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Artrip v. Ebasco Services, Inc., 89-ERA-23 (ALJ Jan. 26, 1996)

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Date: January 26, 1996

CASE NO.: 89-ERA-23

In the Matter of:

NOAH JERRY ARTRIP,
Complainant,

v.

ESICORP, INC., formerly known
as EBASCO SERVICES, INC.,
Respondent.

Appearances:

BILLIE PIRNER GARDE, ESQ.
230 North Morrison
Appleton, WI 54911
On behalf of the Complainant

RAYMOND L. KALMANS
1700 West Loop South
Suite 1400
Houston, Texas 77027
On behalf of the Respondent.

Before: Hon. Richard D. Mills
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON DAMAGES

The case before me on remand from the Secretary of Labor arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (hereinafter ERA or the "Act"), 42 U.S.C. 5851 (1988). In his Decision and Order of Remand, the Secretary directed a hearing on the issue of damages, which in this case encompasses back pay, compensatory damages,

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attorney's fees, and expenses. The hearing took place on June 27, 1995, in Houston, Texas.[1]

ISSUES

1. A determination as to the period of time for which a back pay award should be calculated;
2. Whether Complainant is entitled to compensatory damages, and if so, the amount of those damages;
3. Whether Complainant is entitled to recover out-of-pocket expenses, and if so, the amount of those expenses.

STIPULATIONS

The following stipulations will apply concerning Attorney's fees and expenses: 1) Should the Secretary's final decision and order be upheld on appeal, Complainant's attorney, Ms. Garde, is entitled to \$33,360.00 in fees for work done up to the time of the Secretary's March 21, 1995 decision; 2) Should the Secretary's final decision and order be upheld on appeal, Complainant's attorney is entitled to \$2,000.00 for work done for the hearing in this court; 3) Should the Secretary's final decision be upheld, Complainant is entitled to \$9,922.99 in expenses for those cost reasonably incurred in connection with this case before the Administrative Law Judge and the Secretary up to the date of the decision on remand (the date of this Recommended Order); 4) The federally mandated rate of interest will apply to any judgement paid by the Respondent, from the date of the final award of the Secretary to the date of payment to the Complainant.

BACKGROUND

Complainant Noah J. Artrip (hereinafter "Complainant") was employed by EBASCO (hereinafter "Respondent") from 1982 until 1988, as an inspector, primarily in the area of paint coatings. Complainant worked at the Comanche Peak Steam Electric Station in Glen Rose, Texas for sixteen months. While at Comanche Peak, Complainant participated in a Nuclear Regulatory Commission ("NRC") investigation of coating failures and quality issues. As a result of the investigation, the NRC required a major rework of the station. Soon after Complainant was transferred to the South Texas Nuclear Plant in Bay City, Texas. During this time, he engaged in protected activity under the ERA by reporting various violations to the NRC, which were investigated and found to be valid.

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On December 9, 1988, after the NRC investigation, which was high-profile and resulted in large expense to the Respondent, Complainant was laid off in a reduction in force at the South Texas Nuclear Plant. Previous to this, on November 30, 1988, in anticipation of the impending layoff, Respondent compiled a master list of fifty-eight South Texas employees for whom new assignments were being pursued. (CX 1-25) ("CX 1" refers to Complainant's original exhibits admitted pursuant to the original claim. "CX 2" refers to the exhibits admitted during the hearing on damages). The list, which included Complainant, was distributed to certain managers at various projects where Respondent was seeking either to hire directly, or to refer to the contractor or licensee for hire. *Id.* After the layoff, the names of 14 people were provided to Texas Utilities

as candidates they might select for several thermolag positions at the Comanche Peak Nuclear facility in Glen Rose, Texas. (CX 1-26) Complainant was not included on this list. Of the 14 people referred to Texas Utilities on December 16, 1988, six were selected to work at Comanche Peak.

Complainant filed a charge of retaliation under the ERA for Respondent's failure to place his name on the referral list, and his subsequent failure to be hired by Texas Utilities. A hearing was held and the Administrative Law Judge recommended that the case be dismissed. Complainant appealed the ALJ's findings to the Secretary. On March 21, 1995, the Secretary overturned the ALJ's recommended decision and held that by failing to place Complainant's name on a list of persons eligible for consideration for employment at Comanche Peak, Respondent had violated the ERA because they had interfered with a former employees prospective employment opportunities based on a discriminatory motivation. (Secretary's opinion at 6, 13). The Secretary found that the Complainant was excluded from the list because Respondent knew, or at least suspected, that the personnel manager from Texas Utilities, Doug Snow, "would not be interested in rehiring a former inspector from his department who had participated in an NRC investigation that forced a Post Construction Hardware Validation Program, caused substantial delay in the project, and left the company with untold financial loss." (Secretary's opinion at 13). The Secretary then remanded to fashion an appropriate relief. On June 27, 1995, this Court held a one day hearing limited to the issue of appropriate remedy and relief which should be awarded to Complainant.

DISCUSSION

Under the Energy Reorganization Act, whistleblowers are entitled to various damages. Under Sec. 210(b)(2)(B):

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If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C. Section 5851(b)(2)(B).

Once an employee establishes a violation of the Act, there is a presumption that the employee is entitled to back pay and

other remedies available under the law. *Lewis v. Smith*, 731 F.2d 1535, 1538 (11th Cir. 1984).

I. Back Pay

Complainant is entitled to back pay. The goal of back pay is to make the victim of discrimination whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405. Therefore, the person discriminated against should only recover damages for the period of time he would have worked but for the wrongful termination; he should not recover damages for the time after which his employment would have ended for a nondiscriminatory reason. *Martinez v. El Paso County*, 710 F.2d 1102, 1106 (5th Cir. 1983).

Complainant asserts that he is entitled to back pay from the date he was laid off, December 9, 1989, to the date Respondent complies with this order. Complainant contends that he is entitled to back pay for: 1) Employment at Comanche Peak from January 20, 1989 to March 3, 1989 (when five of the six people hired were laid off in a reduction in force) (Tr. 14); 2) Continued employment at Comanche Peak until November 22, 1989 (assuming that Complainant would have been kept on rather than the employee actually retained)

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Id.; 3) Eventual employment in a permanent position by Respondent (of the five who were laid off on March 3, 1989, four were later rehired by Respondent, two left after six weeks and two took permanent positions) (Tr. 11).

First, we must assume that Complainant is entitled to back pay for some length of time. Once discrimination has been proven, a presumption of entitlement to back pay arises. *Lewis v. Smith*, 731 F.2d 1535. The burden then shifts to the employer to rebut this presumption by showing that the discriminatee would not have been hired absent their discrimination. *Id.* Here, Respondent could have shown that Mr. Snow, the personnel manager at Texas Utilities, would not have hired Complainant, whatever his motivation. Had Respondents showed that Texas Utilities would not have hired Complainant because of his previous whistleblowing activity, Respondent's liability would have ended there. Even though there is discriminatory motivation involved, this would not have been Respondent's discriminatory motivation. Respondent is not liable for other employers' discrimination. By failing to put Complainant's name on a list, for a job he was not very likely to get because of more than probable discrimination by the hiring company, Respondent has opened themselves to liability. Thus, we must assume that Complainant would have been hired by Texas Utilities.

Next to be determined is the length of the period of back pay owed. Absent evidence that Complainant's employment would have continued past the end of his employment term (ie: the date he would have been laid off), Respondent's back pay liability should end on that day. *Blackburn v. Martin*, 982 F.2d 125, 129 (4th Cir. 1992); *Martinez*, 710 F. 2d at 1106. The employment term under Texas Utilities is at most from January 20,

1989, until November 22, 1989, when the last employee hired from Respondent was laid off.

One of the problems in assessing back pay in this case is that the entity which would have hired Complainant is not the same as the one which discriminated. For our purposes, we must treat Texas Utilities, the entity which would have employed Complainant, as if it were the entity which had discriminated against Complainant. When assessing employment term, we must use the same rationale with Texas Utilities as we would have with Respondents directly. That is, Complainant's back pay must end when his employment term would have ended, absent any discrimination. It is clear that in the absence of any discrimination, Complainant's employment term with Texas Utilities would not have exceeded November 22, 1989.

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Complainant, however, seeks back pay past that date. This must be denied. In *Welch v. University of Texas*, 659 F.2d 531, 535 (5th Cir. Unit A 1981), it was pure speculation whether or not an employee would have been shifted to another grant job after the grant which was providing the funds for her salary had expired. The court found that mere speculation was not enough and that the award for damages went only to the date that the grant under which she was working expired. *Id.* Here, it is simply speculation that Complainant would have been hired for a different job, by a different company, after his employment term with Texas Utilities. In *Blackburn v. Martin*, the employee testified that he expected to be hired by the employer on another project because other employers usually gave preference to former employees. 982 F.2d at 129. However, the court found that this was merely speculative and insufficient to support the extension of back pay liability beyond his original employment term. *Id.* Here, preference by Respondent in rehiring Complainant was not even an issue. Further, in assessing back pay damages, the relevant case law demonstrates that only the term of employment affected by the discrimination is used to calculate back pay. Subsequent employment is not used in the back pay calculation. See *Blackburn*, 982 F.2d at 129; *Martinez*, 710 F.2d at 1106; *Edwards v. School Board*, 658 F.2d 951, 956 (4th Cir. 1981); *Holley v. Northrop Worldwide Aircraft Servs., Inc.*, 385 F.2d 1375, 1377 (11th Cir. 1988); *Pillow v. Bechtel Construction, Inc.*, Case No. 87-ERA-35, Sec. Ord., July 19, 1993, slip op. at 26.

Complainant has asserted that it should recover back pay up to the date that Respondent complies with this order because Respondent has not met its evidentiary burden of showing that Complainant was not qualified for the positions. This argument must fail. The Complainant has the burden of establishing the economic injury resulting from the adverse employment action. *Marks v. Prattco*, 633 F.2d 1122, 1125 (5th Cir. 1981). However, in establishing economic injury, if the Complainant is claiming that the economic injury extended beyond the employment term, then he must introduce evidence showing that this is the case. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 (11th Cir. 1982). This proof may consist of no more than a showing that the particular complainant's contract had been renewed in

the past, that contracts of similarly situated employees had been renewed, or that the employer had made a promise of continued employment. *Id.* Once this burden has been fulfilled, then the Respondent has the burden to show by a preponderance of the evidence that the complainant would not have remained in employment beyond the contract term. *Id.* at 1361; *OFCCP v. PPG Indus., Inc.*, Case No. 86-OFC-9, Dep.

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Asst. Sec. Dec., Jan. 9, 1989, slip op. at 33-34.

Complainant has not established that his economic injury extended beyond his employment term. Complainant did not show that his contract had been renewed in the past, that contracts of similarly situated employees had been renewed, or that the employer had made a promise of continued employment. Complainant could argue that contracts of similarly situated employees were renewed, referring to the four people hired by Texas Utilities who were then rehired by Respondent. However, *Walker* specifically maintains that the contract must be *renewed*, which means that the present employer must renew it, not a subsequent employer. 684 F.2d at 1362. Therefore, Complainant has not fulfilled his burden of showing economic injury extending beyond the employment term. Thus, Complainant cannot recover damages past the point of his term of employment.

Respondent has argued that Complainant should not recover back pay past the date of March 3, 1989, when five of the six people hired by Texas Utilities were laid off in a reduction in force. However, it must be assumed that Complainant would have been the last person in his work force to be laid off. *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (ALJ May 4, 1993). Thus, the period of Complainant's back pay runs from January 20, 1989, to November 22, 1989.

The back pay amount will be calculated by $\$2,860.00 \times$ the number of months worked, plus a stipulated factor of 20.8% for fringe benefits. This would be $\$2,860.00 \times 10$ months (approx) = $\$28,600.00 \times (.208) + \$28,600.00 = \$34,549.00$.

Also considered in the back pay calculation is the amount of interim earnings made by Complainant during the back pay period. Interim earnings in replacement employment should be deducted from a back pay award. *Blackburn*, 86-ERA-4, Sec. Dec., Oct. 30, 1991. The employer, and not the complainant bears the burden of proving a deduction from back pay on account of interim earnings. *Hadely v. Southeast Coop. Serv. Co.*, 86-STA-24, Sec. Dec., June 28, 1991. Here, the only evidence of interim earnings has been presented by the Complainant in the form of Complainant's tax returns. The problem presented is how to calculate which interim earnings were earned during the 10 month period that Complainant would have been working for Texas Utilities. Complainant's 1989 adjusted gross income was \$18,913.00. This figure does not reflect what amount of work Complainant did during the time he would have worked for Texas Utilities. Since Complainant would have worked 10 months out of the year, or 83.3% of the year, then Complainant will only have

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83.3% of his interim earnings offset against his back pay. The offset interim earnings will be $\$18,913.00 \times .833 = \$15,755.00$.

The total amount of back pay due Complainant is \$34,549.00 - \$15,755.00 = \$18,794.00.

II. Interest

Complainant is also entitled to all appropriate prejudgment interest on the award of back pay. Such interest will be calculated in accordance with 29 C.F.R. 20.58(a), at the rate specified in the Internal Revenue Code at 26 U.S.C. 6621.

III. Expenses

Complainant is further entitled to all reasonably incurred expenses in bringing this complaint. *DeFord v. Secretary of Labor*, 700 F.2d 281, 288 (6th Cir. 1983). Complainant's expert witness, Dr. Richard N. Bean, submitted a bill for ,200.00. In light of current costs for expert witnesses, I will let this amount stand.

Complainant listed as an expense a \$927.00 airline ticket for round trip airfare from Hawaii to Houston. Although Respondent has objected to the authenticity of the sales slip, the amount in question is a reasonable amount for airfare. The hotel bill, transcripts, copying fees, meals, and auto rental bills are all reasonable. Complainant will be entitled to \$2,644.29 for total expenses incurred on Remand Hearing.

IV. Successor Liability

EBASCO was a wholly owned subsidiary of Enserch Corporation, which sold EBASCO's operations to Raytheon Corporation on December 22, 1993. (Tr. 7). The surviving entity is Esicorp, which is owned by Enserch. Respondent, at the hearing, stated that Esicorp retains the liability in this case. This assertion will stand.

V. Compensatory damages

Complainant has not claimed compensatory damages.

ORDER

It is therefore ORDERED that:

1. Respondents shall pay to Complainant back pay in the amount of \$34,549.00 less interim earnings of \$15,755.00 for a total of \$18,794.00, plus the appropriate interest at the IRS rate, computed until the date of date of payment to Complainant.

2. Respondents shall pay to Complainant expenses reasonably incurred in connection with this hearing, in the amount of \$2,644.29.

3. Respondents shall pay to Complainant expenses reasonably incurred as per the stipulation.

4. Respondents shall pay to Garde Law Office, all reasonably incurred attorney fees and costs as per the stipulation.

Richard D. Mills
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed Reg. 13250 (1990).

[ENDNOTES]

[1] As Administrative Law Judge E. Earl Thomas has retired since the time the Decision and Order was issued, this matter is being considered by the undersigned *See Kendall v. Bethlehem Steel Corp.*, 3 BRBS 255, BRB No. 75-205 (February 26, 1976).



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