U.S. Department of Labor

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

In the Matter of:

GALE COOK,

COMPLAINANT,

v.

GUARDIAN LUBRICANTS, INC.,

RESPONDENT.

ARB Case No. 97-055

ALJ Case No. 95-STA-43

DATE: May 30, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

SECOND DECISION AND ORDER OF REMAND

The Secretary issued a decision in this case, which arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. § 31105 (West 1994), on May 1, 1996. In that Decision and Order of Remand (D.O.R.), the Secretary held that Guardian Lubricants, Inc. (Guardian) had discriminated against Gale Cook (Cook) in violation of the STAA. Specifically, the Secretary concluded that Guardian was liable under the STAA both for its termination of Cook and, as a joint employer, for its knowing participation in retaliatory conduct against Cook by Conex Freight Systems, a freight company that contracted with Guardian for Cook's trucking services. The case was therefore remanded to the Administrative Law Judge (ALJ) for a determination concerning Complainant's complete remedy in this case.

Following a hearing on the issue of damages, the ALJ issued a Recommended Decision and Order Awarding Damages (R.D.O.A.D.) on January 27, 1997, in which he concluded that Guardian was liable for back pay in the amount of $3,174.74 plus pre-judgment interest at the rate provided by 26 U.S.C. § 6621. The ALJ also determined that Guardian was not liable for compensatory damages claimed by Cook in connection with filing a petition for bankruptcy. R.D.O.A.D. at 6-7. Further, the ALJ found that Cook was not seeking reinstatement with Guardian and that Cook had not claimed any costs or attorney's fees in connection with the adjudication of this complaint. R.D.O.A.D. at 6-8. Following a review of the record in this case, we conclude that the ALJ's analyses regarding the reinstatement issue and the extent of Guardian's liability for back pay, R.D.O.A.D. at 4-8, are flawed. We further conclude that this

case must be remanded to the ALJ for further proceedings related to the reinstatement issue and to the extent of Guardian's liability for back pay.

DISCUSSION

I. Findings of facts and conclusions of law -- standard of review

Pursuant to the regulation implementing the STAA at 29 C.F.R. § 1978.109(c)(3) (1996), if the factual findings rendered by the ALJ are supported by substantial evidence on the record considered as a whole, we are bound by those findings. Aside from the exceptions noted herein, the factual findings rendered by the ALJ are in accord with the standard provided by Section 1978.109(c)(3) and we adopt those findings. Pursuant to the Administrative Procedure Act, in reviewing the recommended disposition of the ALJ, we act, as the designee of the Secretary, with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C. § 557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec. Dec., Apr. 7, 1992 (applying analogous employee protection provision under the Energy Reorganization Act, 42 U.S.C. § 5851); *see* 29 C.F.R. § 1978.109(b) (1996); *see generally Mattes v. United States Department of Agriculture,* 721 F.2d 1125, 1128-30 (7th Cir. 1983)(relying, *inter alia*, on *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano,* 621 F.2d 829 (6th Cir. 1980) and cases cited therein (sustaining rejection of ALJ's recommended decision by higher level administrative review body). In our review of this case, we have carefully considered the legal conclusions rendered by the ALJ and we indicate the basis for our disagreement with certain of those conclusions in the analysis that follows. *See Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389-90 (8th Cir. 1995); *cf. McCann*, 621 F.2d at 831-32 (examining rationale provided by administrative review body for its rejection of ALJ's decision).

II. Period of liability for back pay

A. Absence of reinstatement offer

Initially, we address the issue of whether Cook has validly waived reinstatement to his former position with Guardian. In *Dutile v. Tighe Trucking, Inc.,* Case No. 93-STA-31, Sec. Dec., Oct. 31, 1994, the Secretary addressed the circumstances in which a complainant's statement that he would not seek reinstatement, in the absence of an unconditional offer of reinstatement, would be binding. *Dutile*, slip op. at 3-5. The Secretary cited previous Secretarial decisions holding that back pay continued to accrue until the employer had complied with the damages order. *Id.* The Secretary noted that the date of such compliance, including the proffering of an unconditional offer of reinstatement, was the proper point at which accrual of back pay would terminate. *Dutile*, slip op. at 3-4; *see Francis v. Bogan, Inc.,* Case No. 86-ERA-8, Sec. Dec., Apr. 1, 1988, slip op. at 6 (stating that "the NLRB has 'consistently . . . discounted statements, prior to a good faith offer of reinstatement, indicating unwillingness to accept reinstatement.' *Hein[rich] Motors, Inc.,* 166 N.L.R.B. No. 88 (1967), 1967 CCH NLRB 21,654,

at 28,297."). As stated in *Dutile,* whether the employee declines or accepts the reinstatement offer, the period of back pay ends at the time the offer is made. *Id.* To this end, the Secretary discouraged reliance on waivers by complainants that were made in the absence of a *bona fide* reinstatement offer. *Id.; see Ass't Sec'y and Polewsky v. B & L Lines, Inc.,* Case No. 90-STA-0021, Sec. Dec., May 29, 1991, slip op. at 2-4.

In the instant case, the ALJ took action that is at odds with the Secretarial directive in *Dutile.* Following receipt of the case on remand, the ALJ ordered Cook to advise whether he would be seeking reinstatement, pursuant to the Secretary's May 1, 1996 order in this case.[1] *See* May 10, 1996 Notice of Hearing on Remand at 1; July 18, 1996 Notice Concerning the Scheduling of a Second Hearing on Damages; R.D.O.A.D. at 7. The ALJ thus improperly placed the onus on Cook to resolve the reinstatement issue in the absence of an offer by Guardian.

The ALJ also erred under *Dutile* in determining that Cook's statements constituted a binding waiver of his right to seek reinstatement. R.D.O.A.D. at 7. In a letter responding to the ALJ's May 10, 1996 order, Cook stated that he was then employed at a trucking company in Denver, Colorado and preferred to remain at that employment, "unless certain circumstances change." ALJX 4 at 1.[2] Cook then stated that Guardian had not offered him reinstatement and added that he believed that the issue of compliance with pertinent state and federal rules and regulations in such employment would be problematic. *Id.*; *see* R.D.O.A.D. at 7. At the damages hearing, Cook testified that he would be interested in working for Guardian, "As long as I got the damages first, and there was no retaliation ...." T. at 222. Cook then elaborated on why he thought he would be the subject of retaliation and, noting that he was not working at a trucking industry job at the time of the hearing, stated that he would return to Guardian to work if offered such employment. T. at 223-24; *see* T. at 266-67, 313-19.

The foregoing evidence does not establish that Cook did or would decline an unconditional offer of reinstatement. Furthermore, Cook's testimony does not demonstrate that the employment relationship has suffered irreparable damage, which would militate against reinstatement. *Dutile*, slip op. at 4-5. In addition to the reasoning provided by the Secretary in the *Dutile* and *Francis* decisions, numerous decisions of the United States Courts of Appeals provide support for the conclusion that Cook's July 30, 1996 statements do not constitute a valid waiver of his right to seek reinstatement.

In *Heinrich Motors, Inc. v. N.L.R.B.,* 403 F.2d 145 (1968), the Court of Appeals for the Second Circuit held that remarks indicating a disinterest in reinstatement are "of little value in

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[1] The Board understands that in seeking this information from Cook the ALJ was merely attempting to facilitate the calculation of damages, but in so doing, the ALJ failed to appreciate that he was wrongfully relieving Guardian of its obligation to make a *bona fide* offer of reinstatement.

[2] The following abbreviations are used herein for references to the record: Transcript of December 9, 1996 hearing, T.; ALJ Exhibit, ALJX.

determining whether there has been a withdrawal from the labor market or a waiver of reinstatement when they are made before the Company has offered reinstatement." 403 F.2d at 150. Further, the court, quoting from the National Labor Relations Board decision in *Heinrich Motors, Inc.,* stated that such premature statements made by an employee "'may reflect only a momentary state of mind that is subject to change; . . . and the discriminatee's expression may have been made in the heat of dissatisfaction with his treatment by [the employer].'" 403 F.2d at 150, *quoted in E.E.O.C. v. Sandia Corp.,* 639 F.2d 600, 627 (10th Cir. 1980).

Similarly instructive is the decision of the United States Court of Appeals for the Sixth Circuit in *N.L.R.B. v. Seligman and Associates, Inc.,* 808 F.2d 1155 (1986), *cert. denied,* 484 U.S. 1026. In that decision, the Sixth Circuit Court of Appeals affirmed the holding of the National Labor Relations Board, in *Seligman and Associates, Inc.,* 273 N.L.R.B. 1216 (1984), that statements made by an employee in the absence of an unconditional offer of reinstatement did not constitute a valid waiver of the right to seek reinstatement. 808 F.2d at 1162-64. In reaching its conclusion, the Sixth Circuit court discussed the reasoning of the *Heinrich Motors* and *Sandia Corp.* courts, and the Board's holding in the *Seligman* case that "'only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled.'" 808 F.2d at 1162 (quoting *Seligman & Assoc., Inc.,* 273 N.L.R.B. at 1217). The Sixth Circuit court also noted that the National Labor Relations Board had consistently held "that an offer of reinstatement must be specific, unequivocal, and unconditional in order to toll the backpay period." 808 F.2d at 1163 [citations omitted].

Based on the foregoing authorities, we conclude that the ALJ mistakenly found that Guardian's back pay liability was tolled by Cook's July 30, 1996 letter responding to the ALJ's pre-hearing order. We therefore hold that Guardian's back pay liability continues to accrue until Guardian has extended an unconditional offer of reinstatement to Cook.[3] *See Ass't Sec'y and Polewsky,* slip op. at 2-4.

B. Mitigation of back pay losses

[3] We note that Guardian did not avail itself of the opportunity to offer Cook reinstatement between the time the Secretary's order mandating reinstatement was issued on May 1, 1996 and the ALJ's order requiring a response from Cook was issued on May 10, 1996. *See* ALJX 4 at 1. There is also no suggestion that Guardian took the opportunity to discuss Cook's possible interest in reinstatement, despite the parties' communications regarding Cook's estimate of his damages prior to the hearing on damages. *See* T. at 283-85, 322-23; ALJX 4; *cf. Dutile*, slip op. at 1, 5 (employer held liable on a continuing basis following invalid waiver of reinstatement, Secretary noted that employer had tendered a check for back pay damages plus interest, which had been declined by the complainant); *see generally Spinner v. Yellow Freight System, Inc.,* Case No. 90-STA-17, Sec. Dec., May 6, 1992, slip op. at 21-25 (discussing immediate effect of Secretary's reinstatement order), *aff'd*, *Yellow Freight System, Inc. v. Martin,* 983 F.2d 1195 (2d Cir. 1993).

Cook was terminated by Guardian on November 15, 1994. R.D.O.A.D. at 2; *see* D.O.R. at 7 n.6.[4] During the period between Guardian's termination of Cook and the hearing on damages in this case, Cook worked as a truck driver for various trucking companies. R.D.O.A.D. at 2-4; T. at 233-57, 259-67; ALJX 4, 6, 7, 8. Cook also worked at one point as a part-time general laborer and, at the time of the December 1996 hearing on the damages issue, Cook was working in a temporary, part-time maintenance position, twenty to thirty hours a week. R.D.O.A.D. at 3-4; T. at 201, 257. As noted by the ALJ, a wrongfully discharged STAA complainant is required to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment, *Hufstetler v. Roadway Express, Inc.,* Case No. 85-STA-8, Sec. Dec., Aug. 21, 1986, slip op. at 49-58*; see also Ford v. Nicks,* 866 F.2d 865 (6th Cir. 1989); *Iron Workers Local 118 v. N.L.R.B.,* 804 F.2d 1100, 1102 (9th Cir. 1986); *Rasimas v. Michigan Dep't of Mental Health,* 714 F.2d 614 (6th Cir. 1983), *cert. denied,* 466 U.S. 950 (1984), *cited in Office of Federal Contract Compliance Programs v. Washington Metropolitan Area Transit Auth.,* Case No. 84-OFC-8, Asst. Sec. Dec., Aug. 23, 1989, slip op at 4; *Office of Federal Contract Compliance Programs v. Cissell Manufacturing Co.,* Case No. 87-OFC-26, Ass't Sec. Dec., Feb. 14, 1994, slip op. at 15-16. *See* R.D.O.A.D. at 4-5.

As also noted by the ALJ, the burden is on an employer to establish any failure by a wrongfully discharged complainant to properly mitigate damages through the pursuit of alternative employment, *Lederhaus v. Donald Paschen,* Case No. 91-ERA-13, Sec. Dec., Oct. 26, 1992, slip op. at 9-10 (citing *N.L.R.B. v. Browne*, 890 F.2d 605, 608 (2d Cir. 1989) for the proposition that, once the gross amount of back pay at issue is established by a complainant, the burden shifts to the respondent to establish any amounts by which the back pay due is to be reduced); *see Kawasaki Motors Mfg. Corp. v. N.L.R.B.,* 850 F.2d 524, 527 (9th Cir. 1988); R.D.O.A.D. at 4-5. Consistent with the foregoing principles, the ALJ properly concluded that Guardian had failed to demonstrate that Cook had not taken reasonable steps to secure alternative employment during the post-termination period preceding the damages hearing on December 9, 1996. R.D.O.A.D. at 4-5. The mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee act reasonably to maintain such employment. *Hufstetler,* slip op. at 52-53; *Office of Federal Contract Compliance Programs v. Exide Corp.*, Case No. 84-OFC-11, Ass't Sec. Dec., Apr. 30, 1991, slip op. at 11-18. A failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period. *Knickerbocker Plastic Co., Inc.,* 132 NLRB 1209, 1215

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[4] In addition to the back pay period following Guardian's termination of Cook, Guardian is liable for losses to Cook's income that Cook suffered during the October 14 - November 14, 1994 period, when Guardian knowingly participated with joint employers Seattle Freight and Conex in the assignment of less lucrative freight assignments for Cook. D.O.R. at 35; *see* R.D.O.A.D. at 5-6. The back pay due for this four week period is included in the back pay calculation provided at n.13, *infra*.

(1961), *cited in Brady v. Thurston Motor Lines, Inc.,* 753 F.2d 1269, 1279-80 (4th Cir. 1985).

Although neither the Secretary nor this Board has specifically addressed the issue of what level of employee misconduct leading to termination from interim employment will serve to toll back pay liability, extensive case law on this issue has been developed by the National Labor Relations Board and the United States Courts of Appeals. According to that body of case law, only if the employee's misconduct is gross or egregious, or if it constitutes a wilful violation of company rules,[5] will termination resulting from such conduct serve to toll the discriminating employer's back pay liability. *Thurman v. Yellow Freight Systems, Inc.,* 90 F.3d 1160, 1169 (6th Cir. 1996)(employee's discharge from interim employment due to a motor vehicle accident not deemed a failure to mitigate because there was no showing that the employee "acted intentionally"); *see Patterson v. P.H.P. Healthcare,* 90 F.3d 927, 937 (5th Cir. 1996)(holding that employee had breached duty to mitigate when terminated from interim employment because of excessive absences, excessive use of company telephone for personal calls and conflicts with another staff member, citing *Brady,* 753 F.2d at 1277).

The ALJ erroneously found that Guardian's liability for back pay ended when Cook was terminated by May Trucking Company, in January 1995. R.D.O.A.D. at 5-6. The ALJ found that Cook's testimony clearly indicated that he was terminated "either for cause or in retaliation for activities protected under the STAA." R.D.O.A.D. at 6. The ALJ erroneously concluded that in either case Guardian's liability for back pay ended on January 15, 1995, when Cook was terminated from employment with May Trucking Company.[6] *Id.*

We agree with the ALJ's conclusion regarding Cook's termination from employment with May Trucking to the extent that we find that the evidence is inconclusive regarding the precise circumstances under which Cook departed that employment.[7] The burden to establish

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[5] The *Brady* court declined to follow the National Labor Relations Board's rule that, when an employee is terminated from interim employment for misconduct, only misconduct that demonstrates moral turpitude will constitute a breach of the employee's duty to mitigate damages. *Brady*, 753 F.2d at 1279 (addressing NLRB decision in *Mid-America Machinery Co.,* 258 NLRB 316, 319 (1981)). We find the *Brady* court's rule to be the more appropriate test for determining the reasonableness of an employee's mitigation efforts.

[6] The ALJ cited no legal authority in support of this proposition. R.D.O.A.D. at 6. We note that the principle stated by the ALJ is contrary to the common law principle that a tortfeasor who injures a plaintiff is not relieved of liability by the subsequent independent and similarly tortious and injurious act of another tortfeasor, *see Restatement (Second) of Torts § 879* (1979).

[7] A review of Cook's testimony regarding the circumstances of his termination from May Trucking Company as a whole, *see* 20 C.F.R. § 1978.109(c)(3) (1995), indicates various factors that may have contributed to his termination there. T. at 233-41; *see* T. at 259-61. Specifically, Cook stated that, on the occasion when he was unable to complete a lengthy run -- the round trip from a

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that Cook failed to exercise proper care and diligence in the retention of alternative employment is on Guardian; any failure of proof on this issue thus operates to Guardian's detriment. *See Browne,* 890 F.2d at 608; *Hoffman v. W. Max Bossert,* ARB Case No. 96-091, Jan. 22, 1997, slip op. at 4-5; *see also Artrip v. Ebasco Servs., Inc.,* Case No. 89-ERA-23, ARB Dec., Sept. 27, 1996, slip op. at 4 (quoting *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 260-61 (5th Cir. 1974) for principle that uncertainties in back pay determination must be resolved against the discriminating employer); *but see Minette Mills, Inc.,* 316 N.L.R.B. 1009 (1995)(in National Labor Relations Act cases, if evidence establishes that employee has voluntarily quit interim employment, the burden shifts to NLRB General Counsel to show that decision to quit was reasonable). The record does not show that Cook was terminated from May Trucking for engaging in conduct that was gross or egregious, or a wilful violation of company rules. We therefore conclude that Guardian's liability for back pay was not extinguished by Cook's termination by May Trucking on January 15, 1995.

We now turn to the question of whether Cook took reasonable steps to retain his employment with other employers during the remainder of the back pay period that is before us, *i.e.,* through December 9, 1996, the date of the damages hearing. This analysis was not conducted by the ALJ in the recommended decision. After leaving May Trucking Company in January 1995, Cook was next employed by Kidimula International, Inc., beginning on April 7, 1995. ALJX 6 at 27; T. at 241-42. The evidence also indicates that the truck driving work done by Cook for Kidimula International consisted of short distance hauling around the port of Seattle, similar to the work Cook had done for Guardian. ALJX 4 at 3; ALJX 6 at 63; R.D.O.A.D. at 2-3.[8] Cook left the Kidimula employment on April 24, 1995. ALJX 6 at 63; *see* R.D.O.A.D. at 3. A review of the hearing transcript in the Kidimula case, ALJX 6, indicates that Cook failed to take reasonable steps to retain his employment with Kidimula. Although Cook testified that he was terminated because of his concern about accepting overweight shipments, he acknowledged that he failed to identify and discuss any of his concerns with Kidimula at that

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[7](...continued)
terminal in Oregon to Los Angeles -- without driving a number of hours that would violate the Department of Transportation "fatigue rule," he dropped off his freight at a May Trucking terminal, from which another driver hauled the freight the remainder of the assigned run. T. at 237-39. After that incident, Cook discussed the "fatigue rule" with the safety director and operations supervisors at May Trucking, who asked that Cook drive thereafter as a member of a team, in which he would share driving responsibilities for long distance assignments with another driver. T. at 237-40. In summing up the basis for his termination by May Trucking, Cook repeatedly referred to the company's decision that he work as a team driver as "the problem" that lead to the termination. T. at 236, 237; *see also* T. at 238, 240. Cook also testified, "After that load was split off, they wanted me to go onto a team. Plus at that time I wanted -- I requested some time off. I believe it was a day or - we're supposed to be allowed seventy-two hours to turn down a load or a dispatch." T. at 240.

[8] ALJX 6 refers to the transcript of the October 16, 1995 hearing in the STAA complaint that was filed by Cook against Kidimula, *Cook v. Kidimula International, Inc.,* Case No. 95-STA-44, which was admitted into evidence at the damages hearing in the instant complaint. T. at 214-15.

time.[9] ALJX 6 at 47-55. The foregoing circumstances, in which there was no discussion with the employer regarding the employee's concerns, contrast with instances in which the Secretary has held that a wrongfully discharged employee could justifiably leave interim employment based on a *bona fide* dispute over unreasonable working conditions.

We find the decision in *Hufstetler* particularly instructive, as it involves an employee who, like Cook, was working in interim employment in the trucking industry. In rejecting the respondent's argument that the complainant in *Hufstetler* had improperly left two interim jobs with trucking companies, the Secretary relied on the principle that a wrongfully discharged employee can permissibly leave employment on the basis of unreasonable working conditions. *Hufstetler*, slip op. at 53 (citing *Brady,* 753 F.2d 1269). Specifically, the Secretary concluded that the evidence clearly indicated that the first interim employer requested that Hufstetler violate a Department of Transportation regulation and concluded that Hufstetler had provided a sound reason to the second interim employer for his refusal to accept an assignment. *Hufstetler*, slip op. at 53-56.

In contrast, the evidence in this case does not indicate that Cook was asked to violate applicable regulations or that Cook provided the basis for his refusal to accept the assignment to Kidimula. ALJX 6 at 47-55. While the complainant in *Hufstetler* acted in a manner that served the purpose of the employee protection provision of the STAA, Cook, by failing to even mention the overweight issue with Kidimula, did not.

We accordingly conclude that Cook did not take reasonable steps to retain his employment with Kidimula. Consequently, Guardian's liability for back pay must be reduced, for the remainder of the back pay period, by no less than $200.00 per week, which is the amount that Cook would have earned had he remained at Kidimula.[10] *See Knickerbocker Plastic Co., Inc.,* 132 NLRB at 1215.

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[9] The Kidimula transcript shows that Cook had been working at Kidimula for less than three weeks when he delivered a load that turned out to be overweight. ALJX 6 at 27, 33-34. Cook did not inform anyone that the shipment was overweight. *Id.* at 41, 48. When the dispatcher assigned him another shipment Cook refused the shipment, *id.* at 42, handed the keys to Kidimula's owner, *id.* at 75, 98, and walked out. *Id.* at 92-93. Kidimula's owner delivered the rest of Cook's shipments that day and Cook never returned to work at Kidimula. ALJX 6 at 75.

[10] Kidimula did not provide a W-2 form or other documentation regarding Cook's earnings while employed there. *See* ALJX 4 at 3; R.D.O.A.D. at 3. Although Cook's pay agreement with Kidimula was for a flat 40% of proceeds, ALJX 6 at 24, 85, which was more than his overall pay scale at Guardian, RX 2, Cook estimated that he had made a total of $600.00, or $200.00 per week, for his work at Kidimula. ALJX 6 at 63. We note that Cook's three weeks of employment at Kidimula occurred during the seasonal decline in shipping activity around the Seattle port. *See* p. 10, *infra*. Guardian offered no evidence to dispute Cook's estimate.

Cook next began work at Long Haul, Inc., another trucking company. T. at 242; ALJX 4 at 3,6; R.D.O.A.D. at 3. As the ALJ found, R.D.O.A.D. at 3, Cook worked at Long Haul for approximately three months. T. at 242-49; ALJX 4. Cook testified that he worked as a team driver at Long Haul but he had requested assignment to solo runs. T. at 243-44. Cook said that he sought the solo runs because he "wasn't getting any sleep" in the truck while the other team member was driving on overnight assignments; Cook also testified regarding other objections to team driving. T. at 243, 245, 248, 249; *see* T. at 264-65. Cook said that a problem arose on his last run as a team driver for Long Haul with the other team member, based on an overweight shipment accepted by the other driver. T. at 245-46, 264-65. After that incident, Cook said that he was taken off that team assignment and told that no solo driver assignments were available. T. at 242-49.

Contrary to the ALJ's suggestion, R.D.O.A.D. at 3, 7, the evidence does not indicate that Cook was terminated from Long Haul because of a culpable inability on Cook's part to get along with the other driver on his team. The circumstances under which Cook left Long Haul do not indicate any misconduct on Cook's part. Indeed, the only evidence regarding any disagreement between Cook and the other team driver indicates that Cook was dissatisfied when he received a traffic ticket for an overweight shipment that the other driver had accepted. T. at 265. Certainly, similar to the complainant in *Hufstetler*, Cook was acting within his rights in expressing concern about such circumstances. Furthermore, Cook provided ample justification regarding his other objections to team driving. Guardian has thus failed to demonstrate that Cook's termination from employment with Long Haul constituted a failure on Cook's part to properly mitigate his damages.

Cook left employment at Long Haul during the last week of August 1995. T. at 246-47; R.D.O.A.D. at 3. Cook was next employed by Labor Ready, Inc., as a part-time general laborer. T. at 249; ALJX 4 at 7; R.D.O.A.D. at 3. That position paid considerably less than Cook had earned as a truck driver. ALJX 4; R.D.O.A.D. at 3. At that time, Cook had worked for three trucking companies and had applied at a number of others. R.D.O.A.D. at 5. Cook testified at the damages hearing that he had difficulty finding jobs in the trucking industry around Seattle, because he wanted to "drive by the rules" and because it was known in the Seattle port area that he had filed two complaints against employers under the STAA. T. at 315-20; *see* T. at 266-67. The mitigation of damages doctrine permits an employee who has taken reasonable steps to obtain substantially equivalent employment but has been unsuccessful in securing such employment "after a reasonable period of time . . .[to] consider 'other available, suitable employment at a somewhat lower rate of pay,'" *Office of Federal Contract Compliance Programs v. Louisville Gas & Electric Co.,* Case No. 88-OFC-12, Asst. Sec. Dec., Jan. 14, 1992, slip op. at 4 (quoting *N.L.R.B. v. Madison Courier, Inc.,* 472 F.2d 1307, 1320 (D.C. Cir. 1972), *following N.L.R.B. v. Southern Silk Mills, Inc.,* 242 F.2d 697 (6th Cir. 1957), *cert. denied*, 355 U.S. 82); *see Brady,* 753 F.2d at 1273-76.[11]

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[11] Cook, who has not been represented by counsel in the adjudication of this case, indicated in (continued...)

In addition, both Cook and Guardian's owner, Carol Guddat, testified at the damages hearing that there is a seasonal decline in shipping activity around the Seattle port, beginning around February and lasting until May. T. at 305-06, 319. In view of "the individual characteristics of the claimant and the job market," *Rasimas*, 714 F.2d at 624, Cook did not act unreasonably in turning to the less lucrative part-time employment with Labor Ready. Furthermore, he acted properly in leaving that employment to work at a higher paying job with Navaho Trucking, in Denver, in March 1996, R.D.O.A.D. at 3, 5. *See DiSalvo,* 568 F.2d at 598-99; *Florida Steel Corp.,* 234 N.L.R.B. at 1101.

Cook worked as a truck driver for Navaho Trucking from approximately March 23, 1996 until August 6, 1996. T. at 249-50, 254; *see* R.D.O.A.D. at 3. Cook testified that, while working at Navaho, he had been concerned about Navaho's failure to respond to his requests for repairs to the truck he was assigned at Navaho. T. at 250-52. Cook testified that there were problems with "the federal motor carrier rules and regulations and company policy. It just seems like it's things that they don't want to discuss, and if you do bring it up, why - bring it forward, you've got problems." T. at 250-51. On his last day at work, Cook testified, his routine inspection of the truck indicated that repairs had not been done as he had requested and, concluding that the truck was unsafe to drive, he declined to drive it. T. at 251-53. These circumstances are also similar to those in *Hufstetler,* and we thus conclude that Cook did not breach his duty to mitigate his damages in the circumstances leading to his termination from Navaho Trucking.

After leaving Navaho in early August 1996, Cook again turned to less lucrative part-time work, this time in building maintenance. T. at 241-258; *see* R.D.O.A.D. at 2-3, 4-5. In view of the foregoing employment history, we conclude that Cook did not breach his obligation to mitigate damages by seeking such employment, *see Louisville Gas & Electric Co.,* slip op. at 4 and cases there cited.

III. Calculation of back pay

The record before us provides a basis for the calculation of back pay only through December 9, 1996, the date of the damages hearing in this case. On remand, the ALJ, following receipt of evidence concerning Cook's back pay losses and mitigation of same for the period beginning with December 10, 1996, and based on whether and when Guardian extends an unconditional offer of reinstatement to Cook, should determine the amount of back pay due for the period beginning December 10, 1996. As discussed *supra*, Guardian's back pay liability will continue to accrue until Guardian extends an unconditional offer of reinstatement to Cook.

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[11](...continued)
his testimony at the damages hearing that he was unaware of the legal standard applicable to the calculation of back pay owed a wrongfully discharged complainant and did not realize that his back pay award would be diminished by the employment he was engaged in during the interim period. T. at 217-18, 281-83; *see* R.D.O.A.D. at 4.

To determine the amount of back pay due for the period currently before us, *i.e.,* October 14, 1994 through December 9, 1996, we rely on the ALJ's calculation of Cook's average weekly wage with Guardian, which is supported by the evidence of record and is in accordance with pertinent law. *See, e.g., Hoffman*, slip op. at 4. As found by the ALJ, Cook's projected wages, had he continued to work with Guardian under the nondiscriminatory conditions of his employment prior to October 14, 1994, must be calculated based on the weekly average of $349.06. R.D.O.A.D. at 2, 5, 6 n.7; ALJX 5. The duration of the back pay period before us is 112 weeks.[12] After deducting income from interim employment, *see Hoffman,* slip op. at 4-5, offset by a minimum of $200.00 per week beginning with April 25, 1995, *see Knickerbocker Plastic Co.,* 132 NLRB at 1215, Guardian's liability for back pay due Cook for the period through December 9, 1996 amounts to $11,690.35.[13]

IV. Proceedings on remand

On remand, the ALJ must provide an opportunity for the parties to present evidence concerning Cook's interim earnings and mitigation of back pay losses for the period beginning December 10, 1996. The ALJ should also determine whether Cook has incurred any additional

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[12] In addition to the period following Cook's November 15, 1994 termination, Guardian is also liable for losses to Cook's income that were suffered as the result of discriminatory freight assignments during the approximate four week period of October 14 through November 14, 1994. *See* n.4 *supra.* Back pay calculations must be reasonable and supported by the evidence of record, but need not be rendered with "unrealistic exactitude." *Pettway*, 494 F. 2d at 260. Particularly in view of the irregular work schedules involved in most of Cook's truck driving employment during the back pay period, we conclude that the use of calendar weeks, rounded to the closest full week, as the basic computation unit is reasonable.

[13] During 53 weeks of the back pay period following Cook's termination at Kidimula on April 24, 1995, Cook was unemployed or was earning less that $200.00 per week. ALJX 3, 4; T. at 257. For those 53 weeks, the projected weekly Guardian earnings of $349.06 are thus reduced by $200.00 per week under the *Knickerbocker Plastic* rule, yielding a weekly net back pay amount of $149.06 due. That figure calculates to a total of $7,900.18 for the 53 week period. The remaining 59 weeks of the back pay period are weeks which either precede the April 24, 1995 termination from Kidimula International or in which Cook made in excess of $200.00 per week. The earnings for those weeks total $16,803.84 ($629.30 --Guardian/Seattle Freight, 10/14/94-11/14/94; $831.00 -- May Trucking; $600.00 -- Kidimula International; $6,843.54 -- Long Haul, Inc.; $7,900.00 -- Navaho Trucking). ALJX 3,4; T. at 250; R.D.O.A.D. at 2-4; *see Marcus v. United States Environmental Protection Agency,* Case No. 92-TSC-5, Sec. Ord., Sept. 27, 1994, slip op. at 2-3. Calculated at $349.06 per week, the projected earnings from Guardian for this 59 week period total $20,594.54, which, when reduced by $16,803.84 in interim earnings, yields a net back pay amount for those 59 weeks of $3,790.70. The total net back pay for the period of October 14, 1994 through December 9, 1996 is thus $11,690.88 ($7,900.18 + 3,790.70). The unemployment benefits and lottery winnings Cook received in 1995, ALJX 4, are not properly deductible from the back pay award. *See Marcus,* slip op. at 2-3; *Ass't Sec'y and Phillips v. MJB Contractors,* Case No. 92-STA-22, Sec. Dec., Oct. 6, 1992, slip op. at 2-4.

costs or attorney's fees as a result of the proceedings on remand to be conducted pursuant to this decision and order.

ORDER

Accordingly, it is ORDERED that this case be remanded to the Administrative Law Judge for proceedings consistent with this opinion. Further, Respondent Guardian Lubricants, Inc., is ordered to:

1) Offer Complainant Gale Cook reinstatement to his former position;

2) Pay Complainant Gale Cook back pay for the period beginning October 14, 1994 and continuing until such time as Respondent extends an unconditional offer of reinstatement to Complainant; for the period October 14, 1994 through December 9, 1996, the amount due totals $11,690.88;

3) Pay interest on all amounts due, at the rate provided at 26 U.S.C. § 6621 (1988), to accrue from the dates that each salary payment, minus the applicable interim income, would have been paid had Complainant Gale Cook not been discriminated against by Respondent Guardian Lubricants, Inc. beginning October 14, 1994;

4) Pay any costs and attorney's fees incurred in the proceedings to be conducted pursuant to this decision and remand order;

5) Refrain from engaging in or knowingly participating in discriminatory conduct toward Complainant Gale Cook, including derogatory communications regarding Complainant that would have the effect of interfering with his future employment in the trucking industry in the Seattle area.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member