

I find that Article 10.1 of the Employment Agreement is a liquidated damages provision and is reasonable – and thus enforceable – to the extent that the Respondent may recover the expenses listed in the provision, unless recovery of such specific expense is prohibited by Department of Labor regulation. See § 655.731(c)(10)(i)(B); § 655.731(c)(10)(ii). I also find that applicable New Jersey law does not prohibit the Respondent from recovering liquidated damages because of its status as a licensed consulting/temporary services agency.

Accordingly, I find the Prosecuting Party is liable to pay liquidated damages to the Respondent in the amount of \$2,941.50.

I request that the parties inform the New Jersey court of this Decision.

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any interested party desiring review of this Decision and Order may file a petition for review with the Administrative Review Board (Board) pursuant to 20 C.F.R. § 655.845. To be effective, such petition shall be received by the Board within thirty (30) calendar days of the date of this Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge. Once an appeal is filed, all inquiries and correspondence should be directed to the Board. The Board's address is:

U.S. Department of Labor
Administrative Review Board
Room S5220 FPB
200 Constitution Ave NW
Washington, DC 20210

If no petition for review is filed, this Decision and Order becomes the final order of the Secretary of Labor. *See* 20 C.F.R. § 655.840(a). If a petition for review is timely filed, this Decision and Order shall be inoperative unless and until the Board issues an order affirming it, or, unless and until 30 calendar days have passed after the Board's receipt of the petition and the Board has not issued notice to the parties that it will review this Decision and Order.