

U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222



(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 17 January 2012

CASE NO.: 2006-WPC-2
2006-WPC-3

In the Matter of:

DAISY ABDUR-RAHMAN,
RYAN PETTY,

Complainants

v.

DEKALB COUNTY,

Respondent

Appearances:

Robert N. Marx, Esq.,
Jean Simonoff Marx, Esq.,
For the Complainants

Randy C. Gepp, Esq.,
Stephen E. Whitted, Esq.,
For the Respondents

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER ON DAMAGES ON REMAND

I. Introduction

The Complainants, Daisy Abdur-Rahman and Ryan Petty, filed complaints with the United States Department of Labor's Occupational Safety and Health Administration alleging that the Respondent, DeKalb County, their employer, retaliated against them in violation of the employee protection provisions of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367, and its implementing regulations, 29 C.F.R. Parts 18 and 24. The Complainants claimed that DeKalb County violated the FWPCA when it discharged them in retaliation for complaining that the County did not properly report sanitary sewer overflows. On September 10, 2007, I issued a Decision and Order Denying Relief finding that although Complainants engaged

in protected activity of which DeKalb County was aware and Complainants were subsequently terminated, they were not terminated for engaging in protected activities. On May 18, 2010, the Administrative Review Board (“Board”) issued a final decision and order reversing my decision and remanding the case for a determination of damages. The Board concluded that DeKalb County was not relieved of liability under the dual motive theory because Complainants’ supervisor’s inability to manage them was integral to the supervisor’s inability to manage Complainants’ protected activities. On February 16, 2011, the Board denied Respondent’s motion for reconsideration.

II. Back Pay

A complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow v. Bechtel Constr., Inc.*, 87-ERA 35 (Sec’y July 19, 1993). However, uncertainties in establishing the amount of back pay to be awarded are resolved against the discriminating party. *EEOC v. Enter. Ass’n Steamfitters Local No. 638*, 542 F.2d 579, 587 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); *see NLRB v. Browne*, 890 F.2d 605, 608 (2d Cir. 1989); *Lederhaus v. Donald Paschen & Midwest Inspection Serv., Ltd.*, 91-ERA-13 (Sec’y Oct. 26, 1992), slip op. at 9-10.

The purpose of a back pay award is to make the complainant whole, i.e. to restore the complainant to the same position the complainant would have been in had the complainant not been unlawfully discharged. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec’y Oct. 30, 1991). Ordinarily, an unlawfully discharged complainant “is entitled to back pay from the date his employment ended until the tender of an offer of reinstatement, even if the offer is declined.” *Berkman v. United States Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, at 28 (ARB Feb. 29, 2000) (citing *West v. Sys. Applications Int’l*, 94-CAA-15, Sec. Dec. and Ord. Of Rem., Apr. 19, 1995, slip op. at 11-12). Back pay is calculated by determining what compensation a complainant would have received had the complainant not been unlawfully discharged and is offset by any interim earnings. *Sayre v. Alyeska Pipeline Serv. Co.*, 1997-TSC-6, at 63 (ALJ May 18, 1999) (citing *Johnson v. Old Dominion Sec.*, 1986-CAA-3 (Sec’y May 29, 1991)). The calculation of back pay should include any salary increases that reasonably would have occurred in the period between the complainant’s discharge and his or her reinstatement. *See Mosbaugh v. Georgia Power Co.*, 91-ERA-1, 11, at 9 (Sec’y Nov. 20, 1995).

Complainants argue that *Moder v. Village of Jackson, Wisconsin*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-5, at 9 (ARB June 30, 2003), stands for the proposition that where a complainant works more hours at a new job than the complainant would have worked for a respondent had the complainant not been unlawfully terminated, complainant’s interim income when calculating back pay, should be proportionally reduced to reflect the hourly differential. In support of their argument, Complainants quote the following language from *Moder*, “[t]he backpay amount should not be reduced for an employee who is paid by the hour and works overtime. Otherwise, the employer would benefit from and the innocent employee be penalized for the employee’s additional hours of work.” However, the sentence before that quote in *Moder* favorably cites *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 90-ERA-30 (ARB Feb. 9, 2001) *aff’d sub nom. Georgia Power Co. v. United States Dep’t of Labor*, 52 Fed. Appx. 490 (table) (11th Cir. 2002), making it clear that the Board did not intend to overrule

Hobby and, thus, this language cannot be construed as broadly as Complainants suggest. In *Hobby*, ARB No. 98-166, the Board rejected the complainant's argument that work performed for a second company after regular working hours should be excluded from the back pay offset calculation, “[b]ecause these monies were nevertheless ‘interim earnings,’ [and] we include this amount in the interim earnings calculation.” *Id.* at 39. The broad reading of *Moder* that Complainants suggest would in effect overrule *Hobby*’s holding, which was not the Board’s intent as evidenced by its favorable citation to *Hobby*. Instead, *Moder*’s holding should be strictly construed such that it is limited to the court’s expressed language, “the backpay amount should not be reduced for an employee who is *paid by the hour and works overtime.*” *Moder*, ARB Nos. 01-095, 02-039, ALJ No. 2000-WPC-5, at 9(emphasis added); see *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 02-ERA-30 (ARB Sept. 29, 2006).

A. Complainant Abdur-Rahman

Complainant Daisy Abdur-Rahman seeks a total of \$53,275 in back pay excluding interest accruing from her lay off, on March 11, 2005, until reinstatement, which was offered on November 18, 2011, to begin on December 1, 2011.

In 2005, Complainant Abdur-Rahman would have earned \$37,976 working for DeKalb County had she not been unlawfully terminated. Instead, she earned \$37,901.47. Complainant seeks to reduce her earned income because she worked 37.5% more hours than she would have had she continued working for DeKalb County. Complainant has not established that she was paid by the hour and worked overtime based on the paystubs I received. Thus, she is not entitled to the *Moder* reduction. Complainant would have earned an additional \$74.53 had she not been unlawfully terminated. She is entitled to back pay in that amount.

Respondent argues that Complainant Abdur-Rahman is not entitled to back pay after 2005 because her total earnings exceeded her projected County earnings. Respondent cites no authority as to why looking at earned income in the aggregate is the appropriate way to analyze a back pay award. I find that utilizing annualized time periods is the correct way to analyze a back pay award for three reasons. First, as a general principle the purpose of back pay is to restore the complainant to the position the complainant would have been in but for the respondent’s discriminatory act. *Blackburn*, 86-ERA-4. So, for the year 2007, when Complainant Abdur-Rahman earned less money than she would have earned had she not been unlawfully terminated, she would have been better off by the difference. Second, the Board uses annualized wages as an analytic tool. See, e.g., *Jackson v. Butler & Co.*, ARB No. 03-116, 03-144, ALJ No. 2003-STA-26 (ARB Aug. 31, 2004); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 99-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000). Third, uncertainties in calculating back wages are resolved in the complainant’s favor. *EEOC*, 542 F.2d at 587, *cert. denied*, 430 U.S. 911; see *NLRB*, 890 F.2d at 608; *Lederhaus*, 91-ERA-13, slip op. at 9-10.

In 2006, Complainant Abdur-Rahman would have earned \$38,355 for DeKalb County had she not been unlawfully terminated. She actually earned \$46,030. Once again, Complainant seeks to reduce her earned income because she worked 37.5% more hours than she would have for DeKalb County. Again, Complainant has not established that she was paid by the hour and worked overtime based on the paystubs I received. Complainant earned \$7,675 more than she

would have earned had she not been unlawfully terminated. Thus, Complainant Abdur-Rahman is not entitled to back pay for that year.

In 2007, Complainant Abdur-Rahman would have earned \$39,889 working for DeKalb County had she not been unlawfully terminated. She instead earned \$30,654. Respondent argues that because Complainant previously had been earning more money and there was a sudden decrease in her earnings with no explanation, the County should not be responsible for the sudden loss in earnings and should not have to pay back pay. Respondent implies that Complainant suffered medical hardship, took time off, or quit the previous job without adequate reason. A complainant has the burden of establishing the amount of back pay that a respondent owes. *Pillow*, 87-ERA 35. However, uncertainties in establishing the amount of back pay to be awarded are resolved against the discriminating party. *NLRB*, 890 F.2d at 608 (once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate that liability); *EEOC*, 542 F.2d at 587, *cert. denied*, 430 U.S. 911 (1977); *see Lederhaus*, 91-ERA-13, slip op. at 9-10. Additionally, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, “ ‘unrealistic exactitude is not required’ ” in calculating back pay, and “ ‘uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating [party].’ ” *EEOC*, 542 F.2d at 587, *cert. denied*, 430 U.S. 911 (1977) (quoting *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233 (4th Cir. 1975)). Viewing the record in light of these principles, I find Respondent has not met its burden and that Complainant Abdur-Rahman would have earned an additional \$9,235 working for DeKalb County had she not been unlawfully discharged. Complainant is entitled to \$9,235 in back pay for this year.¹

In 2008, Complainant Abdur-Rahman would have earned \$40,686 working for DeKalb County had she not been unlawfully terminated. She actually earned \$44,287. Complainant earned \$3,601 more than she would have earned working for DeKalb County. Complainant Abdur-Rahman is not entitled to back pay for this year.²

In 2009, Complainant Abdur-Rahman would have earned \$41,499³ working for DeKalb County had she not been unlawfully terminated. She earned \$55,473. Complainant Abdur-Rahman earned \$13,974 more than she would have earned working for DeKalb County. Complainant Abdur-Rahman is not entitled to back pay for this year.

In 2010, Complainant Abdur-Rahman would have earned \$41,499 working for DeKalb County had she not been unlawfully terminated. Complainant earned \$48,290. Complainant

¹ It appears Complainant Abdur-Rahman is now an hourly employee. Complainant does not seek a *Moder* reduction.

² It appears Complainant Abdur-Rahman is an hourly employee. Complainant does not seek a *Moder* reduction. Although applicable, the *Moder* reduction does not change the amount of back pay awarded for this year. Complainant could only reduce her income by \$2,069.45.

³ Exhibit 2 in DeKalb County’s Response to Show Cause, entitled “Pay Histories and Income Projections for Complainants,” indicates that Complainant Abdur-Rahman’s expected salary for years 2009, 2010, and 2011 is \$41,499. However, Complainant’s brief changes this figure to \$41,999 without explanation. Because a complainant has the burden of establishing the amount of back pay that a respondent owes and it appears it is likely a scrivener’s error although repeated on three separate occasions, I find that for these years Complainant Abdur-Rahman would have earned \$41,499 working for DeKalb County had she not been unlawfully terminated. *See Pillow*, 87-ERA 35.

Abdur-Rahman earned \$6,791 more than she would have earned working for DeKalb County had she not been unlawfully terminated. Once again, Complainant seeks to reduce her earned income because she worked more hours than she would have worked for DeKalb County. Complainant has not established that she is a wage employee that worked overtime based on the paystubs I received and, in fact, has admitted she is a salaried employee so she is not entitled to the *Moder* reduction. As such, Complainant earned \$6,791 more at her job than she would have had she not been unlawfully terminated. Complainant Abdur-Rahman is not entitled to back pay for this year.

In 2011, Complainant Abdur-Rahman would have earned \$41,499 working for DeKalb County had she not been unlawfully discharged. Complainant was given an offer of reinstatement on November 18, 2011 that was to begin on December 1, 2011. Both parties agree that Complainant Abdur-Rahman will earn more working for Home Depot than she would have earned working for DeKalb County.⁴ Complainant seeks to reduce her earned income because she worked more hours for Home Depot than she would have had to work for DeKalb County. Complainant has not established that she is a wage employee that worked overtime based on the paystubs I received and, in fact, has admitted she is a salaried employee so she is not entitled to the *Moder* reduction. Thus, Complainant Abdur-Rahman is not entitled to back pay for this year.

In conclusion, Respondent owes Complainant Abdur-Rahman \$9,309.53, in back pay.

B. Complainant Petty

Complainant Ryan Petty seeks a total of \$55,895 in back pay excluding interest accruing from his lay off, on March 11, 2005, until reinstatement, which was offered on November 18, 2011, to begin on December 1, 2011.

In 2005, Complainant Petty would have earned \$42,273 working for DeKalb County had he not been unlawfully terminated. He earned \$28,961. Complainant Petty would have earned \$13,312 more had he not been unlawfully terminated from his position working for DeKalb County. He is entitled to \$13,312 in back pay for this year.

In 2006, Complainant Petty would have earned \$42,695 working for DeKalb County had he not been unlawfully discharged. Complainant Petty actually earned \$37,683. Complainant's pay stub reflects 166.0 overtime hours for a total of \$3,541.13. Peculiarly, Complainant does not seek a reduction for this amount. Complainant Petty would have earned an additional \$8,553.13 working for DeKalb County had he not been unlawfully terminated. He is entitled to \$8,553.13 in back pay for this year.

In 2007, Complainant Petty would have earned \$44,402 working for DeKalb County had he not been unlawfully terminated. Instead, he earned \$35,704. Complainant Petty argues that because his pay stubs reflect 107 hours of overtime, he is entitled to the *Moder* reduction. Although Complainant Petty in his brief describes himself as a salaried employee his pay stubs suggest otherwise. The last pay stub provided lists Complainant's year to date overtime as

⁴ Complainant is a salaried employee earning \$48,290 per year.

193.00 hours for a total of \$4,356.05. Complainant is entitled to \$13,054.05 in back pay for this year.

In 2008, Complainant Petty would have earned \$45,290 working for DeKalb County had he not been unlawfully terminated. Complainant actually earned \$37,571. Complainant is entitled to \$7,719 in back pay for this year.

In 2009, Complainant Petty would have earned \$46,195 working for DeKalb County had he not been unlawfully terminated. Complainant Petty actually earned \$39,930. Complainant Petty's pay stubs reflect 63.0 hours of overtime for a total of \$1,150.96 in overtime earnings; however, he is not entitled to the *Moder* reduction because he is a salaried employee. Complainant is entitled to \$6,265 in back pay for this year.

In 2010, Complainant Petty would have earned \$46,195. He actually earned \$44,570. In 2010, Complainant Petty worked 160.25 hours of overtime for a total of \$2,984.62 in overtime earnings; however, he is not entitled to the *Moder* reduction because he is a salaried employee. Complainant Petty is entitled to \$1,625 in back pay.

In 2011, Complainant Petty would have earned \$46,195. The offer of reinstatement was given on November 18, 2011 to begin December 1, 2011, so Complainant Petty would have earned \$40,945.56 in the first ten months and three weeks working for DeKalb County ($\$46,195 \times (10/12) + (\$3,849.58 \times (14/22))$). The last pay stub I was given encompasses the pay period 10/3/2011 until 10/9/2011. Complainant Petty earned \$35,049.04 through that pay period (including 98 hours of overtime for a total overtime of \$1,847.73). He works forty hours a week at a rate of \$18.9142/hour (he earned \$18.6347 up until the week up 2/28/2011-3/6/2011). There are five weeks and five days between that pay period and November 18, 2011.⁵ Complainant's anticipated earnings for this time period are \$4,496.28.⁶ Thus, Complainant's projected earnings are \$39,545.32. Complainant Petty is entitled to \$1,400.24.

In conclusion, Respondent owes Complainant Petty \$51,928.42 in back pay.

Respondent argues I should cut off back pay after 2007 because of Complainant Petty's failure to mitigate damages. Specifically, Respondent argues that back pay should be cut off because Complainant switched careers in 2005 and became a truck driver earning significantly less money than he would have as a compliance inspector, he continued to work as a truck driver for the next six years, and did not diligently seek substantially equivalent employment. A respondent bears the burden of proving that the complainant did not properly mitigate damages. *Georgia Power Co. v. USDOL*, No. 01-10916 (11th Cir. 2002) (unpublished). To meet this burden, the respondent must show: (1) there were substantially equivalent positions available;

⁵ Respondent correctly notes that back pay stops at the offer of reinstatement but then includes December in its back pay calculations.

⁶ In *Sprague v. American Nuclear Resources, Inc.*, 92-ERA-37 (Sec'y Dec. 1, 1994), the Secretary adopted the ALJ's conclusion that back pay should be calculated based on the average hours worked by persons in Complainant's position. Complainant worked an average of 2.45 hours in overtime a week (98.0 hours/40 weeks). Complainant is projected to work 237.72 hours between October 10, 2011 and November 18, 2011 ($(42.45 \text{ hours/week})(5 \text{ weeks}) + ((42.45 \text{ hours/week})/(5 \text{ days/week}))(3)$). Complainant is projected to earn \$4,496.28 in this same time period.

and (2) the complainant failed to use reasonable diligence in seeking these positions. *Id.* Respondent did not establish that there were substantially equivalent positions available and that complainant failed to use reasonable diligence in seeking these positions.

C. Interest

In addition, Complaints are entitled to statutory interest on back pay recovered pursuant to 29 C.F.R. § 20.58 at the rate established by 26 U.S.C. § 6621. *Bertacchi v. City of Columbus-Div. of Sewerage & Draining*, 2003-WPC-11 (ALJ Aug. 26, 2005).

DeKalb County shall pay interest, compounded quarterly, in accordance with the following methodology delineated in *Doyle*, ARB Nos. 99-041, 99-042, 00-012, slip op. at 19-20 and affirmed by *Hobby*, ARB No. 98-166:

[T]he interest rate is that charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. *See* 26 U.S.C. §6621(a)(2)[.]

The Federal short-term interest rate to be used is the so-called "applicable federal rate" (AFR) for a quarterly period of compounding. *See, e.g.*, Rev. Rul. 2000-23, Table 1.

To determine the interest for the first quarter of back pay owed, the parties shall multiply the back pay principal owed for that quarter by the sum of the quarterly average AFR plus three percentage points. To determine the quarterly average interest rate, the parties shall calculate the arithmetic average of the AFR for each of the three months of the calendar quarter. . . .

To determine the interest for the second quarter of back pay owed, the parties shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter's interest rate as calculated according to the preceding paragraph. This multiplication yields the second quarter interest.

Hobby, ARB No. 98-166, at 40-41 (quoting *Doyle*, ARB Nos. 99-041, 99-042, & 00-012, slip op. at 19-20) (alterations and paragraphing in original).

Complainant Abdur-Rahman seeks \$62,707 in interest. Complainant Petty seeks \$71,749 in interest. Respondent's calculation of interest does not follow *Doyle*. The Complainants' calculation of back pay with accrued interest is correct to the extent that back pay plus interest is calculated annually by taking the sum of the previous year's total back pay and interest and multiplying that sum by the interest rate in the applicable year.

1. Complainant Abdur-Rahman

<u>Year/Quarter</u>	<u>Back Pay Owed</u>	<u>Interest Rate</u>	<u>Interest</u>	<u>Total</u>
2005				
Quarter 2	\$24.84	6.41%	\$1.59	\$26.43
Quarter 3	\$51.28	6.59%	\$3.38	\$54.66
Quarter 4	\$79.50	7.03%	\$5.59	\$85.09
2006				
Quarter 1	\$85.09	7.38%	\$6.28	\$91.37
Quarter 2	\$91.37	7.78%	\$7.11	\$98.47
Quarter 3	\$98.47	8.05%	\$7.93	\$106.40
Quarter 4	\$106.40	7.86%	\$8.37	\$114.77
2007				
Quarter 1	\$2,423.52	7.87%	\$190.65	\$2,614.17
Quarter 2	\$4,922.92	7.77%	\$382.68	\$5,305.60
Quarter 3	\$7,614.35	7.84%	\$596.96	\$8,211.31
Quarter 4	\$10,520.06	7.00%	\$736.40	\$11,256.47
2008				
Quarter 1	\$11,256.47	5.82%	\$655.13	\$11,911.59
Quarter 2	\$11,911.59	4.84%	\$576.92	\$12,488.51
Quarter 3	\$12,488.51	5.42%	\$677.29	\$13,165.80
Quarter 4	\$13,165.80	4.72%	\$620.99	\$13,786.79
2009				
Quarter 1	\$13,786.79	3.71%	\$511.49	\$14,298.28
Quarter 2	\$14,298.28	3.78%	\$540.48	\$14,838.76
Quarter 3	\$14,838.76	3.83%	\$568.32	\$15,407.08
Quarter 4	\$15,407.08	3.72%	\$572.63	\$15,979.71
2010				
Quarter 1	\$15,979.71	3.64%	\$582.19	\$16,561.90
Quarter 2	\$16,561.90	3.73%	\$618.31	\$17,180.22
Quarter 3	\$17,180.22	3.53%	\$607.03	\$17,787.25
Quarter 4	\$17,787.25	3.36%	\$597.65	\$18,384.90
2011				
Quarter 1	\$18,384.90	3.49%	\$642.25	\$19,027.15
Quarter 2	\$19,027.15	3.52%	\$670.39	\$19,697.54
Quarter 3	\$19,697.54	3.32%	\$653.30	\$20,350.84
Quarter 4	\$20,350.84	3.18%	\$647.84	\$20,998.67
Total Interest	\$11,689.14			

Complainant Abdur-Rahman is entitled to \$11,689.14 in interest.

2. Complainant Petty

<u>Year/Quarter</u>	<u>Back Pay Owed</u>	<u>Interest Rate</u>	<u>Interest</u>	<u>Total</u>
2005				
Quarter 2	\$4,437.33	6.41%	\$284.29	\$4,721.62
Quarter 3	\$9,158.95	6.59%	\$603.88	\$9,762.83
Quarter 4	\$14,200.17	7.03%	\$997.80	\$15,197.96
2006				
Quarter 1	\$17,336.25	7.38%	\$1,278.84	\$18,615.08
Quarter 2	\$20,753.37	7.78%	\$1,614.61	\$22,367.98
Quarter 3	\$24,506.26	8.05%	\$1,973.57	\$26,479.83
Quarter 4	\$28,618.11	7.86%	\$2,250.34	\$30,868.45
2007				
Quarter 1	\$34,131.96	7.87%	\$2,685.05	\$36,817.01
Quarter 2	\$40,080.52	7.77%	\$3,115.59	\$43,196.12
Quarter 3	\$46,459.63	7.84%	\$3,642.43	\$50,102.06
Quarter 4	\$53,365.58	7.00%	\$3,735.59	\$57,101.17
2008				
Quarter 1	\$59,030.92	5.82%	\$3,435.60	\$62,466.52
Quarter 2	\$64,396.27	4.84%	\$3,118.93	\$67,515.19
Quarter 3	\$69,444.94	5.42%	\$3,766.23	\$73,211.17
Quarter 4	\$75,140.92	4.72%	\$3,544.15	\$78,685.07
2009				
Quarter 1	\$80,251.32	3.71%	\$2,977.32	\$83,228.64
Quarter 2	\$84,794.89	3.78%	\$3,205.25	\$88,000.14
Quarter 3	\$89,566.39	3.83%	\$3,430.39	\$92,996.78
Quarter 4	\$94,563.03	3.72%	\$3,514.59	\$98,077.63
2010				
Quarter 1	\$98,483.88	3.64%	\$3,588.10	\$102,071.97
Quarter 2	\$102,478.22	3.73%	\$3,825.85	\$106,304.08
Quarter 3	\$106,710.33	3.53%	\$3,770.43	\$110,480.76
Quarter 4	\$110,887.01	3.36%	\$3,725.80	\$114,612.81
2011				
Quarter 1	\$114,962.87	3.49%	\$4,016.04	\$118,978.91
Quarter 2	\$119,328.97	3.52%	\$4,204.36	\$123,533.32
Quarter 3	\$123,883.38	3.32%	\$4,108.80	\$127,992.18
Quarter 4	\$128,342.24	3.18%	\$4,085.56	\$132,427.80
Total Interest	\$80,499.38.			

Complainant Petty is entitled to \$80,499.38 in interest.

III. Compensatory Damages

In addition to back pay, Complainant Abdur-Rahman seeks reimbursement for the following expenses: \$1,898.00 for unpaid leave she had to use to attend the trial, \$6,000 for a career counselor, \$11,646 on health insurance premiums, and \$650,000 for impairment of reputation, personal humiliation, and mental anguish and suffering.⁷

Complainant Petty seeks reimbursement in the amount of \$3,751.00, the amount of money he spent on driving school, and seeks \$175,000 for impairment of reputation, personal humiliation, and mental anguish and suffering.

A. Unpaid Leave

Complainant Abdur-Rahman seeks \$1,898.00 in compensation for taking thirteen days of unpaid leave. Complainant arrives at this figure by estimating that her annual salary at \$38,000 breaks down to approximately \$146 per day. Respondent counters stating the record is devoid of any evidence that Abdur-Rahman lost wages for attending the trial.

The hearing was on the following days: September 25, 2006; September 26, 2006; January 30, 2007; January 31, 2007; February 1, 2007; February 2, 2007; February 5, 2007; February 6, 2007; February 7, 2007; February 8, 2007; February 9, 2007; March 13, 2007; and March 14, 2007; March 15, 2007. The pay stubs Complainant Abdur-Rahman provided do not provide information about leave and some are missing. In *Creekmore v. ABB Power Sys. Energy Services, Inc.*, 93-ERA-24, at 14 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary did not separately award money to replace lost wages incurred by the complainant when he had to take leave without pay from his new job to attend the hearing. The Deputy Secretary found that the back pay award covers this cost since interim earnings (which would be an offset of the back pay award) were reduced for the time he was on leave without pay. *Id.* Therefore, it is immaterial whether Complainant Abdur-Rahman set forth sufficient evidence that she lost wages to attend the trial, because she is not entitled to recover additional money for missing these days.

B. Costs of Pursuing Other Employment

Complainant Abdur-Rahman seeks reimbursement for the following expense: \$6,000 for a career counselor. Respondent argues that Complainant is not entitled to reimbursement for this expense because she did not consult with a counselor until after she had been working at the Waffle House for one year and at that time she was earning more money than she would have earned working for the County. In *Creekmore*, 93-ERA-24, the Deputy Secretary awarded the Complainant \$2,000 in job search expenses for mailing, telephone, and travel. Like the complainant in *Creekmore*, I find Complainant Abdur-Rahman would not have incurred this expense if she had not been unlawfully discharged from DeKalb County. Consequently, I award Complainant Abdur-Rahman \$6,000 as reimbursement for this cost.

⁷ Complainant Abdur-Rahman also states she seeks \$7,000 on medical bills. However when totaling her other economic damages she either excludes this amount or treats it as being part of her health insurance premiums. She also excludes that amount from her total economic damages.

Complainant Petty seeks an additional \$3,751.00 in economic damages, which is the amount of money he spent on driving school. The County does not challenge the amount Petty spent on trucking school nor does it raise any objection to an award in this amount. To recover back pay a complainant has a duty to mitigate damages. In doing so, Complainant Petty spent money to attend a driving school and was able to retain employment in this field. *Georgia Power Co.*, No. 01-10916 (unpublished). Furthermore, if Complainant had not been unlawfully terminated from his position by Respondent, he would not have incurred the foregoing expense. For the aforementioned reasons, I find Complainant Petty is entitled to \$3,751.00

C. Medical Expenses

Complainant Petty did not request an award for medical expenses. Complainant Abdur-Rahman requests an award of \$11,646 for amounts paid on health-insurance premiums. Specifically, she provides that she spends \$1,125 for herself and \$816 for her daughter on health insurance premiums per year. Respondent responds by stating that there is no explanation in Complainants' Brief or the record justifying premiums and that Complainant's testimony is hearsay because she attempted to summarize plans and coverage without presenting the actual plans.

A complainant may recover the value of health insurance fringe benefits paid by his employer or the cost of purchasing substitute coverage, but not both. Thus, in *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 02-ERA-30 (ARB Sept. 29, 2006), the Board found that the ALJ erred in awarding \$10,774 to reimburse the Complainant for his costs in purchasing replacement insurance, and also \$44,074 to cover the net lost value of fringe benefits. The ARB found that the fringe benefit award presumably included premiums the Respondent would have paid for health and dental insurance. The ARB held that the ALJ's ruling resulted in a double recovery of health and dental insurance benefits and, therefore, reversed the award of \$10,774 for replacement insurance.

Therefore, it is evident Complainant may recover the cost of insurance premiums. In support of her request for \$11,656, Complainant cites to her own testimony; however, there is nothing in her testimony on those pages that provides the amount she is paying for insurance premiums after she was unlawfully terminated. Therefore, based on that testimony alone Complainant cannot recover. However, Complainant's Exhibit 121 is a series of invoices for insurance premiums for Complainant's daughter. This exhibit establishes that Complainant Abdur-Rahman pays roughly \$68.00 per month in health insurance premiums for her daughter. Thus, Complainant pays approximately \$816 per year for a total of \$4,896 for six years. Complainant Abdur-Rahman is entitled to recover \$4,896, the amount of her daughter's insurance premiums for six years.⁸

⁸ The hearing transcript consists of 2,940 pages. The following exhibits were admitted into evidence: Complainant Exhibit Numbers ("CX") 1-6, 11-20, 22-28, 31, 34-38, 40A, 42 A&B, 47-52, 54-56, 59-60, 63, 78-81, 83-88, 90-100, 101 pp 4-110 (except pp. 14-16, 79, 87 and pp 111-end not admitted), 102, 103 (p. 14 only), 104, 109 (limited purpose), 111-112, 115-123, 132, 137-138, 143, 155-157, 160 (only portions re Scott Blvd & Ponderosa Circle), 165, and, 169; Respondent Exhibit Numbers ("RX") 1, 2 (without photos), 3, 9-11, 15, 51A-H, 52-55, 62, 72O-Q, 73A-R, 74, 79-80, 82, 87, 89-90, 99-100, 103-105, and 107. This does not even cover the extensive amount of post hearing evidence that was submitted. Thus, it is all but impossible for me to review everything perfectly and, thus, I

Interest does not accrue on a compensatory damages award. *Creekmore*, 93-ERA-24, at 14.

D. Impairment of Reputation, Personal Humiliation, and Mental Anguish and Suffering⁹

Complainant Abdur-Rahman requests compensatory damages in the amount of \$650,000 for impairment of reputation, personal humiliation, and mental anguish and suffering. Complainant Petty requests compensatory damages in the amount \$175,000 for impairment of reputation, personal humiliation, and mental anguish and suffering.

“Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering.” *Hobby*, ARB No. 98-166, at 31 (ARB Feb. 9, 2001). Complainant bears the burden of proving the existence and magnitude of subjective injuries. *Busche v. Burkee*, 649 F.2d 509, 519 (7th Cir. 1981). In order to recover compensatory damages, a complainant needs to show that he or she experienced mental pain and suffering and that the unlawful discharge caused the pain and suffering. *Crow v. Noble Roman's, Inc.*, 95-CAA-8 (Sec'y Feb. 26, 1996) (citing *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992)). Although the testimony of medical or psychiatric experts is not necessary, it can strengthen a Complainant's case for entitlement to compensatory damages. *Thomas v. Arizona Public Serv. Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993) (citing *Busche*, 649 F.2d at 519 n. 12). Administrative Law Judges are not limited in the amount of damages that can be awarded; however, “the ALJ should make such awards with reference to awards in other discrimination related statutes” *Erickson v. U.S. EPA*, 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18, at 93 (ALJ Sept. 24, 2002). Accordingly, that is exactly what I have done below.

1. Complainant Abdur-Rahman

Complainant Abdur-Rahman seeks compensatory damages in the amount of \$650,000¹⁰ based on two claims: (1) adverse health consequences because Complainant's lack of or diminished health insurance resulted in the exacerbation of her health issues and created

have had to rely, in part, on the briefs of the parties submitted to explain how they calculated damages and explain where they obtained their values.

⁹ Complainants respectfully oppose my order denying reopening the hearing record as to compensatory damages and footnoted a request for reconsideration in a thirty-three page brief. Although both Complainants request that I reopen the record, the only specific argument made to reopen the record is made as to Abdur-Rahman. Reopening the record was discussed in my October 19, 2011 order. Given that approximately two years passed between the Complainants' unlawful termination and the hearing, that Complainants were able to testify at length as to the long term effects of their medical conditions, and Complainants have continually failed to make the requisite showing needed to reopen the record, I again decline to reopen the record.

¹⁰ Complainant correctly notes that she previously requested \$500,000 in her post-hearing brief submitted four years ago. Complainants' brief on remand regarding award of damages p. 23 n. 12. However, “Ms. Adbur-Rahman's claim for compensatory damages has been increased from the \$500,000 that was requested in the post-hearing brief submitted four years ago, *in light of subsequent events described above*.” *Id.* (emphasis added). My last order expressly limited the admission of new evidence to that which was requested in the order. To the extent that Complainant's argument contravenes my order, in the interest of justice, I do not consider those arguments.

collateral lifelong consequences; and, (2) embarrassment and humiliation resulting from having to take on employment far beneath her skill or education level and outside her chosen career. Specifically, Complainant mentions that her lack of or diminished medical insurance caused her to live with daily pain, because she was not able to treat her severe autoimmune disorder properly and this caused her to live in a constant fear that she would be unable to afford treatment. Furthermore, she now lives without a gall bladder, has extensive permanent arm scarring, and suffers from irritable bowel syndrome because she was unable to have the necessary surgery before her need for it became emergent. Complainant stresses that some of the harm could have been mitigated or avoided had she obtained COBRA health insurance benefits, but she was unable to obtain COBRA health insurance benefits following her termination because of Respondent's failure to timely mail her the necessary forms. She was unable to get medical insurance until she had worked at Waffle House for one year. Complainant also avers that she continues to suffer severe mental anguish and humiliation as a result of being forced out of her chosen profession. Her brief provides,

It is not difficult to imagine the daily humiliation that Ms. Abdur-Rahman suffered when she considered that despite her graduate and post-graduate degrees from one of the top engineering schools in the country, she was reduced to being a short-order cook at one [of] the "FSE's" that she used to inspect as a Compliance Inspector for DeKalb County[.]

Complainant also alleges that as a consequence of being unlawfully terminated, she is not able to spend as much time with her child as she would have liked. In summation, as a result of her unlawful discharge, Ms. Abdur-Rahman suffered humiliation; lost time with her child; had emergent surgical removal of a severely infected gall bladder; suffers from irritable bowel syndrome, a medical condition that causes Ms. Abdur-Rahman continuous pain and diarrhea; has permanent, extensive scarring as a result of shoulder surgery that had to be deferred; and suffers and suffered from severe pain and mental anguish as a result of her inability to obtain timely necessary, comprehensive medical care for her autoimmune issues and other medical conditions.

Respondent argues that \$650,000 is unreasonable because Complainant Abdur-Rahman had the opportunity to obtain COBRA coverage, she was unable to get coverage because she failed to disclose information on her application, Complainant attempts to obtain compensatory damages for medical conditions she has had for her entire life, there is no medical testimony establishing her shoulder scarring was worse because she had to wait for surgery, there is no evidence she has been frozen out of employment, there is no testimony as to the number of weekends she had to work at the various jobs she held, and the humiliating job she took provided a better career path and higher earnings.

As a consequence of their terminations, both Complainants lost healthcare coverage and were forced to find employment outside their chosen career fields. I previously found that Complainant Abdur-Rahman has not been able to get full medical coverage for herself thus having to pay a great deal of medical expenses out of pocket. Additionally, as a result, she has been unable to have her severe autoimmune disease properly treated and lives in constant pain.

Complainant Abdur-Rahman cites three cases for the proposition that six figure compensatory damage awards have been made in other cases that do not rise to the level of the severity of the damages here. One of the cases Complainant cites is *Hobby*, ARB Nos. 98-166, 196, ALJ No. 90-ERA-30, *aff'd sub nom. Georgia Power Co.*, 52 Fed. Appx. 490 (table) (11th Cir. 2002). The Complainant summarizes *Hobby* in the following way: the Administrative Law Judge awarded Complainant \$250,000 in compensatory damages based on complainant's testimony that he had difficulty finding work in his chosen profession, had experienced emotional distress tied to his depleted finances, had to repeatedly ask his friends and family for more money, and had to inform those responsible for his professional development that he had been fired. Complainant Abdur-Rahman provides that her damages are much more egregious than those in *Hobby* because of her health issues and her humiliation at having to take on employment far beneath her skill and educational level and outside her chosen career.

Complainant's summary is nearly identical to that of the Eleventh Circuit's. The Eleventh Circuit favorably quotes the following from the Board's decision:

In light of Complainant's high level position, his unemployment and underemployment for over eight years, his inability to find any work within the nuclear community, and the detrimental effect his protected activity has had on any chances of future promotion and future salary increases, and in light of the emotional stress Complainant endured due to his termination and inability to find comparable employment, I find that an order of compensatory damages in the amount of \$250,00.00 is reasonable. I recognize that this amount is higher than those awarded in other cases, but I find that the situation here merits such a high award.

Georgia Power Co., 52 Fed. Appx. 490, at 22-23. Missing from Complainant's description is that complainant in that case had no possibility of job growth. This loss was very important to the ALJ when calculating its award.¹¹ Unlike in *Hobby*, Complainant Abdur-Rahman, has not presented any evidence that she will not be able to reach her full potential working for DeKalb County after being reinstated. Furthermore, Complainant Abdur-Rahman has not suggested that

¹¹ The ALJ stressed the fact that complainant went from a \$100,000 per year position to having to ask his mother for money, was unable to care for his mother the way he would have liked, he had to ask his friend and mentor for money, he had to tell his family he was fired, and had to accept a position as a file clerk after he had been an executive for a major power corporation. *Hobby*, 1990-ERA-30. "In addition, he witnessed his friends, acquaintances and associates, one after another, turning from him and refused to even return simple messages." *Id.* Furthermore,

Complainant's loss of reputation, in this matter, has led to a loss of future opportunities for growth within the company and for future earnings. Respondent should compensate him for this loss as well. Prior to the discrimination, Complainant was offered a VP position with Oglethorpe Power. Following the discrimination, Complainant's resume was not even forwarded out of human resources for a position which reported to the VP. Prior to his discrimination, ADM Wilkinson opined that Complainant was on track for a CEO position. Following the discrimination, ADM Wilkinson indicated that Complainant had no chance for such a position. CEO, and even VP, positions, provide salaries and benefits beyond what Complainant was earning prior to his termination.

Id.

she needed to suffer through the added humiliation of borrowing money nor did Complainant hold a “senior” position.

Complainant also cites *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-22, at 22 (ARB June 30, 2009), in which the Board issued a final decision and order awarding \$100,000 in compensatory damages to a helicopter pilot upon testimonial evidence from the complainant and his wife that his firing diminished his self-confidence, caused him anxiety and depression, caused him to withdraw for a period of months from his family life, and required both individual and family therapy sessions. The case *sub judice* is distinguishable from *Evans* in that Complainant Abdur-Rahman has not lost the confidence to be a Compliance Inspector; to the contrary, that is what she most wants to be as evidenced by her request for reinstatement because it allows her to directly use her college degrees. Additionally, Complainant Abdur-Rahman is not suffering from anxiety and depression that forced her to withdraw from family life resulting in the need for individual and family therapy sessions.

Complainant also cites *Van v. Portneuf Medical Center*, ALJ No. 2007-AIR-00002, at 90-92 (Feb. 2, 2011), in which the Administrative Law Judge awarded \$100,000 to the fired Director of Maintenance because his termination caused him personal humiliation, marital difficulties, difficulties in his relationship with his daughter, mental anguish, emotional distress, and he was forced to take a job as a mechanic after losing a prestigious job he held for a long time. Missing from Complainant’s synopsis was that the complainant in that case lost a prestigious job that he had held for a long time. Complainant Abdur-Rahman does not allege that she suffers from many of Complainant Van’s afflictions.

I find that Complainant has submitted sufficient evidence justifying a claim for compensatory damages based on her severe emotional pain and suffering cause by Respondent's unlawful conduct. However, before I begin, I must reiterate that the purpose of compensatory damages is to make the wronged party *whole* and not to *punish* the employer. See *Blackburn*, 86-ERA-4. Complainant cited three cases for the proposition that a six figure award is appropriate; however, none of the cases cited awarded the complainant more than \$250,000 for impairment of reputation, personal humiliation, and mental anguish and suffering, which is not even half of the amount Complainant Abdur-Rahman is seeking. The vast majority of cases in which complainants request compensatory damages for impairment of reputation, personal humiliation, and mental anguish and suffering involve complainants suffering from some sort of psychological injury as a result of the unlawful termination and the unlawful firing causes a strain on familial relations. See, e.g., *Evans*, ARB Nos. 07-118, 07-121, ALJ No. 2006-AIR-22; *Hobby*, 1990-ERA-30; *Van*, ALJ No.2007-AIR-00002. The instant case is unusual in that Complainant Abdur-Rahman is not seeking compensatory damages for either of these reasons.¹²

In *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No 95-CAA-3, at 23-24 (ARB Sept. 29, 1998), the Board affirmed the ALJ’s award of \$50,000 for pain and suffering. The facts in *Jones* are similar in that the complainant struggled emotionally with not being able to work in the field of his choice and as a consequence of his discharge, he worried about being unable to pay his debts and lost medical coverage making it impossible for his wife to receive

¹² I am cognizant of the fact that Complainant Abdur-Rahman does allege that she lost time she could have spent with her child, but her rationale for that lost time is unusual in these types of cases.

necessary medical treatment caused by a pre-existing condition (surgery to restore hearing in an ear that was totally deaf). *Id.* Additionally, the facts in *Pope v. Anchor Drilling Fluids USA, Inc.*, 94-TSC-12 (ALJ May 2, 1995), are also similar. In that case, complainant, as a result of his unlawful termination, lost medical insurance needed to properly treat his daughter's ailments; his daughter has severe attention deficit hyperactivity disorder and has a pervasive developmental disorder. Complainant had also found out that COBRA would no longer pay much of his daughter's care. The *Pope* Court awarded complainant compensatory damages for emotional distress in the amount of \$50,000. *Id.* However, unlike the instant case the complainant in *Pope* suffered from anxiety and emotional distress from being unlawfully terminated and that placed such a significant strain on his marriage that he and his wife had to attend several sessions of marriage counseling. Furthermore, he had to lower himself to ask for money. *Id.*

Complainant Abdur-Rahman has an autoimmune disorder that requires extensive monitoring and treatment and losing her comprehensive medical insurance coverage was undoubtedly devastating. Complainant has not been able to get full medical coverage for herself since the event. Complainant Abdur-Rahman delaying her surgery and treatment more directly affects her quality of life than does that of delaying surgery to repair hearing or delaying treatment for attention deficit hyperactivity disorder and a pervasive developmental disorder. Furthermore, the fact that both of the precedential decisions I cited were decided over a decade ago weighs in on my decision.¹³ The fact that there is no medical testimony does not mean the complainant's testimony is inadmissible it merely means I need to weigh it differently. Also factoring into my award, is that Complainant was unable to find work in her chosen career field despite the help of a career counselor, that the loss of her job was emotionally and mentally devastating for her, and the amount of time that has accrued since Complainant was unlawfully terminated, though not entirely Respondent's fault. For the foregoing reasons I award Complainant Abdur-Rahman \$85,000 in compensatory damages.

2. Complainant Petty

Complainant Petty seeks \$175,000 for impairment of reputation, personal humiliation, and mental anguish and suffering. He justifies the reasonableness of this figure by noting he was forced to become a truck driver after being unable to find work in his career field and that he was unable to afford proper treatment of a scalp condition with the effect of leaving him with permanent scarring. He states that he was frozen out of his chosen profession because of the four Compliance Inspectors that were fired, the only ones that were able to obtain employment in their field were Deidre Stokes, who did not mention her DeKalb County employment to prospective employers, and Manyon Anderson who withdrew his whistleblower complaint. He further provides that he is forced to drive a "gasoline bomb," and he is currently working in the

13

More than ten years ago the Administrative Review Board generally receded from the view that compensatory damage awards in earlier cases litigated before the Secretary should set the compensatory damage award. Repeatedly looking to earlier awards results in compensatory awards 'frozen in time,' ignores inflation, and sets artificially low compensation that fails to enforce that statutory mandate that the 'victims of unlawful discrimination be compensated for the fair value of their loss.'

Van, ALJ No. 2007-AIR-00002, at 91 (quoting *Leveille v. N.Y. Air Nat'l Guard*, ARB No. 98-079, ALJ No. 1994-TSC-3, Decision and Order on Damages, slip op. at 5 (ARB Oct. 25, 1999)).

field of hazardous waste disposal. He notes that his employment is significantly more dangerous than it would have been had he remained working for DeKalb County. He too argues he lost his health insurance and did not receive a timely COBRA notification, and as a result of the lapse in coverage, was unable to pay for necessary medicine and medical procedures on his own. This resulted in permanent and obvious scarring of his scalp and premature and permanent loss of hair, which will continue to cause him substantial mental anguish for the rest of his life.

Respondent finds the amount requested bordering on absurd. Respondent objects arguing that Petty is not a medical expert and his testimony that he has a medical condition that causes hair loss and that medication would correct the loss of hair is inadmissible. Furthermore, had Petty been concerned about obtaining insurance coverage to cover the cost of his scalp condition, he should have made greater efforts to get the forms from the County. Respondent reiterates the argument that Petty could have obtained COBRA insurance by applying within sixty days of when notice was received. Additionally, Petty provides no real evidence entitling him to compensatory damages for emotional distress or mental anguish. Thus, Respondent believes that any amount of compensatory damages should be minimal at best.

I previously found as a consequence of his termination, that Complainant Petty was forced to become a truck driver after being unable to find work in his career field. Furthermore, as a result, he was unable to afford proper treatment of a scalp condition with the effect of leaving him with permanent scarring. The loss of his job has been emotionally and mentally devastating to him.

Complainant cites no case law justifying the requested award; similarly Respondent cites scant authority rebuking the Complainant's requested award. I have reviewed the case law at length in arriving at my decision and have cited only the analogous decisions that aided my decision. In *McQuade v. Oak Ridge Operations Office U.S. Department of Energy*, 1999-CAA-00007, at 59 (ALJ July 31, 2001)¹⁴, the administrative law judge awarded Complainant Byrum \$25,000 for pain and suffering because complainant began to question his abilities and had a pre-existing health condition that was aggravated by work-related stress and sometimes required hospitalization. Similarly in *Murray v. Air Ride, Inc.*, ARB No. 00-034, 99-STA-34, at 8 (ARB Dec. 29, 2000), the Board affirmed an administrative law judge's award of \$20,000 even though the complainant requested \$500,000 finding that it was reasonable because as a result of his unlawful termination, complainant, "was required to declare bankruptcy and divest himself of his belongings, and was also unable to seek treatment for his hernia."

Employer correctly notes that *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1577 (11th Cir. 1992), provides that COBRA plan "must allow the beneficiary *at least 60* days from the later of the date that the beneficiary receives notice of COBRA rights or the date of the qualifying event in which to elect continued coverage." In making this argument, however, Respondent artfully avoids the crux of the issue whether Complainant Petty being unlawfully terminated directly or indirectly aggravated his scalp condition.

¹⁴ This case was appealed and parties entered into a settlement before it was heard. *McQuade v. Oak Ridge Operations Office U.S. Department of Energy*, ARB Nos. 01-093, 01-094, ALJ Nos. 99-CAA-7, 99-CAA-8, 99-CAA-9, 99-CAA-10 (ARB Nov. 28, 2001).

As in *Murray* and *McQuade*, Complainant Petty has a pre-existing condition, his scalp condition, that was exacerbated because he was unlawfully terminated. In rendering my determination as to an award of compensatory damages, I note that over ten years has passed since these cases were decided. Additionally factoring into my award, is Complainant being forced to become a truck driver after being unable to find work in his career field, that losing his job with Respondent was emotionally and mentally devastating for him, and the amount of time, though not entirely Respondent's fault, that has accrued since Complainant was unlawfully terminated. For the aforementioned reasons, I award Complainant Petty \$40,000.

IV. Other Relief

In addition to the foregoing, Complainants also seek (1) expungement from any of their employment records maintained by DeKalb County of any reference to their having been discharged, having been discharged for cause, of any and all criticisms maintained in any file by DeKalb County including but not limited to those marked into evidence or referred to at the hearing in this matter; (2) award of all accrued benefits and seniority; (3) contribution by DeKalb County to or for any pension funds for the benefits of Complainants; (4) prejudgment interest as required to be compounded quarterly on all monetary sums awarded; (5) post-judgment interest; (6) attorneys' fees to be determined following submission of Complainants' petition therefor; and (7) such other and further relief as may be determined to be just and proper.

Respondent agrees that should Complainants accept the offer of reinstatement, they are entitled to all accrued appropriate benefits and seniority. However, Respondent objects to an award of any retroactive benefits because at trial Complainants had the burden of proof regarding benefits and presented no evidence concerning entitlement to or deprivation of employee benefits offered by the County. Therefore, any back pay/damages award should not include any injunctive or monetary award for speculative, unproven employee benefits. Furthermore, Respondent provides that Complainants are not entitled to prejudgment interest on compensatory damages.

I awarded Complainants all pre-judgment and post-judgment interest to which they are entitled to. My last decision and order provided that Complainants submit their petition for attorney's fees no later than December 14, 2011, Attorney Jean Simonoff Marx requested an extension and was to submit a proposed timeline for the submission of the fee petition and Respondent's response thereto. I have not received that proposed order as of yet; however, I recently received Complainants' fee petition. Respondent shall have 14 days from the date of this order with no additional time for mailing to submit a response thereto.

Complainants also seek an award of all accrued benefits and seniority and contribution by DeKalb County to or for any pension funds for the benefits of Complainants. I have already ordered Respondent to reinstate Complainants to their former positions or comparable positions, with the same compensation, terms, conditions, and privileges of their former employment. Additionally, I ordered that Complainants be reinstated to a merit status position and not placed in a probationary position. Thus, should Complainants opt for reinstatement they will receive the same benefits and seniority they would have received had they not been unlawfully terminated. Respondent reads Complainants' request as a retroactive request for an award of all accrued

benefits and seniority and for contribution by DeKalb County for any pension funds that Complainants would have received had they not been unlawfully terminated. I do not read the request the same way, given that Complainants have not cited any factual authority and did not raise this issue in their post hearing brief.

V. Conclusion

IT IS ORDERED that:

1. Back pay in the amount of **\$9,309.53** must be paid to Ms. Abdur-Rahman by certified check by DeKalb County, on or before **thirty (30) days** of the date of this Decision and Order. Back pay in the amount of **\$51,928.42** must be paid to Mr. Petty by certified check by DeKalb County, on or before **thirty (30) days** of the date of this Decision and Order;
2. Additionally, interest in the amount of **\$11,689.14** on the back pay award must be paid to Ms. Abdur-Rahman by certified check by DeKalb County, on or before **thirty (30) days** of the date of this Decision and Order. Interest in the amount of **\$80,499.38** on the back pay award must be paid to Mr. Petty by certified check by DeKalb County, on or before **thirty (30) days** of the date of this Decision and Order;
3. Additional interest on the back pay award, at the same rate shall accrue from the date of this order until the award is paid;
4. Compensatory damages shall be paid by certified check by DeKalb County on or before **thirty (30) days** of the date of this Decision and Order. Complainant Abdur-Rahman is awarded **\$6,000** for the cost of seeking other employment, **\$4,896** for medical expenses, and **\$85,000** for impairment of reputation, personal humiliation, and mental anguish and suffering. Complainant Petty is awarded **\$3,751.00** for the costs of seeking other employment and **\$40,000** for impairment of reputation, personal humiliation, and mental anguish and suffering;
5. Respondent shall immediately expunge from Complainants' personnel records all derogatory or negative information contained therein relating to Complainants' protected activity and that protected activity's role in Complainants' termination to the extent permissible by law; and
6. Respondent shall have **14 days** from the date of this order with no additional time for mailing to submit a response to Complainants' fee petition.

A

RICHARD A. MORGAN
Administrative Law Judge

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

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

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.