In the Matter of:

PHILLIP JACKSON,

COMPLAINANT,

v.

BUTLER & COMPANY,

RESPONDENT.

ARB CASE NOS. 03-116
03-144

ALJ CASE NO. 2003-STA-26

DATE: August 31, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Richard E. Johnson, Esq., Lisa C. Lambert, Esq., *Tallahassee, Florida*

***For the Respondent*:**
B. Forest Hamilton, Esq., *Rumberger, Kirk & Caldwell, Tallahassee, Florida*

FINAL DECISION AND ORDER

This case was brought under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C.A § 31105 (West 1997). The Complainant, Philip Jackson, filed a complaint alleging that the Respondent, Butler & Company, violated the STAA by terminating his employment. On June 25, 2003, and August 20, 2003, an Administrative Law Judge (ALJ) issued recommended decisions ordering Butler to reinstate Jackson and pay damages and attorney's fees. We uphold, with modification, those recommendations.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

We adopt Jackson's version of events as uncontradicted by the record evidence. He began driving for Butler on March 24, 1997. His responsibilities included delivering bulk loads of industrial grade materials such as clay, salt, and lime. Hearing Transcript (Tr.) 34. On November 15, 2001, Butler dispatched Jackson to drive a load of materials from Cairo, Georgia, to Norco, Louisiana, and thereafter return to Butler's Cairo terminal.

Jackson left Cairo at 7:00 p.m. on November 15 and arrived in Norco at 3:00 a.m. on November 16. After unloading, Jackson departed Norco at approximately 5:30 a.m. and drove east, arriving in Gulfport, Mississippi at 7:00 a.m. to commence his mandatory eight-hour break as the Department of Transportation (DOT) Federal Motor Carrier Safety Regulations hours of service rules required.[1] Tr. 56.

At 10:30 a.m. on November 16, Jackson received a message on his Qualcomm[2] to call dispatch. He called and spoke with Deborah Hawkins, Butler's dispatcher, who told Jackson to go to Avery Island, Louisiana, to pick up a load and deliver it to Tifton, Georgia, by noon the following day. Jackson informed Hawkins that he would pick up the load but would be unable to do so in the time requested due to the constraints of the hours of service rules.[3] In response, Hawkins directed Jackson to return to the Cairo terminal and call in before 5:00 p.m. Tr. 58.

Because he was upset about Hawkins' demands, Jackson immediately began driving back to Cairo but received a message over his Qualcomm instructing him to cease driving until his rest break was completed. Tr. 60.

Jackson called Hawkins at 4:30 p.m. She told Jackson that he was being fired and that he should remove his personal belongings from the truck once he arrived at the terminal. When he reached the Cairo terminal, Jackson contacted David Miller, Butler's station manager, who asked Jackson to return on Monday morning so they could get things "squared away." Tr. 61-62.

On Monday, November 19, 2001, Jackson returned to the Cairo terminal and met with Alicia Pinkerton, Butler's general manager. Pinkerton informed Jackson that his employment was terminated because he refused the load that Hawkins dispatched to him on November 16, 2001. Tr. 63-65.

On May 16, 2002, Jackson filed a complaint with the Occupational Safety and Health Administration (OSHA) in which he alleged that "[t]he sole reason for the discharge was that Complainant had pointed out that it would be illegal for him to make

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[1] 49 C.F.R. § 395.3 (2001) (version then in effect). Prior to January 4, 2004, the hours of service rules allowed drivers to drive for ten hours followed by an eight-hour break. The current rules allow drivers to drive up to eleven hours followed by a ten-hour break. Notice of final rule, 49 C.F.R. Parts 385, 390, 395, 68 Fed. Reg. 22456, 22,503 (Apr. 28, 2003). *But see Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209 (D.C. Cir. 2004) (vacating 49 C.F.R. § 395.3 (2003) and related hours of service rules as invalid and remanding to agency for further action).

[2] This is a wireless unit that drivers kept onboard to facilitate communication with the terminal. Tr. 55.

[3] The Complainant's unrefuted evidence was that he would have to finish his mandatory eight-hour break, drive for no more than ten hours, and take another mandatory eight-hour break before completing the trip, arriving no earlier than 4:00 p.m. the following day. *See* Brief of Complaint, at 11-12, and citations to the record therein.

the delivery from Louisiana to Tifton, Georgia by noon the next day." Administrative Law Judge Exhibit 1. On February 10, 2003, OSHA issued a ruling in Butler's favor; Butler received a copy of the ruling, which advised both parties of their rights to file objections and request a hearing. *Id*.

Jackson requested an evidentiary hearing on the complaint, and the ALJ, by notice issued on March 25, 2003, set a hearing date of May 8, 2003. On May 1, 2003, Butler's counsel filed a Motion for Continuance,[4] stating that, "[a]s Counsel undersigned has only recently been retained, additional time is needed in order to prepare a defense on behalf of the Respondent." The ALJ denied the request and on May 8, 2003, conducted a hearing in Tallahassee, Florida.

On June 25, 2003, the ALJ issued an R. D. & O. in which he held that "the reason for [Jackson's] termination was his refusal to ignore his rest period by committing to a delivery deadline that would violate Federal regulations." R. D. & O. at 6-7. The ALJ recommended reinstatement and compensatory damages, and allowed Jackson to file a petition for attorney's fees (and Butler opportunity to respond). R. D. & O. at 11-12. On August 20, 2003, the ALJ issued a Recommended Supplemental Decision and Order Awarding Attorney's Fees (S. D. & O.) ordering Butler to pay Jackson's counsel $24,395.00 in fees and $3,101.61 for expenses, plus interest.

Both the R. D. & O. and the S. D. & O. are before the Board pursuant to the automatic review procedures of the STAA found at 29 C.F.R. § 1978.109(a) (2003).[5]

ISSUES

We consider the following issues:

1. Whether the ALJ erred in denying the Respondent's request for a continuance.

2. Whether the Complainant established, by a preponderance of the evidence, that the Respondent fired him for engaging in activity that the STAA protects.

3. Whether, in addition to reinstatement, the Complainant is entitled to damages for back pay, his 401K, health benefits, emotional distress and interest, and in the amounts the ALJ awarded.

4. Whether the Complainant is entitled to his attorney's fees and costs, and in the amounts the ALJ awarded.

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[4] On the previous day Butler's counsel had sent, by facsimile, an informal request for a continuance.

[5] This regulation provides, "The [Administrative Law Judge's recommended] decision shall be forwarded immediately together with the record to the Secretary for review by the Secretary or his or her designee."

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor's jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) has been delegated to the Administrative Review Board ("ARB" or "Board"). *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2003).

When reviewing STAA cases the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich,* 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . .." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *See Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

I. Denial of Request for Continuance

The Respondent's Brief in Opposition to the R. D. & O. addresses only the denial of its motion to continue the hearing on the merits. We consider that issue first.

By notice dated March 25, the case was set for an evidentiary hearing on May 8, 2003. On the eve of trial, May 1, Butler's newly-obtained counsel requested a continuance, citing as the only reason that he needed more time to prepare. The ALJ denied the request.

The STAA requires that the evidentiary hearing be "conducted expeditiously," and that the final decision of the Secretary be issued within 120 days thereof. 49 U.S.C.A. § 31105(b)(2)(C); *see also* 29 C.F.R. § 1978.109(c). Under the ALJ rules of procedure, "Continuances will only be granted in cases of prior judicial commitments or undue hardship, or a showing of other good cause." 29 C.F.R. § 18.28(a); *see also* 29 C.F.R. § 1978.106(a) (ALJ rules of procedure at 29 C.F.R. Part 18 apply to STAA hearings unless Part 1978 specifically provides otherwise). Furthermore, "[e]xcept for good cause, requests for continuances must be filed within fourteen (14) days prior to the date set for hearing." 29 C.F.R. § 18.28(b). We review the ALJ's rejection of the motion to continue under the abuse of discretion standard. *Malpass v. General Elec. Co.,* 85-ERA-38, 39, slip op. at 7 (Sec'y Mar. 1, 1994).

The ALJ weighed the Respondent's delay in obtaining counsel against the remedial nature of the STAA (e.g., the terminated employee's right to an expedited

hearing and reinstatement), and denied the continuance. *See* R. D. & O. at 4 n.2. *See also Malpass*, slip op. at 8. On appeal, the Respondent now raises an additional reason for the continuance, to secure the testimony of Deborah Hawkins: "Ms. Hawkins' testimony was not available precisely because the Court denied Butler's motion for continuance." Respondent's Brief at 3, 6. However, even now, Butler does not say what efforts were made to secure Hawkins' testimony. Butler makes no proffer that her testimony would have contradicted Jackson's contention that she fired him for refusing a trip that would have put him in violation of the hours of service rules, and therefore fails to show that her absence was prejudicial.

Under these circumstances, we cannot say the ALJ's exercise of discretion in denying the continuance was legal error.

II. Merits of the Complaint

The STAA, 49 U.S.C.A. § 31105(a)(1), provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," § 31105(a)(1)(A), or "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." § 31105(a)(1)(B)(i).

In November 2001, the following DOT hours of service regulation was in effect. 49 C.F.R. § 395.3(a) (2001) provided that "[N]o motor carrier shall permit or require any driver used by it to drive nor shall any driver drive . . . (1) More than 10 hours following 8 consecutive hours off duty." Jackson's argument is that he was fired for complaining that, after taking his mandatory eight-hour break, he could not go to Avery Island, Louisiana, to pick up a load and deliver it to Tifton, Georgia, within ten hours; i.e., he was given an order that violated the STAA.

To prevail under the STAA, a complainant must prove by a preponderance of the evidence that he or she engaged in protected activity, that the employer was aware of the activity, that the employer took adverse employment action against the complainant, and that there was a causal connection between the protected activity and the adverse employment action. *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003); *Assistant Sec'y & Helgren v. Minnesota Corn Processors, Inc.*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003).

Jackson did not refuse to make the run, but he engaged in protected activity when he complained to Hawkins that the assignment from Avery Island to Tifton to arrive by noon the next day violated the hours of service rules. Butler subjected Jackson to adverse action when it fired him. Therefore, the merits issue before us is whether Jackson proved by a preponderance of the evidence that Butler fired him because he engaged in protected activity. The ALJ concluded that "the reason for his termination was his refusal to ignore his rest period by committing to a delivery deadline that would violate Federal regulations." R. D. & O. at 6-7. We concur and adopt that finding, not just because there

is substantial evidence for the ALJ's determination; Jackson's testimony is undisputed. He was the only person who provided evidence about the events of November 19, 2001.[6] There is nothing in the record indicating that he was fired for any reason other than his complaint to Hawkins.

Two witnesses appeared on behalf of Butler. Lecial Hollis, Butler's safety supervisor, testified about Butler's operational procedures but did not provide any testimony about the decision to terminate Jackson's employment. Sherry Guffey, a former dispatcher at Butler, testified that she had no personal knowledge of the events surrounding Jackson's firing but she assumed that he was fired for refusing the load. Tr. 229-230. She also testified that Jackson could not have made the noon delivery to Tifton, Georgia. Tr. 215. However, there were at least three individuals (Hawkins, Miller, and Pinkerton) involved in the termination of Jackson's employment. By not presenting testimony by or evidence from anyone involved in Jackson's firing, Butler failed to provide proof that it fired Jackson for a legitimate, nondiscriminatory reason.

We concur with and therefore adopt the ALJ's conclusions regarding the other arguments Butler presented regarding the termination of Jackson's employment. Butler's contention that Jackson was interested in returning home to watch a football game is speculative; he denied it. R. D. & O. at 6. Butler claimed that it had a policy prohibiting drivers from driving empty trucks and that Jackson violated that policy by returning empty to Cairo. "In the trucking industry refusing any load is a major offense." Complainant's Exhibit (CX) 20. Such a policy could not provide a legitimate, non-discriminatory reason for Jackson's termination if its enforcement would have caused him to violate a DOT regulation. *See* R. D. & O. at 6.

Because the record supports the ALJ's factual findings and legal conclusions, and because Butler's brief before the Board does not contest those facts or conclusions, we affirm the ALJ's ruling that Butler violated the STAA when it fired Jackson on November 19, 2001.

III. **Remedies**

We turn next to the remedies. Under 49 U.S.C.A. § 31105(b)(3)(A),

> If the Secretary [of Labor] decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to—
>
> (i) take affirmative action to abate the violation;
>
> (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

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[6] Jackson also presented testimony from his wife, Carol Jackson, who testified to his mental state, and economist Dr. Michael J. Piette, who provided an analysis of his economic losses. Tr. 115-130, 131-144, CX 50.

(iii) pay compensatory damages, including back pay.

A. Reinstatement

At the hearing, Jackson requested reinstatement to his former position at Butler. Tr. 234. Under the STAA, reinstatement is an automatic remedy for a successful complainant. 49 U.S.C.A § 31105(b)(3)(A)(ii). Reestablishment of the employment relationship is a usual component of the remedy in discrimination cases. *McCuistion v. Tennessee Valley Auth.*, 89-ERA-6, slip op. at 23 (Sec'y Nov. 13, 1991) (under analogous provisions of the Energy Reorganization Act (ERA)). We affirm the ALJ's order that Butler reinstate Jackson to his previous position under the same terms, conditions and privileges of employment with no loss of seniority or benefits. R. D. & O. at 6.

B. Back pay

The Complainant is also entitled to back pay. 49 U.S.C.A § 31105(b)(3)(A)(iii). "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." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992), citing *Hufstetler v. Roadway Express, Inc.*, 85-STA-8, slip op. at 50 (Sec'y Aug. 21, 1986), *aff'd sub nom., Roadway Express, Inc., v. Brock*, 830 F.2d 179 (11th Cir. 1987). Following the practice that the Secretary initiated, this Board calculates back pay awards to successful whistleblower complainants in accordance with the make whole remedial scheme embodied in § 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. (West 1988). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997) (citing *Loeffler v. Frank*, 489 U.S. 549 (1988)). Therefore, Jackson must be restored to the economic position he would have occupied but for Butler's discriminatory act. *Id.* (citing *Hoffman v. W. Max Bossert and Boss Insulation and Roofing, Inc.*, ARB No. 96-091, ALJ No. 94-CAA-004, slip op. at 2 (ARB Jan. 22, 1997)).

Jackson testified that, after his release from employment with Butler, he began working for Celadon Trucking Services, in January 2002. Jackson's position with Celadon ended in February 2002. He was thereafter unemployed until July 2002, when he obtained a position with Arnold Transportation Services at equal or better pay than Butler. R. D. & O. at 7.

The ALJ awarded Jackson back pay in the amounts of (1) $762.54 per week for the period of unemployment between his termination from Butler and his employment at Celadon; (2) $289.85 per week (the difference between his salary at Butler and his salary at Celadon) for the three weeks he was employed at Celadon; and (3) $289.85 per week for his period of unemployment between February and July 2002. R. D. & O. at 8. The ALJ arrived at the latter $289.85 amount by concluding that Jackson should not receive the full $762.54 of lost salary from Butler because "Complainant's loss of his job with Celadon was the result of a dispute between Complainant and Celadon" and "[r]espondent was not an insurer of Complainant's future employment." R. D. & O. at 8-9. We disagree.

The purpose of a back pay award is to restore the complainant to the position he would have been in but for the respondent's discriminatory act. The law requires a complainant to make reasonable efforts to mitigate damages, *see, e.g., Johnson v. Roadway Express*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), and the record does not clearly indicate that Jackson failed to exercise reasonable diligence to retain his position at Celadon. *See Hobby v. Georgia Power Co.,* ARB Nos. 98-166, -169, ALJ No. 90-ERA-30, slip op. at 21-22 and authorities cited therein (ARB Feb. 9, 2001), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490, 2002 WL 31556530 (table) (11th Cir. Sept. 30, 2002). Furthermore, "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Clay v. Castle Coal & Oil Co., Inc.*, 90-STA-37, slip op. at 2 (Sec'y June 3, 1994) (citing *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-261 (5th Cir. 1974)). We believe the correct calculation for back wages simply reduces Jackson's loss by the amount he made while employed with Celadon and then eliminates back wages entirely at the point he became Arnold's employee. The effect of our ruling is to increase the amount of back pay the ALJ awarded for Jackson's period of unemployment between February and July of 2002.

Jackson earned $34,763.00 with Butler between January 1, 2001 and November 16, 2001. Tr. 121. Johnson's expert witness on economic losses, Michael J. Piette, annualized that figure and concluded that Jackson would have earned $39,652.00 for the calendar year 2001. CX 50. His losses for the period between November 16, 2001 and December 31, 2001 were therefore calculated at $4,889.00. For the year 2002, the economist also used Jackson's estimated earnings for 2001 ($39,652.00) and subtracted $20,222.00, the amount Jackson earned that year from Celadon and Arnold, to establish a loss of $19,430.00 for 2002. Tr. 122. We therefore concur with Piette's calculations and award Jackson $24,318.00 in back pay. *See* CX 50, Pp. 2-3 and Appendix B.

C. 401(k)

"[T]erms and privileges of employment" include retirement plans. *See Spinner v. Yellow Freight Sys., Inc.*, 90-STA-17, slip op. at 27 (Sec'y May 6, 1992), *aff'd sub nom. Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195 (2d Cir. 1993). Jackson participated in a 401(k) retirement plan while employed at Butler. Butler contributed $0.25 on the dollar for the six percent of his salary Jackson contributed to the plan. Tr. 71. Since Jackson was not eligible to participate in Arnold's 401(k) plan until July 1, 2003, we agree with the ALJ's conclusion that Jackson is entitled to reimbursement for these lost 401(k) contributions. See R. D. & O. at 9. Piette calculated Jackson's 401(k) losses at $644.00. We award the full amount,[7] which did not continue to accrue after Jackson began participating in a similar plan that Arnold provided. *See* Complainant's Brief at 22.

[7] The R. D. & O. lists the full amount as $645.00. This is a typographical error.

D. Health Benefits

As part of the aforementioned "make whole" remedy, Jackson is entitled to reimbursement for costs incurred as a result of the loss of benefits under Butler's health insurance plan. We concur with the ALJ's conclusion that Jackson should be reimbursed for the actual and direct expenses resulting from his loss of Butler's health plan. R. D. & O. at 9. The ALJ accepted Piette's calculation of Jackson's loss at $45.00 per week for the out-of-pocket expense Jackson was paying under his plan with Arnold, and awarded $8,254.00 through the date of the decision, June 25, 2003, plus three weeks to effect reinstatement. Updating the ALJ's award to account for the passage of time since issuance of the R. D. & O., we increase the amount awarded by $2,610.00 ($45.00 x 58 weeks) for a total of $10,864.00. This amount will continue to accrue at the rate of $45.00 per week until Jackson is reinstated.

In addition to the actual and direct expenses resulting from the loss of his health plan, Jackson also requests reimbursement for "out of pocket expenses for medical care for himself and his disabled wife that were previously covered by Respondent's policy, but are no longer covered under Complainant's present policy." R. D. & O. at 9. These consisted of mail order drugs, methadone, chiropractor visits and Remicade for rheumatoid arthritis. *Id.* at 9-10. The ALJ noted that Butler did not challenge Piette's estimates of Jackson's indirect health care plan losses already incurred. We therefore hold that Jackson is entitled to the $3,277.00 in indirect losses that the ALJ awarded. *Id.* at 10. The ALJ would not predict Jackson's future out-of-pocket expenses that could be incurred after issuance of the R. D. & O. *Id.*[8] While we are also unwilling to accept Piette's estimate of those future expenses, we do recognize that some of those out-of-pocket expenses may have accrued since issuance of the R. D. & O. Accordingly, Jackson may request modification of this Final Decision and Order to establish actual indirect health care plan losses that he experienced between June 25, 2003 and the issuance of this Final Decision and Order.

E. Emotional distress.

An employer who violates the STAA may be held liable to the employee for compensatory damages for mental or emotional distress. 49 U.S.C.A § 31105(b)(3)(A)(iii). *See also Moyer v. Yellow Freight Sys., Inc.*, 89-STA-7, slip op. at 23-24 n. 16 (Sec'y Aug. 21, 1995), *rev'd on other grounds sub nom. Yellow Freight Sys., Inc. v. Reich*, 103 F.3d 132 (6th Cir. 1996) (table). The ALJ found that Jackson was entitled to $4,000.00 for emotional distress, based upon his testimony and that of his wife. R. D. & O. at 10-11. We note that, although the testimony was unsupported by professional counseling or medical evidence, it was also unrefuted. We accept the ALJ's award under the substantial evidence test.

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[8] In his discussion of the out-of-pocket expenses the ALJ stated that he was unwilling to predict Jackson's "future direct expenses," R. D. & O. at 10, which suggests that he was referring back to his discussion regarding the actual and direct expenses from loss of the health plan. This appears to be a typographical error, for in the previous paragraph he referred to these out-of-pocket expenses as "indirect health plan losses." *Id.*

F. Interest

Jackson is entitled to pre-judgment interest on the award of damages, calculated in accordance with the IRS penalty rate at 26 U.S.C.A. § 6621 (West 2002). *See, e.g., Drew v. Alpine, Inc.*, ARB No. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003); *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 17-18 (ARB Mar. 29, 2000).

IV. Attorney's Fees and Costs

Where, as here, a STAA complainant has prevailed on the merits, he or she may be reimbursed for litigation costs, including attorney's fees. 49 U.S.C.A. § 31105(b)(3)(B) provides in part that "the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint."

Jackson requested $40,794.01 in attorney's fees and costs. *See* Complainant Jackson's Petition for Attorneys' Fees and Litigation Costs at 1. The ALJ reviewed Jackson's petition and concluded that the fee requested for Jackson's senior attorney, Richard Johnson, was unreasonable: "I concur with Respondent that 178.5 hours and involvement of two attorneys on a case of this nature is excessive." S. D. & O. at 1. Accordingly, he disallowed Johnson's fee in its entirety. *Id.* at 2. For the reasons that follow, we hold this was error.

A. Legal standards

In reviewing attorney's fee awards, the ARB follows the fee-shifting precedents of the Supreme Court and other federal courts. *See, e.g., Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 98-STA-8, slip op. at 5 (ARB May 29, 2003); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 12 (ARB Nov. 13, 2002).

Once it is established that the plaintiff has prevailed, *Hensley v. Eckerhart*, 461 U.S. 424 (1983) provides the framework for deciding the merits of fee petitions. The *Hensley* Court said, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433. This lodestar "calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Id.* The district court may reduce the award for inadequately documented hours, or for hours that were not "reasonably expended" due to overstaffing or inexperience. As in private practice, "[h]ours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority." 461 U.S. at 434 (emphasis in original).

The petitioner bears the burden of proof that claimed hours of compensation are adequately demonstrated and reasonably expended. *Cf. Webb v. Dyer County Bd. of Educ.*, 471 U.S. 234, 242 (1985); *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899 (D.C. Cir. 1998) (under vexatious litigation statute, 28 U.S.C.A. § 1927 (West 1994); *Hotel & Restaurant Employees Local 25 v. JPR, Inc.*, 136 F.3d 794 (D.C. Cir. 1998)

(ERISA, 29 U.S.C.A. § 1132(g)(2) (West 1999). Under *DiFilippo v. Morizio*, 759 F.2d 231, 235-36 (2d Cir. 1985), the "reasonableness of the time expended must . . . be judged by standards of the private bar" so that "hours claimed are to be examined in detail with a view to the . . . value of the work product to the client in light of the standards of the private bar." Faced with an unreasonable number of hours, the court can reduce the lodestar fee by a reasonable amount or percentage, without performing an item-by-item accounting. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999) (First Amendment); *Case v. Unified Sch. Dist. No. 233, Johnson County, Kan.*, 157 F.3d 1243, 1250-51 (10th Cir. 1998) (decision to remove book from school).

Courts will permit a partner/associate, or first/second chair staffing, especially at trial. *Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 358-59 (8th Cir. 1997) (Title VII). However, they will exclude time that is duplicative, e.g., where two or more attorneys unnecessarily attend hearings and depositions, and perform the same tasks. *Cf. Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1077 (10th Cir. 1998) (Title VII; stating rule, but allowing fees in this instance); *Hudson v. Reno*, 130 F.3d 1193, 1209 (6th Cir. 1997) (even though defense had four lawyers, court found that plaintiff's lawyer's time with one assistant was excessive); *Shrader v. OMC Aluminum Boat Group., Inc.*, 128 F.3d 1218, 1221-22 (8th Cir. 1997) (Title VII; disallowing half hours of second chair); *Luciano v. Olsten Corp.*, 109 F.3d 111 (2d Cir. 1997) (ADA; excluding additional trial attorney). Also excluded is time attributed to office conferences, supervision and training, and review and revision, since such time is not normally billable to private clients.

The other element of the lodestar calculation (besides time reasonably expended) is the reasonableness of plaintiff's attorney's hourly rates. In *Blum v. Stenson*, 465 U.S. 886 (1984), the Court held that fees under 42 U.S.C.A. § 1988 (West 2003) were to be "calculated according to the prevailing market rates in the relevant community." 465 U.S. at 895. It is the petitioners' burden "to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895 n.11. *See also Eddleman v. Switchcraft, Inc.*, 965 F.2d 422, 424 (7th Cir. 1992) (market rate is rate that lawyers of similar ability and experience in community normally charge their paying clients for type of work in question). In deciding the "prevailing market rates in the relevant community," the court may consider, among other things, rates plaintiff's attorney charges paying clients, *Connolly v. National Sch. Bus. Serv., Inc.*, 177 F.3d 593, 596 (7th Cir. 1999) (Title VII); *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 555 (7th Cir. 1999) (FLSA); *Cooper v. Casey*, 97 F.3d 914, 920-21 (7th Cir. 1996) (§ 1983 inmate), and rates other lawyers in the community charge for similar work. *Spegon*, 175 F.3d at 555; *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1312 (7th Cir. 1996) (school desegregation; billing rates of other attorneys in same firm not irrelevant).

Finally, the party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. As we have said, "[A] complainant's attorney fee petition must include adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area, as well as records identifying the date, time, and duration necessary to accomplish

each specific activity, and all claimed costs." *Gutierrez,* slip op. at 13 (internal quotations and citations omitted).

B. Application

We begin with the reasonableness of the Complainant's counsel's hourly rates, because that has bearing on how we view the number of hours expended. Attorney Richard Johnson petitioned for approval of an hourly rate of $325 for his work. He submitted declarations from himself and two other lawyers, stating that he "should" receive $325 per hour based upon his relevant experience. Exhibits to Complainant Jackson's Petition for Attorneys' Fees and Litigation Expenses (Fee Petition), Exhibits L, P, Q. These declarations fall somewhat short of evidencing a market rate for labor and employment law or comparable work in North Florida. While Attorney Johnson's work on this case was excellent and he is highly experienced in his field, the best evidence before us of the reasonable value of his services is the decision of the District Court for the Northern District of Florida, furnished as Fee Petition Exhibit D, *Creel et al. v. Washington County Bd. Of Cty. Comm'rs,* Case No. 5:99cv296-SPM (Nov. 6, 2002), awarding him fees at the rate of $300 an hour. Consequently, that is the rate we award.

With regard to the appropriate hourly rate for Attorney Lisa Lambert, we have considered the Fee Petition, Exhibits L, M, P, Q, R, which note that $175 per hour is at the high end of the market for someone of her two years' experience, the court's discussion and award in *Creel,* and the perception of the ALJ in this case that Attorney Lambert was experienced enough to have handled this matter, including the hearing on the merits, without assistance; indeed, that is the basis upon which the ALJ denied Attorney Johnson's fees. S. D. & O. at 2. Accordingly, we determine that $175 is a reasonable hourly rate, given her ability and experience. However, as we observe below, because we have accepted a senior associate's hourly rate, downward adjustments must be made for time that shows review and revision of her work, supervision and training, duplication of effort, and legal research on topics in her area of presumed expertise.

We turn to the other element of the lodestar calculus, the number of hours reasonably expended. Based on the precedents we have cited, there is no bar to several lawyers being compensated in the same case. Properly managed, a team approach can result in economic efficiencies; a client has the benefit of a senior lawyer overseeing the case, taking important depositions and trying the case, while an associate at a more economical hourly rate handles paper discovery, motions and brief writing. In this case, Attorney Lambert participated both as an associate and as trial co-counsel. Attorney Johnson did the opening statement and the examination of the Complainant's damages expert, Piette. Attorney Lambert handled the direct examination of the Complainant and his wife, and the cross-examination of Lecial Hollis and Sherry Guffey. The time for both lawyers was reasonably expended.

However, some of Attorney Johnson's time was spent providing in-house supervision and training of Attorney Lambert that is not properly awardable against Butler. For example, Attorney Johnson's time entries show meetings with Attorney Lambert and reviews of her work on: 5/21/02; 5/22/02; 6/20/02; 9/19/02; 4/22/03; 4/25/03; 5/2/03; 5/3/03; 5/14/03; and 7/11/03. See Fee Petition, Exhibit B. Those entries represent 5.6 hours of a total of 39.10 hours, or about 15 per cent of Attorney Johnson's

time. Because the entries occasionally reflect more than one function (e.g., preparation and a meeting on 5/2/03), rather than trying to perform surgical excisions, we make a 15 per cent reduction in his total time, to 33.2 hours at a rate of $300, for a total award for Attorney Johnson's fees of $9,960.00.

Attorney Lambert's time sheets show a telephone call with Jackson about an unrelated automobile accident (11/4/02); legal research of about 20.8 hours on STAA, but also procedural matters and fee awards (6/13/02; 2/25/03; 2/27/03; 3/18/03; 4/17/03; 4/25/03; 5/27/03; 5/28/03; 6/10/03; 7/7/03; 7/12/03); routine administrative tasks (3/20/03; 5/3/03); and numerous entries that include meetings with Attorney Johnson or submission of her work for his review that we regard as not chargeable to the losing party (e.g., 5/28/02; 6/9/02; 6/24/02; 3/9/03; 4/25/03/; 4/30/03; 5/2/03; 5/4/03; 5/5/03; 5/7/03; 6/12/03; 7/7/03; 7/10/03; 7/11/03). See Fee Petition, Exhibit C. Because most of these entries are batched with other, properly chargeable work, we cannot simply delete them. Instead we make a downward adjustment of Attorney Lambert's time of 15 per cent, from 139.40 hours to 118.5 hours at $175 per hour, for a total award for Attorney Lambert's fees of $20,737.50.

Finally, we consider costs. We agree with the ALJ that in-house reproduction, postage and express package costs are generally considered part of attorney overhead and are built into the hourly rates. See S. D. & O. at 2. *See also Eash v. Roadway Express*, ARB No. 02-008, ALJ No. 2000-STA-47, slip op. at 8-9 (ARB June 27, 2003). We affirm the award of $2,510.00 for expert fees and $591.61 for court reporter fees. We also grant the request for hearing exhibit enlargements in the amount of $37.63 and outside copying charges of $165.64.

The total award for attorney's fees and costs is $34,002.38.

CONCLUSION AND ORDER

1. Butler shall immediately reinstate Jackson to his previous position as a truck driver under the same terms, conditions and privileges of employment, with no loss of seniority or benefits.

2. Butler shall expunge from Jackson's personnel records any references to his termination of employment on November 16, 2001.

3. Butler shall pay Jackson $24,318.00 in back pay.

4. Butler shall pay Jackson $644.00 for losses under his 401k plan.

5. Butler shall pay Jackson $10,864.00 for the actual and direct expenses resulting from his loss of Butler's health plan. This amount will continue to accrue at the rate of $45 per week until Jackson is reinstated. Butler shall also pay Jackson $3,277.00 for his out-of-pocket indirect losses. In addition, Johnson may request modification of this Final Decision and Order to establish actual indirect health care plan losses that accrued between June 25, 2003, and the issuance of this Final Decision and Order.

6. Butler shall pay Jackson $4,000.00 in compensatory damages for emotional distress.

7. The above sums are subject to pre-judgment interest in accordance with 26 U.S.C.A. § 6621.

8. Butler shall pay Jackson's attorneys $34,002.38 in fees and costs. Jackson's attorneys shall have fifteen days from receipt of this Order in which to file a fully supported attorney's fee petition, with simultaneous service on opposing counsel. Thereafter, Butler shall have ten days from receipt of the fee petition to file a response.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge