

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 August 2011

Case No. 2006-STA-32

In the Matter of

HARRY SMITH,

Complainant,

v.

LAKE CITY ENTERPRISES, INC.,
CRYSTLE MORGAN,
Donald Morgan¹

Respondents.

APPEARANCES:

Richard R. Renner, Esq.
Dover, Ohio
For the Complainant

Brent L. English, Esq.
Cleveland, Ohio
For the Respondents

BEFORE: LARRY S. MERCK
Administrative Law Judge

¹ In my Recommended Decision and Order issued on May 21, 2008, I recommended that the Administrative Review Board dismiss Donald Morgan as a party in this case. On September 24, 2010, the Administrative Review Board in its Final Decision and Order of Remand dismissed Donald Morgan as a party.

RECOMMENDED DECISION AND ORDER ON REMAND²

This proceeding arises from a claim under the Surface Transportation Assistance Act (“STAA” or “the Act”), 49 U.S.C. § 31105³ and the implementing regulations found at 29 C.F.R. Part 1978. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

This case is before me on remand from the Administrative Review Board (“Board”). *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 09-033 and 08-091 (Sept. 24, 2010) (hereinafter “*ARB Final Decision and Order of Remand*”). The Board provided the following summary of the case:

LCE [Lake City Enterprises] contracted with CRST (footnote omitted) International, Inc., to deliver steel coils and bars from manufacturers to customers in Ohio and Illinois. Crystle Morgan owned LCE and hired Smith on September 5, 2005. He used LCE's tractor truck and a 1997 trailer to haul the steel. Smith complained repeatedly to Ken Morrison, dispatcher and terminal manager, about the unsafe handling abilities of the trailer – parts of it had been rewelded and the trailer flexed and swayed under certain loads. Hearing transcript (TR) at 286-87.

On November 8, 2005, when Smith turned into a fuel depot in Effingham, Illinois, the steel coil he was hauling rolled to the side and lifted up the trailer's wheels, almost flipping it over. Respondents' Exhibit (RX) DD at 4. Jacob “Scooter” McNutt had been following Smith and helped him

² The August 31, 2010, amendments to the STAA regulations changed the Administrative Law Judges decisions in STAA cases to a “Decision and Order” rather than “Recommended Decision and Order.” However, because this matter is a continuation of a Recommended Decision and Order issued on May 21, 2008, the new changes do not apply. 75 Fed. Reg. 53550.

³ The Act was amended by Section 1536 of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. No. 110-053, 121 Stat. 266 (Aug. 3, 2007) (the “9/11 Commission Act”). The 9/11 Commission Act broadened the definition of employees covered by the STAA; added to the list of protected activities; adopted the legal burdens of proof found in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121; provided for awards of special damages, and punitive damages not to exceed \$250,000.00; and, provided for *de novo* review by a U.S. District Court if the Secretary of Labor does not issue a final decision on the complaint within 210 days of its filing. Mr. Smith filed his complaint with OSHA on November 15, 2005; therefore, the 2007 Amendments are not applicable.

right the trailer. RX EE at 2-3. Smith completed the delivery to Granite City and called Morrison the next morning to report the incident. Smith told Morrison, "either you replace this trailer or you will have to replace a driver." TR at 475-76. Smith's log for November 9 stated: "unsafe to operate on roadway." RX MM.

Morrison reported Smith's incident to Morgan who called Smith and asked him if he could continue to Cleveland. Smith told her that she needed to replace her "junk trailer" because it was unsafe, but that he would deliver the load. Later that morning, CRST agent Milton Parks told Morgan that Smith had called him and threatened to have the Department of Transportation (DOT) inspect the trailer. TR at 347-49, 633; Complainant's Exhibit (CX) 1. Morgan then told Morrison to tell Smith to return to the LCE terminal, where she fired him. Morgan testified that she believed that Smith's remark to Morrison about replacing the trailer or replacing the driver was an ultimatum, which she interpreted as a resignation, and that his intent to have DOT inspect the trailer was a "verbal threat" against LCE. TR at 659-61.

Smith filed complaints against CRST and LCE with the Occupational Safety and Health Administration (OSHA) on November 15, 2005. Administrative Law Judge Exhibit (ALJX) 1, 3. OSHA dismissed the complaint against LCE, and Smith requested a hearing, which was held on April 16-17 and May 9, 2007.

The ALJ concluded that LCE had violated the STAA in firing Smith. He ordered reinstatement of Smith to his previous position, \$17,799.19 in back pay, and \$20,000.00 in compensatory damages. Subsequently, the ALJ ordered LCE to pay \$57,388.77 in attorney's fees and costs. We affirm the liability finding, the back pay award, and the compensatory damages; modify the attorney's fee award; and remand the case for further proceedings.

ARB Final Decision and Order of Remand at 2-3.

ISSUES

The Board provided the following guidance on remand:

1. Consider Smith's motion to reopen the record.
2. Determine the correct amount of back pay from the date of the hearing, May 9, 2007, until Lake City Enterprise's ("LCE") dissolution on May 15, 2008.
3. Because reinstatement became impossible on May 15, 2008, when LCE dissolved, consider whether Smith is entitled to front pay for a reasonable period, taking into consideration Smith's earnings during both periods of back pay and front pay.
4. Determine the interest on both pay awards and the amount of Smith's insurance benefits.

ARB Final Decision and Order of Remand at 9-12 and 13.

SUMMARY OF THE NEW EVIDENCE⁴

The hearing on remand was held on April 5, 2011, in Canton, Ohio. At the hearing, Complainant's counsel moved to reopen the record to allow additional evidence to be submitted, which I granted. (TR 2 at 9-10).⁵ Respondent's Exhibit 1, a State of Delaware Short Form Certificate of Dissolution of LCE, and CX 37, two Schedule Cs, Profit or Loss From Business, that Complainant submitted as a part of his 2008 tax return, were, without objection, admitted. (TR 2 at 8, 49).

Additionally, Complainant offered as evidence CX 38, "three pages received through discovery from CRST showing the year to date earnings of Crystle Morgan doing business as Lake City Enterprises" and CX 39, "a lease purchase pro forma from CRST." (TR 2 at 12). Respondent's counsel objected to the admission of CX 38 and 39 and as a basis of his objection he opined that these documents are hearsay, not properly authenticated, and have no relevance to this case. (TR 2 at 48). Complainant's counsel responded that Respondent's counsel had waived any objection as to authenticity because he had provided the documents to Respondent in his prehearing submissions and Respondent failed to object under 29 C.F.R. Section 18.50; additionally, Mr. Smith's "testimony that it came from CRST authenticates they are what they purport to be." (TR 2 at 49).

⁴ Post-hearing a review of the file noted that Respondent's Exhibit 1 and Complainant's Exhibits 38 and 39 were missing. The parties provided duplicates of these exhibits to the Court and they are admitted.

⁵ In this Recommended Decision and Order on Remand, "TR" refers to the transcript of the first hearing, "TR 2" refers to the hearing on remand held on April 5, 2011, "RX" refers to Respondent's exhibits, and "CX" refers to Complainant's exhibits.

On the issue of authenticity, 29 C.F.R. § 18.50 provides:

The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection.

Complainant's Exhibits 38 and 39 were attached to Complainant's pre-hearing submission and Respondent failed to offer a written objection regarding their authenticity. As Respondent offered no explanation for his failure to file a written objection, I find these documents are deemed authentic pursuant to 29 C.F.R. § 18.50.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted." 29 C.F.R. § 18.801(c). Thus, Complainant's Exhibits 38 and 39 are hearsay as defined by the regulations. Twenty-nine C.F.R. § 18.802 provides that hearsay is not admissible except as provided under the rules. As Complainant offered no argument regarding whether these documents should be admitted under a hearsay exception or exemption, I find these documents are inadmissible hearsay pursuant to 29 C.F.R. § 18.802. (Compl. Brief at 3-4). Accordingly, Complainant's Exhibits 38 and 39 are not admitted into the record. Even if I considered these documents, they would have no affect my findings of fact and conclusions of law.

Testimony of Complainant

Complainant, Harry Smith, testified at the hearing on April 5, 2011. (TR 2 at 13-55). Complainant was born on November 26, 1969, and resides with his wife, Laurie, whom he married on June 26, 2010. (TR 2 at 14). Complainant is currently unemployed because he had a heart attack on June 27, 2010. *Id.* He has not worked since his heart attack. *Id.* Complainant testified that neither LCE nor Crystle Morgan has paid him anything pursuant to the orders issued in this case. *Id.* Complainant's home was foreclosed in November or December of 2007 and he had to file for bankruptcy. (TR 2 at 14-15, 37). Complainant stated that he disclosed his claims before the Department of Labor to the bankruptcy trustee, but the bankruptcy trustee has "no interest in it." (TR 2 at 16).

At the time of the first hearing, Complainant testified that he was employed at Ameristate Transportation ("Ameristate"). (TR 2 at 17). Ameristate was not financially successful for him because "they did not have the freight to keep me rolling or to keep me in business." *Id.* Complainant stated that the Schedule C, submitted as a part of his 2008 tax return, reflects a \$21,400.00 loss from his work for Ameristate. (Tr. 2 at 17-18). Complainant did not file a tax return in 2009 because he did not have enough earnings from his employment to file. (TR 2 at 18). In 2010, Complainant worked for one month and earned \$452.00. *Id.* Complainant testified that the hearing in the CRST dispute is currently scheduled for July 12, 2011, and he plans to ask for reinstatement with CRST. *Id.* Complainant testified that he seeks front pay until CRST offers reinstatement. (Tr. 2 at 19).

On cross examination, Complainant testified that he was in a lease purchase agreement with Ameristate until November 2007. (TR 2 at 22-23). Complainant then cancelled this agreement and became an owner operator. (TR 2 at 23). Complainant worked as an owner operator for Ameristate until April 2008. (TR 2 at 24). Complainant's gross receipts before expenses for three months work for Ameristate in 2008 was \$45,321.00, according to his Schedule C, which he submitted with his 2008 tax return. (TR 2 at 26; CX 37). Complainant could not explain the "car and truck expenses," of \$35,557.00. *Id.* Complainant stated that his truck was repossessed because Ameristate did not have enough freight for him to haul in order to make the \$2,200.00 monthly payments on his truck. (TR 2 at 24, 31-32).

After Complainant lost his truck in April 2008, he stated that he worked for Guthrie Construction ("Guthrie") in 2008 as a "spot laborer" building "pole" buildings and remodeling houses for Guthrie, but explained that he only worked if Guthrie had work for him to do. (TR 2 at 25, 35- 36). Complainant earned \$4,977.00 from Guthrie in 2008. (TR 2 at 34). This is the only work Complainant engaged in during the last nine months of 2008. *Id.* Complainant stated that he looked for work as a truck driver but couldn't find any work "suitable" for him to do. *Id.* Although Complainant had his commercial driver's license ("CDL"), he stated that he did not trust or have faith in the trucking companies "because they basically don't care about what you are as a family or what you are as an individual." *Id.* He further stated that the companies "don't care if you're out three, four weeks, five weeks at a time and that just does not work for somebody that's a family man and has a family." (TR 2 at 34-35).

Complainant testified that he received Medicaid benefits from the State of Ohio and a small amount of food stamps in November or December 2008. (TR 2 at 36).

Complainant was still insured through Medicaid at the date of the hearing. (TR 2 at 36, 41). He did not work at all in 2009. (TR 2 at 38). Complainant's wife, Laurie, supported him in 2009 with the child support she received. (TR 2 at 39-41).

In 2010, prior to his heart attack in June, Complainant worked for \$7.50 per hour two or three days a week for one month at I Force, a plastics company and earned "\$452.00, \$453.00." (TR 2 at 42-43). In June 2010, Complainant had a heart attack and had a stent inserted. (TR 2 at 42). He has yet to look for work after his heart attack because he had to have another heart "catheter" inserted and he had surgery on February 22, 2011, for carpal tunnel on one of his hands. *Id.* His surgery for his other hand was scheduled for April 19, 2011. *Id.*

Complainant did not look for jobs in the trucking industry in 2009 or 2010. (TR 2 at 43). When asked why, Complainant stated: "It's just I know a lot of the trucking companies that's in the area and I have dealt with them over the years and I'm not going to put myself in a position of having to go back through all this again." *Id.* Complainant explained that "this" was "being fired wrongfully." Complainant had left another trucking company, Coshocton and Trucking, because, when he asked, they refused to fix a truck. (TR 2 at 44). Complainant testified that he had not looked for work in 2011, but that he would look for work after he was cleared by his hand doctor to return to work following his April 19, 2011, hand surgery. *Id.* Complainant clarified that he would not look for work in the trucking industry in 2011 because a trucking job would conflict with the hearings he has coming up against CRST. (Tr. 2 at 45). Thus, he would look for a job that was "more compatible to me to have a day off to be in court." *Id.* Complainant testified that he trusts CRST as he believes he could make money with CRST. *Id.* He also formed a good relationship with the brokers at CRST when he worked for LCE. *Id.*

Complainant stated that he seeks front pay at the same amount of earnings he was being paid by LCE at the date of his firing until he is reinstated by CRST. (TR 2 at 46). When asked why he believed this was reasonable as he did not seek work in 2009 and only worked for one month in 2010, Complainant stated:

I could have went to work for CRST but from the actions of Crystle Morgan and Lake City Enterprises . . . and I feel that with their actions and what they have done to me as far as being fired and the untruths that they stated about me which was proven wrong, that CRST has made a decision not to hire me or employ me because of what Lake City has done

even though they have documentation now to show that Lake City was in the wrong.

(TR 2 at 46-47).

Complainant stated that he was “100 percent qualified” to be hired by CRST under CRST’s hiring standards. (TR 2 at 47). When Complainant was asked why, if he is qualified to work for CRST, he hasn’t looked for a trucking job the last two years, Complainant stated that from 2009 until now he has had “medical problems and I had some things like with my hands that I put off and put off for years and I decided that it’s time to get them fixed.” (TR 2 at 47-48). Complainant further explained that in June 2009 his heart problems started. (TR 2 at 53). He had to go to the hospital because he was on the verge of having a heart attack and had high blood pressure. *Id.* He began treatment for his high blood pressure in 2009. *Id.* Complainant explained that he would still have been able to drive a truck with high blood pressure as he “drove a truck for ten years with high blood pressure.” *Id.*

Complainant testified on Redirect examination that he looked for “odd jobs” in 2008 when he was working for Guthrie, such as “construction jobs or other employment through some companies that was trying to hire in.” (TR 2 at 54). After stating that he had done “nothing” the first half of 2009 to find a job, he said that beginning in January 2010 he began to look for jobs in Newark and Zanesville, but he had received no call backs. (TR 2 at 54-55). On Recross Examination, Claimant clarified that none of the jobs he looked for were in the trucking industry. (Tr. 2 at 55).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Findings of Fact and Conclusions of Law of the undersigned’s Recommended Decision and Order of May 21, 2008, are hereby adopted except to the extent that any findings or conclusions made in the previous decision is inconsistent with those expressed in this Recommended Decision and Order on Remand. Based on a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, case law, legislative history, and the Board’s Final Decision and Order, I hereby make the following findings and conclusions:

Back Pay

A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). The purpose of the STAA's back pay remedy is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Assistant Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36, at 5 (ARB June 30, 2005). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 760 (6th Cir. 2004); *Bryant*, ARB No. 04014 at 5. Ordinarily, back pay runs from the date of the discriminatory discharge until the date the employer reinstates the complainant or the date on which the complainant receives an unconditional, bona fide offer of reinstatement. *Bryant*, ARB No. 04014 at 6.

In my Recommended Decision and Order issued on May 21, 2008, I found Complainant was entitled to back pay from November 9, 2005, the date of his termination from LCE, until May 9, 2007, the final date of the hearing.⁶ *Harry Smith v. Lake City Enterprises, Inc., et al.*, 2006-STA-32 at 142-143 (May 21, 2008)(hereinafter *Rec. Decision and Order*). I found Complainant's average weekly wage paid by LCE in 2005 was approximately \$1,087.00.⁷ *Id.* at 143. After deducting Complainant's interim earnings, I ordered Respondents to remit to Complainant back pay in the amount of \$17,799.19. *Id.* at 144. The Board affirmed my findings as to the amount of back pay between the dates of November 9, 2005, to May 7, 2007. *ARB Final Decision and Order of Remand* at 9.

As previously discussed, back pay typically runs from the date of discriminatory discharge until the date the employer reinstates the complainant or the date on which the complainant receives an unconditional, bona fide offer of reinstatement. *Bryant*,

⁶ I did not order back pay after the final date of the hearing as Complainant stated in his brief that he had stopped working for Ameristate, but failed to provide when his employment with Ameristate ended. *Rec. Decision and Order* at 143. Thus, I concluded that I could not determine the amount of Complainant's back pay entitlement after the final date of the hearing without resorting to pure speculation. *Id.*

⁷ In the Recommended Decision and Order, Complainant's average weekly wage was first reported as \$1,187.00. *Rec. Decision and Order* at 143. This was a clerical error. Complainant's average weekly wage in 2005 was approximately \$1,087.00. (CX 3). As the rest of the Recommended Decision and Order reflects, however, all of Complainant's back pay was calculated using \$1,087.00; therefore, my back pay calculation of \$17,799.19 is accurate. *Rec. Decision and Order* at 143.

ARB No. 04014 at 6. In the present case, reinstatement is impossible as LCE dissolved on May 15, 2008. (RX 1). Thus, the Board found that I “must determine the correct amount of back pay from the date of the hearing, May 9, 2007, until LCE’s dissolution on May 15, 2008.” *ARB Final Decision and Order of Remand* at 10. As Complainant’s average weekly wage at LCE was \$1,087.00 and there are 53 weeks between May 9, 2007, and May 15, 2008, Complainant’s back pay during this period is \$57,611.00 (53 x 1,087.00). The most reliable evidence of Claimant’s earnings from Ameristate is from his testimony at the initial hearing on April 16, 2007, in which he testified that he was earning about \$1,000.00 dollars a week as an owner operator for Ameristate. *Rec. Decision and Order* at 42-43. Complainant worked as an owner operator with Ameristate from May 9, 2007, until the beginning of April 2008. (TR 2 at 24). Thus, Complainant worked for Ameristate approximately 46 weeks, which means he earned \$46,000.00 (46 x \$1,000).

Complainant argues that I should not deduct any earnings from Complainant’s back pay due to his work as an owner operator with Ameristate because “his work at Ameristate as an owner-operator resulted in a net loss.” (Comp. Brief at 2). As evidence of this, Complainant submitted into evidence his Schedule C from 2008, which demonstrates a tentative loss from his business as a truck driver after various deductions for expenses, including truck depreciation, taxes, and deductible meals. (CX 37). In *Bryant*, the Board found that items such as taxes and license fees may not be deducted from the gross income a complainant receives when determining the appropriate amount of back pay. ARB No. 04-014 at 6. Furthermore, Complainant made the same argument to the Board regarding my calculation of back pay in my Recommended Decision and Order. The Board rejected Complainant’s argument, finding that “back pay awards are ordinarily reduced by the amount of an employee’s interim earnings prior to reinstatement” because “[w]ithout such reduction, a back pay award could place the employee injured by the employer’s discrimination in a better position than he was when employed.” *ARB Final Decision and Order of Remand* at 9. Thus, I will deduct \$46,000.00, the amount earned while working for Ameristate, from \$57,611.00, the amount he would have made had he continued to work for LCE. Accordingly, Complainant’s total back pay from May 9, 2007, until May 15, 2008, is \$11,611.00.⁸

⁸ The evidence also establishes that Complainant worked for Guthrie Construction (“Guthrie”) in 2008. (CX 37). I cannot determine from the record, however, when Complainant began to work for Guthrie; the evidence only discloses that it was sometime after Complainant stopped working for Ameristate. (TR 2 at 34-36). Thus, I cannot determine if Complainant worked for Guthrie during the months of April and May

Insurance Benefits

The Board also instructed me to include Complainant's additional insurance benefits. *ARB Final Decision and Order of Remand* at 10. Complainant is entitled to an award of health benefits until reinstatement. See *Creekmore v. ABB Power Sys. Energy Services, Inc.*, 93-ERA-24 at 12 (Dep. Sec'y February 14, 1996). As reinstatement became impossible on May 15, 2008, when LCE dissolved, I will award additional health insurance benefits from May 9, 2007, until May 15, 2008. In my previous Recommended Decision and Order, I found the cost of the health insurance benefits amounts to \$142.48 per week. Accordingly, Complainant is entitled to an additional \$7,551.44 in health insurance benefits (\$142.48 x 53).

Thus, adding the two totals together, Complainant is entitled to a total amount of \$19,162.44 in additional back pay. (\$11,611.00 + \$7,551.44).

Front Pay

Front pay is used as a substitute when reinstatement is not possible. See *Bryant*, ARB No. 04014 at 8; see also *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 95-STA-29, slip op. at 5-6 (ARB Oct. 9, 1997) (reasonable refusal of offer of reinstatement ends employer's back pay liability but may subject it to front pay liability); *Doyle v. Hydro Nuclear Services*, (Sept. 6, 1996) ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 7- 8 (front pay appropriate since reinstatement either impossible or impractical). Front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the complainant the same benefit (or as close an approximation as possible) as he or she would have received with reinstatement. *Bryant*, ARB No. 04-014 at 9. Front pay is designed to place the complainant "in the identical financial position that he would have occupied had he been reinstated." *Id.* (quoting *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995)). Though the STAA does not specify front pay as a remedy, the Board has held that it is available to a successful litigant. See *Michaud*, ARB No. 97-113 at 5-6.

A litigant who seeks an award of front pay must provide "the essential data necessary to calculate a reasonably certain front pay award." *Bryant*, ARB No. 04-014 at 9-10, quoting *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992). This information includes the amount of the proposed award, the length of time the

2008. Accordingly, I will not deduct earnings that Complainant made from Guthrie from his back pay award because this evidence is too speculative.

complainant expects to work, and the applicable discount rate. *Id.* at 10. Front pay awards, while often speculative, cannot be unduly so. *Id.*

A wrongfully discharged STAA complainant must mitigate his damages through the exercise of reasonable diligence in seeking alternative employment. *Michaud*, ARB No. 97-113 at 5. Respondent has the burden of establishing the failure of Complainant to mitigate his damages. *Id.* Generally, a respondent can satisfy his burden by establishing that substantially equivalent positions were available to the complainant, and that the complainant failed to use reasonable diligence in attempting to secure such a position. *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-035, at 6 (ARB January 31, 2008). A “substantially equivalent position” provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 02-STA-35, at 17 (ARB August 6, 2004). However, the Board has held that when a complainant makes no effort to seek a substantially equivalent position, he is not entitled to damages even if the employer failed to demonstrate the availability of substantially equivalent jobs. *Roberts*, ARB Nos. 03-071, 03-095 at 18 (upholding an ALJ’s finding that a complainant was not entitled to back pay damages despite the employer’s failure to show the availability of substantially equivalent jobs because the complainant admitted that he made no effort to seek employment).

Here, the Board found that reinstatement is impossible as LCE was dissolved on May 15, 2008. *ARB Final Decision and Order of Remand* at 10. Thus, the Board directs me to “consider front pay for a reasonable period, taking into consideration Smith’s earnings during both periods of back pay and front pay.” *Id.* Complainant testified that he stopped working for Ameristate and sold his truck and trailer in April 2008. (TR 2 at 23-24). He then began working in the construction business as a subcontractor for Gurthrie. (TR 2 at 33-34). Complainant earned \$4,997.00 from Gurthrie in the last nine months of 2008; Complainant did not work anywhere else in 2008. (TR 2 at 33-34; CX 37). When asked about searching for work in the trucking industry in 2008, Complainant stated the following:

Q: So, what else did you do to earn a living during the last nine months of 2008?

A: Nothing.

Q: So, you didn’t look for other work? Is that your testimony?

A: I had looked for other work, but there was no work suitable for what I could do.

Q: No work suitable for you and you didn't think to maybe go drive a truck for somebody else? You still have your CDL, correct?

A: Correct.

Q: Okay and that would enable you to drive a truck or somebody else's truck, correct?

A: It enabled me to drive another truck, but in getting in past dealings with companies and with other owner/operators as far as what's been dealt to me, I do not trust or have the faith in a company because they basically—what my understanding is, they basically don't care about what you are as a family or what you are as an individual. They're most interested in your freight, deliver. They don't care if you're out three, four weeks, five weeks at a time and that just does not work for somebody that's a family man and has a family.

Q: Okay. So, would it be fair to say that you did not make an effort to find another truck driving job after the end of March, 2008?

A: I did look, but there was no opportunities out there that was trustworthy enough to go to.

Q: Trustworthy enough? So, you don't trust trucking companies? Is that your testimony?

A: I distrust a lot of companies, correct.

(TR 2 at 34-35). Later in his testimony, Complainant suggested that he looked for "odd jobs" in 2008, such as "construction jobs or other employment through some companies that was trying to hire in." (TR 2 at 54). Complainant stated that none of these jobs were in the trucking industry. (TR 2 at 55).

Complainant did not work at all in 2009, but testified that he lived off his wife's income from child support payments. (TR 2 at 38-39). Complainant stated that he did not look for work in the trucking industry in 2009 because he knows "a lot of the trucking companies that's in the area and I have dealt with them over the years and I'm

not going to put myself in a position of having to go back thorough all this again.” (TR 2 at 43). Later, however, Complainant blamed medical issues for not looking for employment in the trucking industry in 2009. (TR 2 at 47 and 53). Complainant stated that he did not look for work at all in 2009 because in June 2009 his heart problems started. (TR 2 at 53). However, Complainant further testified:

Q: Oh, so you had heart problems in June of 2009?

A: Correct, I went to the hospital and was on the verge of having a heart attack and that’s how it come about that I was having problems with my heart and high blood pressure and that’s when I started going to the doctor to address that.

Q: And if you had problems with high blood pressure, you wouldn’t be able to drive a truck in any event, correct?

A: No, I drove a truck for ten years with high blood pressure.

Q: Okay, thank you.

A: It was never an issue.

(TR 2 at 53).

In 2010, Complainant worked for one month at I Force, a plastics company, and earned \$452.00. (TR 2 at 42). Complainant testified that he sought work beginning in January 2010, which is when he got the job with I Force. (TR 2 at 54). However, later Complainant clarified that he did not look for work as a trucker at the beginning of 2010. (TR 2 at 55). Complainant had a heart attack in June 2010 and had a stent put in. (TR 2 at 42). He has yet to look for work because he “still has heart problems” and had surgery for carpel tunnel on February 22, 2011. *Id.* He was scheduled for surgery on his other hand on April 19, 2011. *Id.* Complainant testified that he planned to look for work six to nine weeks after his April 19, 2011, surgery, but stated he would not look for work in the trucking industry until his dispute with CRST, another trucking company, is complete because he needs a job “that’s going to be more compatible to me to have a day off to be in court.” (TR 2 at 45).

Complainant argues that he is entitled to front pay until CRST reinstates him.⁹ (TR 2 at 19, 46). He seeks the same amount of weekly salary that he had been making at LCE prior to his termination. (TR at 46). On April 5, 2011, the hearing regarding the CRST dispute was scheduled for July 12, 2011. (TR at 18).¹⁰

As discussed, front pay cannot be unduly speculative. *Bryant*, ARB No. 04-014 at 10. Here, Complainant states that he should be awarded front pay until CRST reinstates him or makes an offer of reinstatement. (TR 2 at 19, 46). This suggested time period is extremely speculative; there is no guarantee that Complainant will win his case against CRST. Thus, Complainant submits that I order front pay—in the amount of his prior earnings from LCE—for an indefinite period until his reinstatement with CRST, which may or may not happen. I find this to be unduly speculative.

Furthermore, even if I determined a more appropriate end date to Complainant's front pay award, Complainant would not be entitled to front pay due to his failure to mitigate his damages. The general rule is that in order for an employer to demonstrate a failure to mitigate damages, an employer must establish both: 1) that substantially equivalent positions were available to the complainant, and 2) that complainant failed to use reasonable diligence in attempting to secure such a position. *Hobson*, ARB Nos. 06-016, 06-053 at 6. Here, Respondent offers no evidence that establishes there were substantially equivalent positions available to Complainant. Nevertheless, when a complainant admits that he failed to seek substantially equivalent employment, employer satisfies his burden of establishing a failure to mitigate damages. *Roberts*, ARB Nos. 03-071, 03-095 at 18.

Complainant stated in his testimony that he looked for jobs within the trucking industry after his employment with Ameristate ended at the beginning of April 2008, but that he could not find any trucking companies that were "trustworthy" enough to work for. This is not a sufficient explanation for failing to apply for trucking jobs in the area, especially as the testimony suggests that there were opportunities available, but

⁹ Complainant is currently involved in dispute with CRST, which is related to his claim with LCE. Complainant argues that CRST is also a responsible employer under the Act and should therefore be held liable for his unlawful firing. He, inter alia, is seeking reinstatement with CRST. 2006-STA-31. Currently, Complainant's current dispute under the provisions of the STAA is set for hearing on September 8, 2011.

¹⁰ Complainant's counsel in his brief argues that Complainant should be paid back pay from May 9, 2007, the date of the first hearing, until June 2010 when Complainant "stopped working." (Comp. Brief at 2). This position contradicts the Board's remand order, which states that back pay ends on May 15, 2008, the date LCE dissolved. Complainant's brief did not include any argument regarding Complainant's entitlement to front pay, the appropriate amount of front pay, or when front pay should end.

that he did not want to take this employment as the hours would be too long and he might be fired wrongfully. (TR at 34). Furthermore, Complainant later testified that the jobs he sought in 2008 were mere “odd jobs” and not in the trucking industry. (TR 2 at 54-55).

In 2009, Complainant testified that he did not look for any type of work the entire year. Complainant’s proffered explanation for this admitted lack of diligence is that he did not trust the trucking companies in the area and that he began to have health issues in June 2009. (TR 2 at 43, 53). As previously stated, I do not find Complainant’s explanation that he did not trust trucking companies in the area a good reason to not seek employment, especially as Complainant is seeking reinstatement with CRST, a company he claims illegally fired him for reporting safety concerns. As for the health issues, Complainant’s heart attack did not occur until June 2010. Although he stated that he began treatment for high blood pressure in June 2009, Complainant also testified that he could drive a truck with high blood pressure as he had driven “a truck for ten years with high blood pressure.” In 2010, Complainant testified that he sought work in January, but again did not seek work in the trucking industry. (TR 2 at 55). Claimant further testified that he would not look for work in the trucking industry following his second hand surgery as it would not be “compatible” to have a day off work to be at the hearing in the CRST case. (TR 2 at 45). This is not a good excuse to not look for a substantially equivalent employment. *See Roberts*, ARB Nos. 03-071, 03-095 at 17-18 (upholding an administrative law judge’s finding that a complainant failed to mitigate his damages when he worked on his OSHA complaint rather than seek employment).

In sum, Complainant admitted in his testimony that he failed to look for employment in the trucking industry for nearly three years following his employment with Ameristate. I found his explanations for failing to seek comparable work unpersuasive. Thus, based on the foregoing, I find Complainant failed to mitigate his damages because he failed to use reasonable diligence in searching for a substantially equivalent employment after he stopped working for Ameristate in April 2008. Accordingly, I find Complainant is not entitled to front pay.

Interest

Complainant is entitled to pre-judgment and post-judgment interest on his back pay award, calculated in accordance with 26 U.S.C.A. § 6621(a)(2). *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, at 9 (ARB December 29, 2000). In calculating the interest on STAA back pay awards, the rate used is that charged for underpayment

of federal taxes. *See Bryant*, ARB No. 04-014 at 10; 26 U.S.C. § 6621(a)(2). The interest is compounded quarterly, until the damage award is paid. *Bryant*, ARB No. 04-014 at 10.

Attorney Fees and Costs

Under the STAA, a prevailing complainant is entitled to litigation expenses including attorney fees and costs. *See, e.g., Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Eash v. Roadway Express, Inc.*, ARB Nos. 02 008, 02 064, ALJ No. 2000 STA 47 (ARB Mar. 9, 2004). Thirty (30) days will thus be allowed to Complainant's counsel for the submission of a petition for attorney fees and costs. Respondents' counsel will be allowed twenty (20) days thereafter to file any objections thereto.

RECOMMENDED ORDER

For the foregoing reasons, I **HEREBY RECOMMEND** that Complainant, Harry Smith, be awarded an additional amount of \$19,162.44 in back pay, for a total amount of \$36,961.63, plus pre-judgment and post-judgment interest calculated in accordance with 26 U.S.C.A. § 6621(a)(2) and compounded quarterly. I further **RECOMMEND** that Complainant not be awarded front pay due to his failure to mitigate his damages.

A

LARRY S. MERCK
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.