U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

NOAH JERRY ARTRIP, **CASE NO. 89-ERA-23**

COMPLAINANT, **DATE: September 27, 1996**

v.

EBASCO SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

DECISION AND ORDER

In a Decision and Order of Remand (D. O. R.) dated March 21, 1995, the Secretary of Labor found that Respondent, Ebasco Services, Inc. (Ebasco), violated the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and remanded the case to the Administrative Law Judge (ALJ) for a recommendation on the appropriate remedy. Now pending before the Board are the ALJ's Recommended Decision and Order on Damages (R. D.), dated January 26, 1996, and the Order Recommending the Granting of Complainant's Motion for Reconsideration (O. R.), dated March 15, 1996. As explained below, we agree in part and modify in part.[2/]

BACKGROUND

In the interim decision the Secretary found that Ebasco violated the ERA when it singled out and refused to refer Complainant, Noah Jerry Artrip (Artrip) to another employer, Texas Utilities,

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[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under this statute and the implementing regulations to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the ARB now issues final agency decisions.

[2/] The ARB has reviewed the interim decision of the Secretary and the entire record in this case in rendering this final decision.

for possible employment as a thermolag inspector. D. O. R. at 10-14. Under the circumstances Ebasco, as the discriminating employer, bore the burden of proving that Artrip would not have been hired even if he had been referred for that job.[3/] Since Ebasco failed to meet its burden, the Secretary concluded that back pay relief is available. *See* D. O. R. at 16.

It is undisputed that of the fourteen co-workers who were referred by Ebasco for the thermolag job, only six were hired. Transcript of June 27, 1995 (T.) at 13-14. All six were eventually laid off from that job. T. at 9. The ALJ determined that Artrip is entitled to back pay for the period from January 20, 1989, the date the first of the six commenced working in the thermolag job, until November 22, 1989, when the sixth person was laid-off. R. D. at 5-7. Based on an agreed monthly salary and stipulated amount of fringe benefits, the ALJ found Artrip's gross back pay over the ten month period to be $34,549.00. R. D. at 7. Excluding Artrip's unemployment compensation, the ALJ calculated his interim earnings as $4,172.00 and ordered Ebasco to pay $30,377.00 with interest as provided in 26 U.S.C. § 6621 (1988). O. R. at 2. He also ordered Ebasco to pay Artrip's expenses in the amount of $2,644.29 and upheld the parties' stipulation regarding other expenses, attorney fees, and costs. R. D. at 2, 8.

DISCUSSION

A. Stipulation

As an initial matter, we agree with the ALJ's decision to accept the parties' stipulation regarding attorney fees, expenses, and interest. *See* Exhibit J-1; *Tritt v. Fluor Constructors, Inc.*, Case No. 88-ERA-29, Sec. Dec., Mar. 16, 1995, slip op. at 4 (unless contrary to public policy, parties' stipulation will be enforced). We note that although the agreement indicates that payment is contingent upon judicial affirmance of the Secretary's March 21, 1995 decision, the Secretary's decision becomes a final and enforceable order in the event that a timely appeal is not taken. *See Frady v. TVA*, Case No. 92-ERA-19, Sec. Dec., June 7, 1996, slip op. at 2-3 n.3.

B. Back Pay Period

The parties argue that the ALJ erred in determining the time period over which back pay should be calculated. Artrip contends that he is entitled to back pay from the date he was laid off by Ebasco, December 9, 1988, until Ebasco complies with this order. Ebasco argues that the period of back pay liability should end on March 3, 1989, when five of the six inspectors were laid off. Alternatively, Ebasco argues that the principles of *Dougherty v. Barry*, 869 F.2d 605, 614 (D.C. Cir.

[3/] *Cf., e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Doll v. Brown*, 75 F.3d 1200, 1202 (7th Cir. 1996) (if plaintiff proves that employer violated law, employer can avoid having to pay damages only by proving that plaintiff was not made worse off by the violation); *Alexander v. City of Menlo Park*, 787 F.2d 1371, 1375 (9th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987), citing *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981) (where plaintiff proves unlawful discrimination in hiring or promotion, it is defendant's burden to prove that plaintiff would not have been hired or promoted absent discrimination).

1989), should be applied to reduce the award for the period from March 3 to November 22 to reflect the odds that Artrip would not have been the one person retained.

Artrip's argument that the back pay period should commence on December 9, the date of his layoff, is without merit. We agree with the ALJ that back pay commences on January 20, 1989, the date the first person hired began working in the thermolag job. Back pay awards are based on what the complainant would have earned had he not been subjected to unlawful retaliation. *Blackburn v. Martin*, 982 F.2d 125, 129 (4th Cir. 1992), *aff'g Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Sec. Dec., Oct. 30, 1991, slip op. at 4; *Nichols v. Bechtel Constr., Inc.*, Case No. 87-ERA-0044, Sec. Dec., Nov. 18, 1993, slip op. at 9-10, *aff'd*, 50 F.2d 926 (11th Cir. 1995); *Pillow v. Bechtel Constr., Inc.*, Case No. 87-ERA-35, Sec. Dec., Jul. 19, 1993, slip op. at 25, *appeal docketed*, No. 94-5061 (11th Cir. Oct. 13, 1994). Ebasco unlawfully interfered with Artrip's prospects of being hired into the thermolag job that commenced on January 20, 1989. Artrip's layoff on December 9 was not unlawful, and he would not have earned wages from December 9 to January 20 regardless. *Cf. Asst. Sec. and Phillips v. MJB Contractors*, Case No. 92-STA-00022, Sec. Dec., Oct. 6, 1992, slip op. at 3 (back pay not appropriate during time that complainant would have been laid off absent discrimination).

The period of an employer's liability ends when the employee's employment would have ended for reasons independent of the violation found. *Blackburn*, 982 F.2d at 129; *Blake v. Hatfield Elec. Co.*, Case No. 87-ERA-4, Sec. Dec., Jan. 22, 1992; slip op. at 14; *Francis v. Bogan, Inc.*, Case No. 86-ERA-8, Sec. Dec., Apr. 1, 1988, slip op. at 6. However, a complainant working on a fixed term contract may be entitled to back pay beyond that term if he shows that his employment would have continued after the contract ended. *See Blackburn*, 982 F.2d at 129-30; *Holley v. Northrop Worldwide Aircraft Serv.*, 835 F.2d 1375, 1377 (11th Cir. 1988); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 (11th Cir. 1982).

The ALJ applied the principle expressed in *Nichols*, slip op. at 10, and assumed that Artrip would have been the last worker laid off in the thermolag job on November 22, 1989. R. D. at 7. He also found no back pay due thereafter because Artrip did not prove economic injury as defined in the case law past that date. We agree.

In arguing that the back pay period ends on March 3, 1989, Ebasco claims that the one inspector who remained until November 22 had more experience than any of the other inspectors, as well as Artrip. Although Ebasco claims that the evidence is uncontroverted on this point, the record does not clearly establish even the identity of the one inspector who remained. The parties have presented conflicting information in their testimony and briefs before both the ALJ and the Secretary. *Compare, e.g.*, Respondent's April 12, 1996 Brief at 4 (McMananman) with Complainant's October 1, 1995 Brief at 5-6 (Irish) with Artrip's testimony, T. at 85-86 (Cornett, Jackson, Penhale, Rush, Stevens). *See also* Respondent's September 13, 1989 Brief at 24 and Respondent's April 5, 1990 Reply at 8. Respondent's proposed exhibit (RX 1) was never admitted into evidence at the June 1995 hearing, and Complainant's Exhibit 27 is inconclusive.

We also reject Ebasco's argument that *Dougherty* should be applied to reflect that Artrip had only a one-sixth chance of remaining past March 3. In *Dougherty* eight firefighters charged and

proved discrimination when two other firefighters were promoted. The court ruled that it was improper to award back pay to each plaintiff as if each had received the promotion, and the court, therefore, ordered a pro rata scheme. The record in *Dougherty* was clear that only two of the plaintiffs would and could have been promoted. The record here does not show that only one worker could possibly have continued past March 3. In view of the uncertainties in this record, we reject Ebasco's argument and apply the presumption expressed in *Nichols*. Back pay awards are, at best, approximate and any "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-61 (5th Cir. 1974).

For the reasons expressed in *Blackburn* and *Holley*, we agree that the back pay period does not extend past November 22, 1989. The Secretary and the court of appeals rejected Blackburn's argument that his employer's liability should extend past the termination date of the contract he was working on when he was unlawfully terminated. 982 F.2d at 129; slip op. at 6. Even though several of his co-workers did subsequently go to work on another project with the employer, they were not transferred or given any preferences. Blackburn's expectations of future work were merely speculative and insufficient to support an extension.

In *Holley*, after the fixed-term contract ended, 100% of his co-workers were either rehired by the employer or hired by another contractor on referral by the employer. The court still found insufficient evidence to extend the back pay period, noting that every co-worker was fired when the contract terminated and their reemployment was merely speculative.

Similarly, in this case all of the workers hired for the thermolag job were laid off by November 22, 1989. The mere fact that four were subsequently rehired is insufficient to extend Ebasco's back pay liability. There is no evidence of direct transfers or promises of future work. Since no other arguments are raised regarding the amount of gross back pay, we uphold the ALJ's finding of $34,549.00. R. D. at 7.

C. Deductions from gross back pay

1. Unemployment compensation

The ALJ initially found that Artrip had interim earnings in the amount of $18,913.00. Upon reconsideration, the ALJ deducted unemployment compensation that Artrip received during the period and found interim earnings of $5,009.00. Ebasco contends first that it was procedurally improper for the ALJ to reconsider his initial decision. It urges the Board to accept instead the ALJ's first ruling as a proper exercise of his discretion. In support, Ebasco relies on case law of the United States Court of Appeals for the Fifth Circuit, where an appeal of this case would lie, holding that it is within the court's discretion to determine whether unemployment compensation should be deducted. We reject the argument.

There is a split among the circuits in cases arising under other discrimination laws over whether deducting unemployment compensation should be prohibited or left to the discretion of the trial court. *See, e.g., Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104, 1113-14 (8th Cir.

1994), *cert. denied*, 115 S. Ct. 355 (1994). The Fifth Circuit follows the minority view that deduction of unemployment benefits, and application of the collateral source rule, is discretionary.[4/] No court, however, has specifically addressed this point under the ERA or similar whistleblower provisions. The Secretary of Labor consistently has held that unemployment compensation is not deductible from back pay awards in whistleblower cases. *See, e.g., Moyer v. Yellow Freight Sys., Inc.*, Case No. 89-STA-7, Sec. Dec., Aug. 21, 1995, slip op. at 11; *Clay v. Castle Coal and Oil Co., Inc.*, Case No. 90-STA-37, Sec. Dec., June 3, 1994, slip op. at 4 n.3, *vacated on other grounds*, No. 94-4125 (2d Cir. Apr. 26, 1995); *Williams v. TIW Fabrication & Mach., Inc.*, Case No. 88-SWD-3, Sec. Dec., June 24, 1992, slip op. at 12-13. The ALJ, who issues only recommended decisions, was bound to follow controlling decisions of the Secretary. 29 C.F.R. § 24.6(a) (1995)*; Dysert v. Westinghouse Elec. Corp.*, Case No. 86-ERA-39, Sec. Dec., Oct. 30, 1991, slip op. at 3. Thus, it is immaterial whether the ALJ erred in reconsidering his ruling because, as a matter of Secretarial precedent, Artrip's unemployment benefits are not deductible from gross back pay.[5/]

2. Pension contributions

Citing *Smith v. OPM*, 778 F.2d 258 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986), and *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175 (5th Cir. 1992), Ebasco argues that a sum of $9,478.00 earned by Artrip during the relevant period but allotted by him to a self-employment pension plan should be deducted. Artrip counters that the "pension benefits" are not deductible because they were provided by a collateral source. The ALJ did not discuss the issue.

We agree with Ebasco but not on the basis of the collateral source rule. The Secretary has held that pension income received by a plaintiff during the back pay period from another source, as opposed to earnings from alternative interim employment, are not deducted from back pay awards. *Moyer*, slip op. at 11-12 n.7. This, however, is not a case in which the complainant received pension benefits as assistance during the back pay period based on contributions made during previous employment. The sum at issue here is compensation paid to Artrip by a subsequent employer for services actually performed during the back pay period. In addition, Ebasco has agreed to restore fringe benefits to which Artrip would have been entitled in the thermolag job during that same time period. We conclude that Ebasco is entitled to an offset for this sum. *Cf. EEOC v. Riss Int'l Corp.*, 35 F.E.P. 423 (W.D. Mo. 1982) (gross back pay logically offset by actual benefits received from interim employment).

[4/] The collateral source rule provides that a plaintiff's recovery is not to be reduced by benefits received for his or her loss from another source. *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983).

[5/] We also note that there is no evidence that the benefits were a disincentive for Artrip to use reasonable diligence in finding replacement employment, or that the contributions to the fund from which the benefits derived were made solely by Ebasco, or that Artrip would be receiving a double recovery, or any other reason that might arguably support a ruling in Ebasco's favor.

The parties do not otherwise object to the ALJ's calculation of deductions. Thus, we add $9,478.00 to the sum of $5,009.00 and multiply by .833 for a total offset of $12,068.00.[6/] The total amount of back pay is $34,549.00 minus $12,068.00 or $22,481.00.

D. Interest

As more fully explained in *Blackburn*, slip op. at 19, and *Wells v. Kansas Gas & Electric Co.*, Case No. 85-ERA-0022, Sec. Dec., Mar. 21, 1991, slip op. at 17 n.6, the ALJ properly ruled that interest accrues at the rate provided in 26 U.S.C. § 6621.

E. Expenses

Dr. Richard Bean, an associate professor of economics, prepared a report and testified at the June 27, 1995 hearing regarding Artrip's lost earnings. The ALJ included Dr. Bean's bill of $1,200.00 as expenses reasonably incurred by Artrip. Ebasco contends that the ALJ erred in awarding Artrip any fee for Dr. Bean's services because his calculations were based merely on assumptions, were inaccurate, and were not credited by the ALJ.

The ERA specifically provides that upon finding a violation the Secretary, at the request of the complainant, shall assess against the respondent expert witness fees "reasonably incurred, as determined by the Secretary." 42 U.S.C. § 5851(b)(2)(B). It was not unreasonable in this case for Artrip to enlist an expert to make computations and projections based on his theory of back pay liability, even though his theory was ultimately rejected. The Board concludes that Dr. Bean's fee for nine hours of consultation, preparation, and testimony is reasonable.

ORDER

Accordingly, it is **ORDERED** that:

1. Ebasco pay Artrip the sum of $22,481.00 in back wages from January 20, 1989, through November 22, 1989, with interest thereon calculated in accordance with 26 U.S.C. § 6621.

2. Ebasco pay Artrip the sum of $ 2,644.29 for expenses incurred in connection with this hearing.

3. Ebasco pay Artrip other expenses incurred in accordance with the parties' stipulation.

4. Ebasco pay the Garde Law Office attorney fees and costs in accordance with the parties' stipulation.

[6/] These figures are based on Artrip's income tax returns, which do not reflect the precise amount he would have earned during the ten-month period of the thermolag job. To approximate, the ALJ reasonably multiplied Artrip's yearly interim earnings by the decimal .833 (the ratio of ten months to twelve months). R. O. at 7; O. R. at 1-2.

5. Artrip is permitted a period of twenty days from receipt of this Decision and Order in which to submit any supplemental petition for fees and expenses incurred subsequent to the period covered by the stipulation. Ebasco may respond to any petition within twenty days of its receipt.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member