

U.S. Department of Labor

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Issue Date: 09 February 2012

CASE NO.: 2009-STA-47

In the Matter of:

CYNTHIA FERGUSON,
Complainant

v.

NEW PRIME, INC.,
Respondent

Appearances:

Paul O. Taylor, Esq.,
For the Complainant

Charles A. Cox, III, Esq.,
For the Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER ON REMAND

I. Background

The complainant, Cynthia Ferguson, filed a complaint with the Occupational Safety and Health Administration (“OSHA”) alleging that the Respondent, New Prime Inc., her employer, retaliated against her in violation of the employee protection provisions of the Surface Transportation Assistance Act (“STAA”), 49 U.S.C.A. § 31105 (West Supp. 2010), and its implementing regulations at 29 C.F.R. Part 1978 (2010). The complainant claimed that New Prime Inc., violated the STAA when it discharged her for refusing to drive in hazardous weather conditions. On March 15, 2010, Administrative Law Judge Daniel L. Leland issued a Recommended Decision and Order finding that the employer terminated Complainant because of her protected activity. Judge Leland ordered the complainant’s reinstatement, back pay from the date of her termination to the day she receives a bona fide offer of reinstatement, compensatory damages in the amount of \$50,000, and punitive damages in the amount of \$75,000.

On August 31, 2011, the Administrative Review Board (“ARB”) issued a Final Decision and Order of Remand affirming Judge Leland’s finding that New Prime terminated Complainant because she engaged in activity that the STAA protects, the order of reinstatement, and the award of compensatory damages but vacated the award of back pay and punitive damages and remanded the case as to these issues. Specifically, the ARB remanded this case as to back pay writing that:

While the Board has held that a formula for computing back pay keyed to the earnings of a representative employee may give a reasonable approximation of what a complainant would have earned but for the discrimination, *Reed v. National Minerals Corp.*, No 1991-STA-034 (Sec’y July 24, 1992), the ALJ did not explain the reason for choosing a company driver’s wages to calculate the amount of the back pay award, rather than a leased driver. The Administrative Procedure Act (APA) requires that decisions rendered on the record provide the ‘findings and conclusions, and the basis therefor, on all the material issues of fact, law or discretion presented on the record’ 5 U.S.C.A. § 557(c)(3)(A) (West 1996); see *Lockert v. Sec’y of Labor*, 867 F.2d 513, 517 (9th Cir. 1989) (arising under Energy Reorganization Act, 42 U.S.C. § 5851 (1988)). Consistent with the mandate of Section 557(c)(3)(A), the ALJ’s findings of fact must provide an explanation for the resolution of conflicts in the evidence and must reflect proper consideration of evidence that could support contrary findings. See *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983); see also 29 C.F.R. § 18.57(b) (2010) (summarizing contents of ALJ decisions). As the ALJ did not provide a rationale for his determination of the amount due for back pay, we vacate the ALJ’s finding that Ferguson would have earned an average of \$509.70 per week had New Prime not discriminated against her, and remand the issue of the amount of back pay to which Ferguson is entitled for reconsideration based upon further findings and explanation.

Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) (internal citations and quotations in original). Additionally, the ARB remanded the case as to punitive damages because:

[t]he ALJ did not consider whether Thomas’s behavior reflected a corporate policy of STAA violations or whether punitive damages are necessary in this case to deter further violations. See generally *White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001 (ARB Aug. 8, 1997); *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec’y May 29, 1991). Moreover, the ALJ accepted the Complainant’s request for damages in the amount of \$75,000 without discussing the evidentiary basis for this finding. Thus, we vacate the ALJ’s punitive damages award and remand the case for further findings on the necessity and amount of such damages under the facts of this case. In his analysis, the ALJ should include consideration of the size of the award that would adequately deter New Prime from future violations and the punitive impact of the damages on the company.

Id.

II. Back Pay

Complainant argues that Judge Leland correctly used the rates of pay that New Prime pays to its company drivers as a basis for calculating Complainant's back pay award. This is because Respondent's leased operators usually earn more than the company drivers over the long term and a leased operator's ability to be profitable is analyzed over the long term rather than the short term as a leased driver may be profitable some weeks and unprofitable other weeks. Thus, a leased driver with a negative balance like Complainant may become profitable after a few trips. Additionally, as Complainant was not given the opportunity to work for Respondent over the long term, using wages New Prime paid to its company drivers for a representative wage is appropriate here as New Prime's leased operators usually earn more money than company drivers. Complainant argues that she should be awarded back pay damages based upon a weekly wage of \$750 - this figure is based on the fact that New Prime's company drivers average 2,500 miles per week at a rate of thirty cents per mile. Complainant argues that the sixteen-week period during which Complainant drove as a leased contractor for New Prime is an insufficient period within which to determine that she would have averaged only 1699 miles per week had she remained as a New Prime driver.

Respondent argues that an award of back pay is not appropriate in this case because Complainant suffered no economic loss. In fact, when she was terminated she had a negative balance of \$5,000 and in the sixteen weeks she had worked for Respondent Complainant had never received a net check. Respondent argues that calculating Complainant's back pay using a weekly wage for a company driver is improper for two reasons. First, a company driver's pay is based solely as a function of the total amount of miles a company driver drives, whereas a leased driver receives a percentage of the contract price of the haul between the respondent and its customer. From that share the leased driver must pay lease payments and operating expenses. Accordingly, a leased driver may drive many hundreds of miles in a week but not turn a profit, whereas the company driver who drives the same number of miles will receive a weekly pay check. Second, the use of a "representative employee" is wholly inappropriate in this case because it may only be used where there is some uncertainty in calculating back pay. In the instant case, the evidence is uncontroverted that Complainant never earned any income and there was no reasonable foreseeability that she ever would.

A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005) (quoting *Ass't Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1922)). "The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against." *Clifton v. United Parcel Serv.*, ARB No. 97-045, ALJ No. 94-STA-016, slip op. at 2, (ARB May 14, 1997), *rev'd on other grounds sub nom. United States Parcel Servs. Inc. v. Administrative Review Bd.*, 166 F.3d 1215 (6th Cir. 1998); *accord Blackburn v. Metric Constructors, Inc.*, No. 1986-ERA-

004, slip op. at 8 (Sec'y Oct. 30, 1991), *aff'd in relevant part and rev'd in part sub nom. Blackburn v. Martin*, 982 F.2d 125 (4th Cir. 1992). Uncertainties in calculating back pay are resolved against the discriminating party. *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993). "Back pay calculations must be reasonable and supported by evidence; they need not be rendered with 'unrealistic exactitude.'" *Johnson v. Roadway Express, Inc.*, ARB No. 01-013; ALJ No. 99-STA-5 (ARB Dec. 30, 2002) (quoting *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, slip op. at 11 n.12 (ARB May 30, 1997)). "[A] formula for computing back pay keyed to the earnings of a representative employee may give a reasonable approximation of what a complainant would have earned but for the discrimination." *Ferguson*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (citing *Reed v. National Minerals Corp.*, No. 1991-STA-034 (Sec'y July 24, 1992)). "Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement . . ." *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (ARB Jan. 31, 2008).

A leased driver's earnings vary with the contract price of the load and with the season. Although it is true that at the time Complainant was unlawfully terminated from New Prime she had a negative balance, New Prime's leased drivers typically earn more than its company drivers and it was not uncommon for a leased driver to be in the negative one week and positive the next. (TR 50-51, 255). For the aforementioned reasons, I adopt the representative theory and will use the rate company drivers earn per mile, \$0.30, to calculate the amount of back pay owed. (TR 50-51). I conclude that Complainant is entitled to a back pay award of \$509.70 a week (\$0.30 x 1699 miles) based on the average rate of Respondent's company drivers and the average number of miles she drove each week. Complainant's Independent Contractor Operating Agreement was cancelled on January 1, 2009 and a bona fide offer of reinstatement was made on March 29, 2010. She was out of work for sixty-four weeks, so her back pay award would be \$32,911.33(64.57 weeks x \$509.70). The \$5,000.00 she is in arrears to Respondent is deducted from this amount. Therefore, her total back pay award is calculated to be \$27,911.33.

III. Punitive Damages

Complainant argues that an award of \$250,000.00 for punitive damages is necessary to deter future violations of the STAA by New Prime, Inc. Complainant argues that this is appropriate because multiple New Prime managerial employees were involved in the decision to unlawfully terminate Complainant. Furthermore, Respondent's policies provide motivation for its dispatchers to retaliate against drivers who exercise their rights under the STAA. Specifically, Mr. Thomas' compensation is based, in part, on driver productivity and was adversely affected by Complainant refusing to drive in bad weather. Additionally, Congress enacted the STAA to combat the increasing number of deaths injuries and property damages resulting from commercial trucking accidents. Here an award of punitive damages is warranted in order to serve the statutory purposes of the STAA of combating the increasing number of deaths, injuries, and property damage resulting from commercial trucking accidents. Respondent's conduct shocks the conscience because Complainant was fired for refusing to drive in hazardous weather. Complainant suggests now that an award of \$250,000.00 in punitive damages is necessary to deter one of the largest trucking companies in the nation from engaging in future retaliation against drivers who exercise their rights under the STAA because only the maximum amount of punitive damages allowed will deter future retaliatory conduct.

Respondent argues that no award of punitive damages is necessary because Mr. Thomas did not have the authority to set policy as he was a mere dispatcher, Respondent's policy regarding stoppages due to adverse weather conditions is that it is always the driver's call, Mr. Thomas would be fired if he threatened a driver with termination for refusing to drive in hazardous conditions, New Prime's trucks are equipped with state of the art safety systems, and there is no evidence that either New Prime or Mr. Thomas have been found liable in other instances under the STAA for forcing drivers to operate in inclement conditions. At worst, Respondent argues, that this was an isolated incident. If the Court believes some punitive damages are appropriate punitive damages not to exceed \$5,000.00 should be awarded.

“In the amendments effective August 2007, the STAA provides that ‘relief in any action under subsection (b) may include punitive damages in an amount not to exceed \$250,000.’ ” *Ferguson*, ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) (quoting 49 U.S.C.A. § 31105(a)(3)(C)). “The United States Supreme Court has held that punitive damages may be awarded where there has been ‘reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law’ ” *Id.* (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The Court further explained that “the purpose of punitive damages is ‘to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.’ ” *Id.* (quoting Restatement (Second) of Torts § 908(1) (1979)) (alterations in original). “The focus is on the character of the tortfeasor’s conduct - i.e., whether it is the sort that calls for deterrence and punishment over and above that provided by compensatory awards.” *Id.* (citing *Smith*, 461 U.S. at 54). If, however, “the purposes of the statute can be served without resort to punitive measure,” there should be no award of exemplary damages. *Jones v. EG&G Defense Materials, Inc.*, ARB. No. 97-129, ALJ No. 95-CAA-3 (ARB Sept. 29, 1998) (citing *White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 95-SDW-1 (Aug. 8, 1997)). Factors in determining whether punitive damages should be awarded and in what amount include: (1) The degree of the defendant’s reprehensibility or culpability, (2) the relationship between the penalty and the harm to the victim caused by the respondent’s actions, (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001) (citations omitted). It should be noted that punitive damages awards rarely withstand appeal rendering it difficult to find case law imposing sanctions for comparable misconduct. *See, e.g., Collins v. Village of Lynchburg*, ARB No. 07-079, ALJ No. 2006-SDW-003 (Mar. 30, 2009) (reversing the ALJ’s award of \$20,000 because punitive damages are not available against a municipality); *White v. The Osage Tribal Council*, ARB No. 96-137, ARB No. 95-SDW-1 (Aug. 8, 1997) (reversing the ALJ’s award of \$60,000, because the ARB found that the respondent “was wrongly operating under the assumption that it was not subject to the employee protection provisions under the SDWA”); *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, -3-044; ALJ No. 98-CAA-7 (ARB Jan. 30, 2004).

The conduct of Respondent herein clearly shows an intent that met and surpassed the threshold for an exemplary damage award because it goes beyond “a bare statutory violation.” *Johnson v. Old Dominion Sec.*, Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec’y May 29, 1991). Unlike *White v. The Osage Tribal Council*, ARB Case No. 96-137, ARB No. 95-SDW-1 (Aug. 8, 1997), the record is devoid of evidence that New Prime, Inc. was unaware that it was subject to the employee protection provisions of the applicable statute. In addition, Mr. Thomas,

the fleet manager at New Prime, intentionally violated a federal safety statute when he pressured Complainant to drive through Donner Pass in hazardous conditions. Thomas' actions demonstrated a total disregard not only for Ferguson and her co-driver's safety but also for the safety of the other drivers on the road. Thomas then recommended termination of the complainant's lease in part because of her refusal to drive through Donner Pass and respondent terminated her in part for that reason. Although there was no corporate policy to retaliate against drivers who engaged in protected activity, multiple managers were involved in the unlawful termination of Complainant in violation of the STAA. Additionally, this was not the first time that Thomas ordered Complainant to continue driving when Complainant believed it was too hazardous to drive.¹ While the respondent is not punished for delays in delivery due to bad weather, the individual dispatcher loses money because driver productivity is decreased. Congress enacted the STAA to combat the "increasing number of deaths, injuries, and property damage due to commercial vehicle accidents" on America's highways, *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987). Respondent is a large company² with an incentive based system for productive that is indirectly affected when weather delays drivers transporting loads. Complainant was fired for her refusal to drive in hazardous weather in a reckless or callous disregard for the plaintiff's rights. Therefore, I believe it is necessary to award punitive damages to avoid further violations.

Recently in *Oglesby v. Foresight Transport, Inc.*, No. 2011-STA-16 (June 22, 2011), I found an award of \$20,000 was sufficient to punish and deter a future violation of the STAA, where the employer had been "caught 'red-handed' in a blatant effort to pressure and to have its driver falsify records and violate hours-of-service regulations, as well as instructing a driver how to sneakily avoid being caught." I find the violation in the case at hand to be slightly less egregious than that in *Oglesby* because in that case drivers were briefed on how to hide violations of the STAA. For the aforementioned reasons, I conclude that an award of punitive damages of \$19,000 is warranted in this case because only an award of that magnitude will impact and punish the respondent for its outrageous conduct and to deter it and others like it from similar conduct in the future.

IT IS ORDERED that:

1. Back pay in the amount of **\$27,911.33** must be paid to Ms. Ferguson by certified check by New Prime, Inc., on or before **thirty (30) days** of the date of this Decision and Order on Remand.

¹ On December 20, 2008, Complainant encountered black ice in Iowa and was first to shut down, and sent an electronic message to the dispatcher informing him of this. (TR 91-92). Thomas called her on her cell phone at 5:30 PM on December 23 and told her that if she shut down again due to bad weather she would be fired. (TR 98).

² In Complainants' Post-Hearing Brief the Complainant provides that Respondent is one of the largest trucking companies in the nation. This is consistent with Thomas' testimony that he dispatches fifty trucks at any given time. (TR 207-208).

2. Punitive damages in the amount of **\$19,000** shall be paid to Ms. Ferguson by certified check by New Prime, Inc. on or before **thirty (30) days** of the date of this Decision and Order on Remand.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party

expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).