U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ASSISTANT SECRETARY FOR OCCUPATIONAL SAFETY AND HEALTH,

PROSECUTING PARTY,

and

MICHAEL BECKER,

COMPLAINANT,

v.

SMITHSTONIAN MATERIALS, LLC,

RESPONDENT.

ARB CASE NO. 2021-0048

ALJ CASE NO. 2013-STA-00050
ALJ PAUL R. ALMANZA

DATE: October 18, 2023

Appearances:

For the Prosecuting Party:
Seema Nanda, Esq.; Edmund Baird, Esq.; Heather Phillips, Esq.; Mark Lerner, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
Mark P. Murphy, Esq.; Milwaukee, Wisconsin

Before PUST and WARREN, Administrative Appeals Judges

DECISION AND ORDER ON RECONSIDERATION

PUST, Administrative Appeals Judge:

In its current posture, this case involves an appeal of the damages awarded to Complainant Michael Becker (Complainant or Becker) after his employment was unlawfully terminated by Respondent Smithstonian Materials, LLC (Respondent or Smithstonian). The case arose under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) and its applicable implementing regulations.[1] On June 17, 2021, a United States Department of Labor (Department) Administrative Law Judge (ALJ) issued a Decision and Order on Remand (D.O.R.) awarding Becker $132,248.12 in back pay with interest.[2] For the following reasons, we affirm the ALJ's determinations regarding Becker's entitlement to an award of back pay and the ALJ's reliance upon the prevailing legal test defining the parameters of a back pay award. In our Decision and Order issued on August 10, 2021, we reversed the ALJ's calculation error made in applying the prevailing test and reduce the back pay award to $45,245.94. In this Decision and Order on Reconsideration, we have restated the Decision and Order in full and made changes related only to our order that interest will accrue on the principal amount owed until the date the award is paid.

BACKGROUND

1. Becker's Employment with Smithstonian

Becker worked for Smithstonian, a landscaping and snow removal company owned by James Smith (Smith) and located in Wisconsin, beginning as a field supervisor in April 2009.[3] During his employment with Smithstonian, Becker had a commercial driver's license and his duties included operating company trucks, supervising landscaping jobs, and inspecting equipment.[4]

On November 29, 2010, Smith directed Becker to transport a load of gravel using a 1992 dump truck owned by Smithstonian.[5] During this assignment, Becker learned that the truck lacked current registration and had difficulty steering the

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1 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2023).

2 D.O.R. at 20.

3 Decision and Order Awarding Damages (D.&O.) at 2 (issued on July 31, 2015); Joint Stipulations and Document Authentication and Admissibility submitted prior to May 2014 hearing (2014 Joint Stipulations or 2014 Jt. Stip.) at 2, ¶ 9.

4 D.&O. at 2-3.

5 *Id.* at 3.

vehicle when the power steering failed, which required Becker to drive it back to Smithstonian at less than 10 miles per hour with hazard lights activated.[6] Becker complained to Smith about the truck's mechanical problems and lack of registration and, with Smithstonian's mechanic, advised that the truck was unsafe and should be taken out of service until it was repaired.[7] When Becker told Smith that he would not drive the truck again until it was fixed, Smith told Becker to "[d]rive what I tell you to drive" or "stay home."[8]

On November 30, 2010, Smith again instructed Becker to drive the truck. Becker again refused, and the two men engaged in an exchange of words that led Becker to conclude that Smith had discharged him from employment.[9] Becker left Smithstonian's premises and returned on December 3, 2010, to drop off company equipment.[10] At all times during his employment with Smithstonian, Becker earned $20 per hour and his overtime rate was calculated at 1.5 times his hourly rate, or $30 per hour.[11] As a result, he earned $800 per work week in regular pay, plus $210 per work week in overtime pay, for a total of $1010 per week during his employment with Smithstonian.[12]

2. Becker's Employment Post-Smithstonian

After his employment with Smithstonian was terminated, Becker had a few periods of unemployment but also worked for several different employers. He earned the amounts listed and left each job for the reasons indicated below.

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6 *Id.*

7 *Id.* at 3-4.

8 ARB Decision and Order of Remand (ARB D.O.R.) at 2.

9 D.&O. at 4-5.

10 *Id.* at 5.

11 2014 Jt. Stip. at 2, ¶¶ 10, 11.

12 DOL Exhibit (Ex.) 146, identified in Joint Stipulations and Document Authentication and Admissibility for Hearing on March 16, 2021 (2021 Joint Stipulations or 2021 Jt. Stip.) at 3. Hereinafter as appropriate, the $1010 per week wage rate is referenced as the "Smithstonian wage rate."

Employer	**Dates of Employment**[13]	**Earnings**[14]	**Reason for Leaving**[15]
Smithstonian Materials, LLC	At least 4/2009 to 11/30/2010	$1010 per week ($800 regular pay plus $210 overtime pay)	Unlawfully terminated
Northern Exposure Landscaping	12/2010	$540 + $600[16] for a total of $1,140	Only part-time work
Rodriguez Landscape Co., Inc.	4/11/2011 to 11/29/2012	$800/week (4/2011-4/2012) then $880/week[17]	Fired for gross misconduct

[13] D.&O. at 2; D.O.R. at 3-4, 19; 2014 Jt. Stip. ¶¶ 9, 37-38, 42-43; 2021 Jt. Stip. ¶¶ 1, 7, 13, 16.

[14] See DOL Ex. 146, compiling earnings noted in Becker's W-2s and pay stubs from 2010 to 2015 (DOL Exs. 129-132, 137, 139-140, 144-145) and as stipulated to by the parties in the 2021 Joint Stipulations at ¶¶ 4, 5, 9, 10, 15 and 18. Calculations are based on earnings per week, which has been determined to be a reasonable basic computational unit for back pay calculations. *See Cook v. Guardian Lubricants, Inc.*, ARB No. 1997-0055, ALJ No. 1995-STA-00043, slip op. at 11 n.12 (ARB May 30, 1997).

[15] Neither party challenges the ALJ's determinations as to the reasons Becker left each employer. D.O.R. at 9 (citing March 16, 2021 Transcript (Tr.) at 7-8).

[16] Although the parties' Joint Stipulations only state that Becker earned $540 from Northern Exposure Landscaping, the record reflects that he also earned an additional $600, for a total of $1,140. *See* DOL Exs. 129-132, 146.

[17] The factual record contains slight disparities related to Becker's wage rate at Rodriguez Landscape in 2012. In the 2014 Joint Stipulations at 4, ¶¶ 39-40, the parties stipulated that Becker earned $42,000 per year from April 11 to June 1, 2012, and earned $45,760.00 per year from June 1, 2012, to November 29, 2012. Based solely on these annualized figures, gross calculations would indicate a weekly wage rate of approximately $808 for the first period and $880 for the second period. The record also includes a weekly calculation of Becker's earnings compiled from his W-2s and paystubs, both legally required to reflect actual earnings. *See* D.O.R. at 7. The parties specifically stipulated to the authenticity of these figures, which the ALJ then admitted into evidence. *See* 2021 Jt. Stip. at 3; DOL Ex. 146. Given the specificity of these earnings figures and their reliable sources, they constitute substantial evidence in the record upon which the ALJ relied to make relevant findings. The Board has consistently held that "[a]lthough the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require 'unrealistic exactitude'" and "[a]ny uncertainty concerning the amount of back pay is resolved against the discriminating party." *Ferguson v. New Prime, Inc.*, ARB No.

Birchwood Snow & Landscape	Week ending 11/30/2013	$529.87[18]	Only part-time work
Winter Services	12/2013 to 3/2014 and 9/8/2014 to 11/2014	$2,986.68 in 2013[19] $18,863.11 plus $1,547.64 in 2014[20]	Laid off at end of season(s)
Villani Landshapers	11/22/2014 to 3/23/2015	$1,207.50 in 2014 $5,587.50 in 2015[21]	Laid off at end of season
Pro-Seal Asphalt Paving	9/2015 to 11/2015	$13,081.27 over ten weeks[22]	Seasonal work ended; left for better pay
Poblocki Paving Corp.	11/2015 to 1/2/2016	$5,748.75[23]	Claim end date

3. Procedural History

Becker filed a STAA complaint with the Department's Occupational Safety and Health Administration (OSHA) on January 3, 2011.[24] OSHA investigated the complaint and, on May 8, 2013, issued an order concluding that Smithstonian violated the STAA by discharging Becker in retaliation for his engaging in STAA-

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2012-0053, ALJ No. 2009-STA-00047, slip op. at 4 (ARB Nov. 30, 2012) (quoting *Cook*, ARB No. 1997-0055, slip op. at 11 n.12) (other citations omitted). As such, the Board reasonably relies upon the wage rates attributed to Becker's earnings from Rodriguez Landscape as identified in this Decision and Order.

18 D.&O. at 19.

19 2014 Jt. Stip. at 4, ¶ 44.

20 2021 Jt. Stip. at 2, ¶¶ 4, 5.

21 *Id.* at 2, ¶¶ 9, 10.

22 *Id.* at 2, ¶ 15.

23 *Id.* at 2, ¶ 18.

24 D.&O. at 1.

protected activity.[25] OSHA awarded Becker back pay and injunctive relief.[26] Smithstonian objected to OSHA's findings and requested a hearing before an ALJ.[27] On or about June 6, 2013, the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) entered an appearance as the Prosecuting Party in the matter.[28]

The ALJ conducted a hearing on May 14-15, 2014,[29] and issued the D.&O. on July 31, 2015. The ALJ concluded that Becker engaged in STAA-protected activity on and before November 30, 2010, and that Smithstonian retaliated against Becker by suspending him for a single day.[30] The ALJ found that Smithstonian intended not to terminate Becker's employment but to merely suspend him for one day, which Becker misunderstood as termination.[31] The ALJ awarded Becker $160 in back pay, expungement from his personnel file of negative references related to his STAA-protected activity, and a neutral and non-disparaging employment reference.[32] The ALJ also ordered Smithstonian to post a notice of employees' OSHA whistleblower rights and, because the company "demonstrated a reckless and callous disregard for Mr. Becker's rights as well as intent to violate the law," the ALJ awarded Becker $2,000 in punitive damages.[33]

The Assistant Secretary appealed the ALJ's decision to the Administrative Review Board (ARB or Board). After reviewing the record, on December 19, 2017, the Board issued a Decision and Order of Remand (ARB D.O.R.) affirming the ALJ's determination that Smithstonian violated the STAA by retaliating against Becker for engaging in protected activity, vacating the ALJ's determination that Smithstonian did not discharge Becker from employment, and remanding the matter for further consideration.[34]

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25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.; see also* C.F.R. § 1978.108(a)(1).

29 D.&O. at 1-2.

30 *Id.* at 23, 25-26.

31 *Id.* at 26.

32 *Id.* at 29-31.

33 *Id.* at 31.

34 ARB D.O.R. at 8.

On June 25, 2020, the ALJ issued an Order on Remand (O.O.R.). The ALJ found that Smithstonian had retaliated[35] against Becker by constructively discharging him in violation of the STAA,[36] and Becker was therefore entitled to an award of back pay.[37] The ALJ also found that, after Becker's discharge by Smithstonian, he secured employment with Rodriguez Landscape Co., Inc. (Rodriguez Landscape), from which he was fired for gross or egregious misconduct.[38] Given the legal consequences of this finding, the ALJ allowed the parties to provide additional evidence for the calculation of back pay or to request a supplemental hearing on the issue of back pay.[39]

The matter was the subject of a supplemental hearing on damages, which the ALJ held on March 16, 2021. Following the hearing and based on the cumulative record, the ALJ issued the D.O.R. on June 17, 2021. In the D.O.R., the ALJ reiterated his finding that Becker had been terminated from Rodriguez Landscape for gross or egregious misconduct, which resulted in a reduction in the amount of back pay to which he was entitled.[40] The ALJ also found that Becker had reasonably mitigated his damages by seeking and maintaining interim employment after the termination of his employment.[41] The ALJ awarded Becker $95,687.70 in back pay plus $36,560.42 in interest for a total award of $132,248.12, in addition to the punitive damages and injunctive relief already ordered in the original D. & O.[42] Smithstonian timely filed a petition for review of the ALJ's D.O.R. on June 29, 2021.

The Administrative Review Board issued an initial Decision and Order in this case on August 10, 2023. On August 16, 2023, it was discovered that the issued Decision and Order contained an inaccurate mathematical calculation of interest. In the interests of justice and in an attempt to ensure accuracy and therefore fairness to all parties, the Administrative Review Board *sua sponte* determined it was appropriate to reconsider its Decision and Order with respect only to the award of interest. The Administrative Review Board issued a Notice of Intent to Reconsider Issued Decision and Order (Notice) on August 21, 2023. On August 28, 2023, the

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35 Throughout the remainder of this Decision and Order, the terms "discriminated" or "discrimination" will be used to collectively include claims of unlawful retaliation.

36 O.O.R. at 6, 10.

37 *Id*.

38 *Id.* at 9.

39 *Id.* at 10.

40 D.O.R. at 15.

41 *Id.* at 20.

42 *Id.* at 19-20.

Assistant Secretary of Labor for Occupational Safety and Health filed an objection to the Notice. On August 30, 2023, Respondent filed a written response to that objection.

4. Issues Currently on Appeal

Smithstonian asserts that: (1) Becker's entitlement to back pay ended following his discharge from Rodriguez Landscape for gross or egregious misconduct, (2) it met its burden to establish that "substantially equivalent positions" were available to Becker in 2014 and 2015, and (3) Becker did not use reasonable diligence in seeking substantially equivalent employment. Smithstonian also argues that the ALJ erred in calculating the back pay award by failing to credit Smithstonian with required offsets such that the award should be significantly reduced.[43]

The Assistant Secretary asserts that we should affirm the ALJ's ruling that Smithstonian failed to establish that Becker did not use reasonable diligence in seeking substantially equivalent employment in jobs that were available during the summers of 2014 and 2015.[44] In opposition to Smithstonian's position, the Assistant Secretary also argues that the Board should uphold the ALJ's ruling that Becker's termination from Rodriguez Landscape tolled the back pay calculations until the first date of Becker's next period of employment, but did not extinguish Becker's right to back pay.[45]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[46] The Board reviews questions of law presented on appeal de novo but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[47]

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[43] *See* Petition for Review Filed by Smithstonian Materials, LLC (Pet. for Review) at 1-2.

[44] Responsive Brief for the Assistant Secretary (Assistant Secretary's Br.) at 22-28.

[45] *Id*. at 15-19.

[46] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[47] 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted).

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[48]

DISCUSSION

1. Back Pay: Governing Law

To prevail on a STAA retaliation complaint, a complainant must prove by a preponderance of the evidence that: (1) they engaged in protected activity; (2) they suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[49] In the 2015 D.&O., the ALJ held that Becker had met this burden and established that Smithstonian violated his rights under the STAA when it suspended him for one day.[50] In 2017, the ARB affirmed the ALJ's finding of a STAA violation in the ARB D.O.R.,[51] but remanded for further consideration of the extent of the unfavorable personnel action suffered by Becker.[52] Upon remand, the ALJ determined that Smithstonian had constructively discharged Becker for protected activity, not merely suspended him.[53] Smithstonian has not appealed that factual determination.

An employee who proves employment discrimination in violation of the STAA is entitled to an award of various compensatory damages, including back pay.[54] The purpose of a back pay award is to make the employee whole for the harm caused by

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48 *Consol. Edison Co. of N. Y. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted).

49 49 U.S.C. § 42121(b)(2)(B)(iii); *id.* § 31105(b)(1) (incorporating the burdens of proof set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century).

50 D.&O. at 31.

51 Given that neither party challenged the ARB D.O.R. on appeal that affirmed the ALJ's decision on the merits, it is now part of the law of this case and our opinion today is limited to damages. *See e.g., Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc.*, ARB No. 2021-0047, ALJ No. 2018-TNE-00022, slip op. at 35 n.148 (ARB Dec. 22, 2022) ("[I]n light of the fact that our summary affirmance of the ALJ's decision on the merits is now part of the law of this case and not challenged on this appeal, our opinion today is limited to the relevant EAJA issues and does not constitute or indicate an affirmance of the ARB's 2020 opinion on the merits.").

52 ARB D.O.R. at 8.

53 O.O.R. at 6, 10.

54 49 U.S.C. § 31105(b)(3)(A)(iii); *see also Estate of Ayres v. Weatherford U.S., L.P.*, ARB Nos. 2018-0006, -0074, ALJ No. 2015-STA-00022, slip op. at 10 (ARB Nov. 18, 2020); *Simpson v. Equity Transp. Co., Inc.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 11 (ARB May 13, 2020).

the discriminating-employer[55]; that is, to restore the employee to the same position they would have been in if they had not suffered unlawful discrimination.[56] A wronged employee is not entitled to merely sit back and do nothing after suffering discrimination, but is instead required to mitigate damages through the exercise of reasonable diligence in both seeking and maintaining alternative employment.[57] While calculations of a back pay award must be "reasonable and supported by evidence[,] they need not be rendered with 'unrealistic exactitude.'"[58] Any uncertainties in calculating an award of back pay are to be resolved against the discriminating-employer.[59]

A. Definitional Terms

In the context of whistleblower cases in which discrimination has been established, the Board and other courts have confusingly used the term "back pay" to mean both a component of the calculation[60] and the result of the calculation,[61]

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[55] The term "discriminating-employer" is used herein to refer to the employer that took adverse employment action against an employee in violation of that employee's rights under the STAA.

[56] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-21 (1975) (under Title VII); *Clifton v. United Parcel Serv.*, ARB No. 1997-0045, ALJ No. 1994-STA-00016, slip op. at 2 (ARB May 14, 1997), *rev'd on other grounds sub nom.*, *United Parcel Serv., Inc. v. Admin. Rev. Bd.*, *U.S. Dep't of Lab.*, 166 F.3d 1215 (6th Cir. 1998).

[57] *Pollock v. Cont'l Expres*s, ARB Nos. 2007-0073, 2008-0051, ALJ No. 2006-STA-00001, slip op. at 12 (ARB Apr. 7, 2010) ("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 acts reasonably to maintain such employment." (citing *Johnson v. Roadway Express, Inc. (Johnson II)*, ARB No. 2001-0013, ALJ No. 1999-STA-00005, slip op. at 10 (ARB Dec. 30, 2002); *Cook,* ARB No. 1997-0055, slip op. at 5)).

[58] *Assistant Sec'y of Lab. for Occupational Safety & Health v. Mendenhall Acquisition Corp.*, ARB No. 2004-0014, ALJ No. 2003-STA-00036, slip op. at 6 (ARB June 30, 2005) (quoting *Cook*, ARB No. 1997-0005, slip op. at 14 n.12).

[59] *Willy v. Coastal Corp.*, Case No. 1985-CAA-00001, 1994 WL 897203, at *12 (Sec'y June 1, 1994).

[60] *See Brand v. Comcast Corp.,* 302 F.R.D. 201, 223 (N.D. Ill. 2014) (examining a claim for compensatory damages "in addition to 'lost wages, including back pay . . . .'" (citation omitted)).

[61] *See Stragapede v. City of Evanston,* 125 F. Supp. 3d 818, 830 (N.D. Ill. 2015) ("[A]n award of back pay generally includes lost wages, bonuses, benefits, and other forms of compensation that a plaintiff would have earned if he had not been wrongfully fired." (citing *Kao v. Sara Lee Corp.,* No. 92-C-7311, 1997 WL 106255, at *8 (N.D. Ill. Feb. 13, 1997) (citing *Kossman v. Calumet Cnty.,* 849 F.2d 1027, 1032 (7th Cir.1988)))).

and have sometimes used the terms "back pay" and "lost wages" interchangeably.[62] This inconsistency has led to some confusion regarding how back pay is appropriately calculated in complicated fact scenarios involving multiple subsequent employers and periods of unemployment due to voluntary quitting or involuntary terminations related to varying levels of misconduct, as illustrated by the fact that both parties in the present case assert that the ALJ erred in applying the law.

In today's decision, we seek to clarify the nomenclature. To this end, we use the term "back pay" to identify one type of statutory award available to an employee who has suffered employment discrimination under STAA.[63] As detailed below, there are two components in calculating a total back pay award: "lost wages" and "offsets." "Lost wages" refers to the amount of earnings that an employee would have earned had there been no discrimination by the discriminating-employer.[64] "Offsets" are defined in this decision as a reduction, in the form of a credit, sometimes but not always related to a termination or suspension of the lost wages calculation. In summary, an award of "back pay" refers to the calculation of a gross amount of "lost wages" minus any allowed "offset(s)."[65]

Back Pay Award = Lost Wages - Allowed Offsets[66]

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[62] *See Testa v. Consol. Edison Co. of N.Y., Inc.*, ARB No. 2008-0029, ALJ No. 2007-STA-00027, slip op. at 10 (ARB Mar. 19, 2010) (discussing whether Con Ed was liable for "claimed back pay/lost wages resulting from Testa's wrongful termination because Testa had failed to establish at trial the *amount* of the back pay/lost wages claimed . . . ." (emphasis in original)); *Tucker v. Hous. Auth. of Birmingham Dist.,* 507 F. Supp. 2d 1240, 1262 n.23 (N.D. Ala. 2006), *aff'd*, 229 F. App'x 820 (11th Cir. 2007) (jury instruction on how to calculate back pay was explained as "[l]ost wages, also referred to as back pay, is the amount that the plaintiff would have earned in his employment with defendant if he had remained employed or been reemployed after his application[.]").

[63] As used further in this analysis, the term "employee" refers to an employee who has successfully met the burden of establishing that they suffered discrimination or retaliation in violation of their rights under the STAA.

[64] "Lost wages," as used herein, has at times been referenced as "gross backpay" in prior decisions. *See Ryder Sys., Inc. v. Loc. Motor Freight Emps. No. 667*, 302 N.L.R.B. 608, 616 (1991) ("Gross backpay is the amount a claimant would have earned as an employee of the Respondents had he not been wrongfully treated by the Respondents.")

[65] *See Johnson v. Old Dominion Sec.*, Case Nos. 1986-CAA-00003, 1986-ERA-00004, -00005, 1991 WL 733576, at *9 (Sec'y May 29, 1991) (finding it appropriate to compute back pay by determining compensation complainants would have received had employer continued their employment and applying relevant offset(s)).

[66] As made clear in the formula, lost wages are a component of—not equivalent to—back pay. A back pay award is equal to calculated lost wages only in factual circumstances where there is no allowed offset.

B. Calculation of Back Pay Award's Component Parts

Accurate calculation of the formula set forth above requires two discrete steps, each of which serve important, and different, statutory purposes and carry varying burdens of proof. Accordingly, their application varies with the facts of each case.

i. Lost Wages

To further the STAA's statutory purpose of making the employee whole, the first step in the analysis requires the calculation of the gross amount of lost wages the employee would have earned from the discriminating-employer if they had not suffered unlawful discrimination.[67] Lost wages are measured by using the wage rate the employee was earning on the date the discrimination occurred to extrapolate the gross amount of wages the employee would have earned from the discriminating-employer from the date of the discrimination to the claim termination date.[68] The employee has the burden of proof to establish the gross amount of lost wages owed.[69]

ii. Allowed Offsets

The second step in the calculation allows for the computation of one or more "offsets" which function as credits against the extrapolated amount of gross lost wages; offsets reduce the final amount of a back pay award. This step exists in

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[67] *See Hobby v. Ga. Power Co*., ARB Nos. 1998-0166, -0169, ALJ No. 1990-ERA-00030, slip op. at 11 (ARB Feb. 9, 2001) (stating the purpose for finding accurate damages is "to make Complainant whole"), *aff'd sub nom. Ga. Power Co. v. U.S. Dep't of Lab.*, 52 F. App'x 490 (11th Cir. 2002); *Johnson I*, ARB No. 1999-0111, slip op. at 13 ("The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against.") (citation omitted)).

[68] *See Johnson v. Old Dominion Sec.*, Case Nos. 1986-CAA-00003, 1986-ERA-00004, -00005, 1991 WL 733576, at *9. Generally, a STAA violation claim terminates on the date the discriminating-employer makes a bona fide offer of reinstatement but, in cases where the employee has already found better-paying employment, reinstatement to the former employment may be impractical such that the STAA claim may terminate on the date of commencement of the better paying job. *See Simpson*, ARB No. 2019-0010, slip op. at 14-15.

[69] *Cook*, ARB No. 1997-0055, slip op. at 5 (citations omitted); *see McCafferty v. Centerior Energy*, ARB No. 1996-0144, ALJ No. 1996-ERA-00006, slip op. at 18 (ARB Sept. 24, 1997) (citing *NLRB v. Browne,* 890 F.2d 605, 608 (2d Cir. 1989) (noting that once the plaintiff establishes the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate that liability)).

recognition of the employee's duty to reasonably mitigate damages.[70] The mitigation doctrine requires that an employee who suffers employment discrimination use "reasonable diligence" to both find and keep subsequent employment.[71] The burden to establish a right to and the amount of any allowed offset is on the discriminating-employer, which must show that the employee failed to mitigate and so the back pay award should be less than the employee's gross lost wages.[72] Generally, a discriminating-employer seeks to establish a failure to mitigate by submitting evidence that substantially equivalent employment positions[73] were available and that the employee failed to diligently attempt to secure and/or maintain such positions.[74]

The ARB recognizes various types of potential offsets which may or may not be applicable in appropriate circumstances, including the following:

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[70] *See Roberts v. Marshall Durbin Co.*, ARB Nos. 2003-0071, -0095, ALJ No. 2002-STA-00035, slip op. at 17 (ARB Aug. 6, 2004) ("The employee has a duty to exercise reasonable diligence to attempt to mitigate damages.") (citation omitted)); *Johnson I*, ARB No. 1999-0111, slip op. at 14 (citing *Wheeler v. Snyder Buick, Inc.,* 794 F.2d 1228, 1234 (7th Cir. 1986) ("[I]t is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages")); *Cook*, ARB No. 1997-0055, slip op. at 5 ("[A] wrongfully discharged STAA complainant is required to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment[.]") (citations omitted)).

[71] *Roberts*, ARB Nos. 2003-0071, -00095, slip op. at 17 (citation omitted).

[72] *See Abdur-Rahman v. Dekalb Cnty.*, ARB Nos. 2012-0064, -0067, ALJ Nos. 2006-WPC-00002, -00003, slip op. at 4 (ARB Oct. 9, 2014) (citing *Johnson I*, ARB No. 1999-0111, slip op. at 14).

[73] A comparable or "substantially equivalent position" is one that "provid[es] the same promotional opportunities, compensation, job responsibilities, working conditions, and status." *Hobby*, ARB Nos. 1998-0166, 0169, slip op. at 20 (citation omitted).

[74] *Anderson v. Timex Logistics*, ARB No. 2013-0016, ALJ No. 2012-STA-00011, slip op. at 7 (ARB Apr. 30, 2014) (citation omitted); *see also Brown v. Smith*, 827 F.3d 609, 616 (7th Cir. 2019).

(1) "interim earnings," defined as wages earned[75] by the employee from a subsequent employer;[76]
(2) "deemed wages," a term that refers to wages not earned but that would have been earned from an employee's subsequent interim employer if the employee had not unreasonably failed to maintain the employment;[77] and
(3) "tolling"[78] of lost wages, meaning a time-limited cessation of the extrapolation of gross lost wages due from the discriminating-employer.[79]

These offset principles operate differently depending on the facts of each case, as each set of facts reflects differently upon the STAA's goal of making the employee whole.

a. Offset for Interim Earnings

The most obvious and most consistently applied offset is for interim earnings, which are the wages the employee earned from subsequent, replacement employers after the unlawful discrimination occurred.[80] As the purpose of a back pay award is

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[75] The ARB "has long held that unemployment compensation benefits received should not be deducted from back pay awards." *Petersen v. Union Pac. R.R. Co.,* ARB No. 2013-0090, ALJ No. 2011-FRS-00017, slip op. at 4 (ARB Nov. 20, 2014) (citing *Smith v. Specialized Transp. Servs*., Case No. 1991-STA-00022, slip op. at 3 (Sec'y Nov. 20, 1991) (citation omitted); *see also Keene v. Ebasco Constructors, Inc*., ARB No. 1997-0089, ALJ No. 1995-ERA-00004, slip op. at 1 (ARB June 27, 1997);*but see Florek v. E. Air Cent., Inc*., ARB No. 2007-0113, ALJ No. 2006-AIR-00009, slip op. 11-12 (ARB May 21, 2009) (allowing offset for unemployment compensation).

[76] *See* 42 U.S.C. § 2000e-5(g)(1); *OFCCP, U.S. Dep't of Lab. v. Bank of Am*., ARB No. 2013-0099, ALJ No. 1997-OFC-00016, slip op. at 25 (ARB Apr. 21, 2016) ("Interim earnings are the amounts earned from employment that is a substitution for the employment the victim would have had with [the discriminating-employer]." (citation omitted)); *see also Knickerbocker Plastic Co., Inc.*, 132 N.L.R.B. 1209, 1215 (1961) (stating offset is deducted from "gross backpay" [herein, "lost earnings"]).

[77] *See Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 382 n.15 (1st Cir. 2004).

[78] Although ARB has used the phrase "tolled" in reference to other legal standards, herein the term "tolled" refers to a defined, time-limited suspension of the extrapolation of lost wages due, not an ultimate termination or extinguishment of the right to recover lost wages. *See Artis v. Dist. of Columbia*, 138 S. Ct. 594, 601 (2018) ("Ordinarily . . . [tolling] "means . . . to suspend or stop temporarily").

[79] *Johnson II*, ARB No. 2001-0013, slip op. at 10-11.

[80] *Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-0014, ALJ No. 2003-STA-00036, slip op. at 7 (ARB June 30, 2005) (back pay award offset by interim earnings) (citing *Sprague v. Am. Nuclear Res., Inc.,* Case No. 1992-ERA-00037, slip op. at 7 (Sec'y Dec. 1, 1994), *rev'd on other grounds sub nom. Am. Nuclear Res. Inc. v. U.S. Dep't of Lab.*, 134 F.3d. 1292, 1296 (6th Cir. 1998)).

to make the employee whole, failing to recognize an offset for interim earnings would result in a windfall for the employee.[81] That is, if an employee received both lost wages from the discriminating-employer throughout the claim period and interim earnings attributable to subsequent employment during that same timeframe, the employee would be in a better position than they would have been in if the discrimination had never occurred.

b. Offsets Tied to Employee's Failure to Mitigate Damages

The more complicated types of potential offsets are grounded in the requirement that an employee must reasonably mitigate damages caused by the unlawful discrimination. "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."[82]

The discriminating-employer bears the burden of establishing that the employee acted unreasonably in failing to mitigate damages.[83] If that burden is met, the discriminating-employer may benefit from either or both of the following additional offsets if justified by the factual record: (i) an offset for deemed wages; and/or (ii) a time-limited cessation of the extrapolation of lost wages by way of the imposition of a tolling offset.

1. Deemed Wages

An employee's duty to mitigate damages following an instance of unlawful discrimination is not without parameters; meeting the duty is grounded in the reasonableness of the employee's actions. Not all periods of unemployment constitute evidence of an employee's unreasonable failure to mitigate damages, and so not all periods of unemployment provide grounds for a discriminating-employer to seek an offset in addition to that allowed for interim earnings. For example, an employee who reasonably quits a replacement job or is otherwise unemployed for reasons related to "'unreasonable working conditions or the earnest search for

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[81] *See Brady*, 753 F.2d at 1275 (examining purposes served by deduction of interim earnings from back pay award) (citing *Merriweather v. Hercules, Inc.,* 631 F.2d 1161, 1168 (5th Cir.1980) (Title VII); *Taylor v. Philips Indus., Inc.,* 593 F.2d 783, 787 (7th Cir. 1979) (Title VII)).

[82] *Cook,* ARB No. 1997-0055, slip op. at 5 (emphasis added) (citation omitted).

[83] *See Johnson I*, ARB No. 1999-0111, slip op. at 14 ("Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer the allocation of the burden of proof is reversed, i.e., it is the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment.") (citation omitted).

better paying employment'" and makes reasonable efforts to find substantially equivalent employment has not failed to mitigate damages.[84] Likewise, an employee seeking but unable to find subsequent employment at wages comparable to those she was earning at the discriminating-employer may evidence reasonable mitigation of damages by taking a lower-paying job.[85] In these circumstances, the discriminating-employer is still allowed an offset for the employee's interim earnings, but is not allowed any additional offset for deemed wages attributed to the periods of unemployment because they did not result from the employee's failure to mitigate.

In contrast, if the facts establish that an employee unjustifiably failed to find, or keep, interim employment because they acted unreasonably in light of the purposes of the mitigation doctrine, the result is different. In those cases, the employee's unreasonable actions can result in an offset for deemed wages, which functions as a continuing offset against gross lost wages and thus a reduced award of back pay.

Though not then named as such, the concept of a deemed wages offset arose from the application of the "*Knickerbocker Plastics* Rule" first identified and applied in *Brady v. Thurston Motor Lines, Inc*.[86] As applied by the ARB, this rule, referred

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[84] *United States v. City of Chicago*, 853 F.2d 572, 579 (7th Cir. 1988) ("'[A] voluntary quit does not toll the [back pay] period when it is prompted by unreasonable working conditions or the earnest search for better paying employment.") (quoting *Brady*, 753 F.2d at 1278)).

[85] *See Cook*, ARB No. 1997-0055, slip op. at 9-10 ("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.'" (citations omitted)); *cf. City of Chicago*, 853 F.2d at 579.

[86] 753 F.2d 1269, 1279-80 (4th Cir. 1985). The *Brady* decision identified and relied upon what it termed the "*Knickerbocker Plastics* rule," now more often cited as "the *Brady* rule." In adopting the rule, the *Brady* Court based its decision upon caselaw reviewing NLRB decisions "supporting the long-standing principle that a claimant who voluntarily quits comparable, interim employment fails to exercise reasonable diligence in the mitigation of damages. *Brady*, 753 F.2d at 1277-78 (citations omitted). The *Brady* court adopted the following analysis from *Knickerbocker Plastic*:

> [A]s a result of such quitting, each of these claimants shall be deemed to have earned for the remainder of the period for which each is awarded backpay the hourly wage being earned at the time such quitting occurred. Therefore, an offset computed on the appropriate rate per hour will be deducted as interim earnings from the gross backpay of each of these claimants. This offset shall be made applicable from the date of the unjustified

to in the current decision as a "deemed wages" offset, provides for the reduction of the discriminating-employer's back pay liability "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."[87]

The ARB initially adopted this portion of the *Knickerbocker Plastics* Rule identified in *Brady* in *Cook v. Guardian Lubricants, Inc.*[88] In *Cook*, the ARB analyzed whether a STAA-complainant took reasonable steps to maintain subsequent replacement employment after suffering unlawful discrimination. After acknowledging that an employee may properly leave interim employment on the grounds of unreasonable working conditions without courting a deemed wages offset,[89] the Board found that the employer in *Cook* had met its burden to establish that the complainant failed to take reasonable steps to retain his employment with one of his interim employers.[90] Without calling it such, the Board applied a deemed wages offset by reducing the employer's back pay liability, for the remainder of the back pay period, by the amount the complainant would have continued to earn at the interim employer had he not "failed to take reasonable steps to retain his employment."[91] *Cook* has been consistently cited by the Board in cases in which the discriminating-employer argued that the employee's actions evidence an unreasonable failure to mitigate damages resulting from earlier discriminating conduct.[92]

> quitting throughout the remainder of the backpay period for each particular claimant.

Id. at 1279 (quoting *Knickerbocker Plastic Co., Inc.*, 132 N.L.R.B. at 1215). Notwithstanding its identified reliance on NLRB precedent, the *Brady* court specifically recognized and refused to follow the NLRB's already announced limitation of *Knickerbocker Plastic* set forth in *Mid-America Machinery Co.*, 258 NLRB 316, 319 (1981), stated as follows: "[T]he discharge of a discriminatee for cause by an interim employer who has found his job performance unsatisfactory does not constitute a wilful loss of earnings on the part of the discriminatee in the absence of an offense involving moral turpitude." *See Brady* at 1279.

87 *Cook,* ARB No. 1997-0055, slip op. at 5 (citing *Knickerbocker Plastic Co., Inc.*, 132 N.L.R.B. at 1215; *Brady*, 753 F.2d at 1279-80).

88 ARB No. 1997-0055, ALJ No. 1995-STA-00043, slip op. at 5-6 (ARB May 30, 1997).

89 *Id.* at 8 (citing *Hufstetler v. Roadway Express, Inc.*, Case No. 1985-STA-00008, slip op. at 53 (Sec'y Aug. 21, 1986).

90 *Id.* at 7-8.

91 *Id.*

92 *See Pollock v. Cont'l Express*, ARB Nos. 2007-0073, 2008-0051, ALJ No. 2006-STA-00001, slip op. at 12 (ARB Apr. 7, 2010); *see also Blackie v. D. Pierce Transp., Inc.*, ARB No. 2013-0065, ALJ No. 2011-STA-00055, slip op. at 15 (ARB June 17, 2014).

In appropriate cases, applying a deemed wages offset may change the available offset related to interim wages. As set forth in *Brady*, the necessary calculations are as follows:

> [W]here the claimant has secured other employment during the time that the [deemed wages] offset is applicable, and if . . . she earned a greater amount than the [deemed wages] offset, the [deemed wages] offset will not be applied, but the actual interim earnings will be deducted from gross backpay. If she earned less than the [deemed wages] offset at employment secured subsequent to the quitting, . . . the amount of the [deemed wages] offset will be applied.[93]

Specifically, if the employee has interim earnings during part or all of the same timeframe for which a deemed wages offset is sought, further calculations must be done to ensure that the discriminating-employer receives the greater of the two offsets, but does not receive a duplicate credit against gross lost wages.[94]

2. Tolling of Lost Wages

As the ARB announced in *Johnson II*, an employee's termination from subsequent interim employment for gross or egregious misconduct can operate to toll—that is, to suspend and not extinguish—the lost wages extrapolation relevant to a back pay award, and that tolling remains in place until new interim employment is secured.[95] While some courts have applied tolling in cases involving less serious conduct,[96] even in the face of other courts' narrowing of the window for the applicability of tolling,[97] the ARB has consistently held that a tolling offset is

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[93] *Brady*, 753 F.2d at 1279 (quoting *Knickerbocker Plastic Co., Inc.*,132 N.L.R.B. at 1215.

[94] *See infra* for these necessary calculations in the present case.

[95] *Johnson II*, ARB No. 2001-0013, slip op. at 10-11.

[96] *Brady,* 753 F.2d at 1276-77, 1280 (applying tolling against complainants who failed to comply with workplace expectations). It is unclear whether the Fourth Circuit Court of Appeals would support this broad reading of the *Brady* analysis today. *See NLRB* v. *Pessoa Const. Co.*, 632 F. App'x 760, 763 (4th Cir. 2015) (specifying that "voluntarily resign[ing from] employment without good cause, tolls the backpay period" as does "willfully los[ing] employment by engaging in deliberate or gross misconduct") (citing *NLRB v. Pepsi Cola Bottling Co.,* 258 F.3d 305, 310 (4th Cir. 2001)).

[97] *See Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (refusing to apply tolling absent proof that complainant "acted wilfully or committed a gross or egregious wrong").

applicable only in cases involving "misconduct [which] is gross or egregious, or [] constitutes a wilful violation of company rules."[98] When this standard of misconduct is established, the extrapolation of gross lost wages can be "tolled"[99]—meaning "suspended"—from the date of the interim employment termination to the employee's start of new employment.[100] Notwithstanding expressed confusion by the parties in the present case,[101] ARB precedent provides that, in situations wherein

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[98] *Cook,* ARB No. 1997-0055, slip op. at 6 (relying on terms developed in "extensive case law on this issue . . . developed by the National Labor Relations Board and the United States Courts of Appeals."); *accord Johnson II*, ARB No. 2001-0013, slip op. at 10-11 (citing *Cook*, ARB No. 1997-0055, slip op. at 6).

[99] Although ARB has used the phrase "tolled" in reference to other legal standards, herein the term "tolled" refers to a defined, time-limited suspension of the extrapolation of lost wages due, not an ultimate termination or extinguishment of the right to recover lost wages.

[100] *Johnson II,* ARB No. 2001-0013, slip op. at 10-11.

[101] In the present case, the Assistant Secretary suggests that the Board's ruling in *Johnson II* creates confusion about how the offsets for deemed wages and for interim earnings interact after employment is recommenced after tolling.[101] In *Johnson II,* the Board held as follows:

> Applying the *Brady* rule to the facts of this case results in a complete bar to the payment of backpay between March 7, 1998, the date on which Landstar Poole terminated Johnson's employment, and the beginning of his employment with Trans-State Lines. Thereafter, the Respondent is entitled to a credit against its backpay liability for the greater of the amount of the earnings Johnson had in subsequent interim employment or the amount **he was paid** for his employment at Landstar Poole.

ARB No. 2001-0013, slip op. at 11 (emphasis added)

The Assistant Secretary suggests that the Board's use in *Johnson II* of the indicative phrase "he was paid" in the quoted language above is inconsistent with *Brady's* use instead of the subjunctive phrase "[he] would have earned" in the following settled statement of law: A discriminating-employer is entitled to an offset "for the wages [the employee] **would have earned** had he remained at [the interim employment from which he was fired for gross misconduct] at the wage rate effective upon that discharge, **or the wages he did earn** [in the next interim employment], whichever is greater." Assistant Secretary's Brief at 20-21 (citing *Brady*, 753 F.2d at 1280 (emphasis added)). The Assistant Secretary concludes that this grammar inconsistency implies that the ARB applied a new legal test.

We agree that the quoted *Johnson II* language is less than clear, specifically in its reference to a "complete bar" rather than a reference to time-limited "tolling" and in its omission of the term "being" from the phrase "he was [being] paid." Those word choice alterations would have better clarified that the standard applied in *Johnson II* was not different from the one espoused in *Brady,* which the Board relied upon by direct citation.

tolling is applied, once the employee begins the next job the extrapolation of lost wages recommences. At that point, the discriminating-employer may again be entitled to a deemed wages offset or an interim earnings offset, whichever provides the greater benefit to the discriminating-employer.[102]

The reasoning for tolling being a time-limited rather than perpetual consequence of an employee's failure to mitigate is best set forth in *Johnson v. Spencer Press of Maine, Inc.*,[103] as follows:

> [B]ack pay is not permanently terminated when an employee is fired for misconduct or voluntarily quits interim employment . . . Had there been no discrimination at employer A, the employee would never have come to work (or have been fired) from employer B. The discriminating employer (employer A) should not benefit from the windfall of not paying the salary differential when the employee is re-employed by employer C.

This result imposes a reasonable consequence upon the employee for their lapsed diligence in failing to mitigate damages flowing from the original discrimination but does not overreach in forever eliminating the employee's right to recover lost wages once they again mitigate damages by obtaining new employment.

2. Calculation of Becker's Back Pay Award

In this matter, both parties assert that the ALJ erred in calculating the back pay awarded to Becker. Respondent argues that Becker failed to mitigate his damages by not diligently seeking substantially equivalent employment available to

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Johnson II, ARB No. 2001-0013, slip op. at 11. Unclear wording aside, the Board correctly applied the law in *Johnson II* when it awarded the discriminating-employer in that case (Roadway Express) an offset measured at the greater of the amount Johnson earned in his next employment (at Trans-State Lines) as compared to his deemed wages—the amount he would have continued to earn at the wage rate he was earning at Landstar Poole, the employment from which he was fired for gross misconduct. Therefore, a complete reading of the case reveals that no new standard was announced.

[102] *Johnson II*, ARB No. 2001-0013, slip op. at 11 (referring to *Brady*, and stating that after the tolling period, "the Respondent is [again] entitled to a credit against its backpay liability for the greater of the amount of the earnings [the employee] had in subsequent interim employment or the [deemed wages] amount . . . .").

[103] 364 F.3d at 382, *quoted in Haydar v. Amazon Corp. LLC*, 2019 WL 2865261, at *5 (E.D. Mich. Jul. 3, 2019) (noting that "[o]ther circuits are in agreement." (citing *E.E.O.C. v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992); *Brady*, 753 F.2d at 1278.))).

him in 2014 and 2015,[104] an argument which the Assistant Secretary opposes.[105] In addition, both parties argue that the ALJ misapplied the mitigation doctrine related to the tolling offset due to Smithstonian following Becker's termination from Rodriguez Landscape for gross or egregious misconduct, though they seek corrections that vary both substantively and procedurally.[106] We address each argument in turn.

A. Smithstonian Failed to Prove that Becker Did Not Mitigate Damages after December 2013

Becker had a duty to exercise reasonable diligence to mitigate his damages by searching for substantially equivalent work after he was terminated from Rodriguez Landscape.[107] Smithstonian bears the burden of proving that Becker failed to mitigate by submitting sufficient evidence to establish that substantially equivalent positions were available, and that Becker failed to diligently attempt to secure such positions.[108] The ALJ correctly concluded that Smithstonian failed to establish either prong of this requirement.

The ALJ correctly ruled that Smithstonian failed to establish the availability of substantially equivalent jobs to Becker during his periods of unemployment in 2014 and 2015. Smithstonian relies solely on the testimony of its expert witness, who asserted that Becker should have been able to find employment because "there were 600 first line supervisor of landscape workers positions in the Milwaukee metropolitan area from April through August 2014, and April through August 2015."[109] Contrary to this assertion, Smithstonian offered no specific evidence regarding the availability of such supervisory groundskeepers positions,[110] and the witness admitted that she did not know how many of these 600 positions were vacant or how often those jobs became vacant.[111]

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104 Pet. for Review at 1-2.

105 Assistant Secretary's Br. at 22-28.

106 *Id*. at 19-21; *see* Pet. for Review at 1-2.

107 *See Anderson*, ARB No. 2013-0016, slip op. at 7 (citation omitted).

108 *Williams v. Grand Trunk W. R.R. Co.*, ARB Nos. 2014-0092, 2015-0008, ALJ No. 2013-FRS-00033, slip op. at 5-6 (ARB Dec. 5, 2016) (reissued Dec. 8, 2016) ("[I]t is the employer's burden to prove failure to mitigate.") (citing *Dale v. Step 1 Stairworks, Inc.*, ARB No. 2004-0003, ALJ No. 2002-STA-00030, slip op. at 6-7 (ARB Mar. 31, 2005)).

109 Tr. at 89, 103.

110 D.O.R. at 16.

111 *Id*. ("Respondent has offered no specific evidence regarding the availability of comparable employment, other than [the expert's] assertion that there are 600 first line

The ALJ also correctly concluded that Smithstonian failed to establish that Becker did not use reasonable diligence in seeking substantially equivalent employment. Becker performed between four and six job searches per week online, sent out resumes, visited job sites, and made inquiries with former co-workers.[112] Becker demonstrated a continuing commitment to be a member of the workforce by obtaining jobs during the two-year back pay period after his discharge from Rodriguez Landscape.[113]

In sum, the ALJ correctly concluded that Smithstonian failed to prove that Becker did not mitigate his damages during periods of unemployment after December 2013. We affirm the ALJ's conclusion. Because Becker did not fail to mitigate damages after he recommenced employment following his termination from Rodriguez Landscape, his claim for back pay from Smithstonian is not foreclosed under ARB precedent.

B. The ALJ Correctly Applied a Tolling Offset for Becker's Gross or Egregious Misconduct Termination

Smithstonian argues that Becker's entitlement to back pay ended following his discharge from interim employment at Rodriguez Landscape because Becker was fired for gross or egregious misconduct.[114] While Respondent is correct in describing the facts, it is incorrect in its application of the law. A discharge for gross misconduct by an interim employer merely tolls the extrapolation of gross lost wages for a period of time, thus reducing the back pay obligation; it does not extinguish it.[115] None of the cases cited by Smithstonian hold than an employee,

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supervisor of groundskeepers positions in Milwaukee and that peak hiring is done in the spring. [The expert] offered no particulars as to what percentage of the Milwaukee job market these positions constitute, whether any of the positions were actually vacant during the relevant timeframes, how many vacant positions are available at any given time, how long people stay employed in those positions, or how long it takes to obtain one of the positions. Additionally, [the expert] could not point to any data to substantiate her claim that peak landscape hiring is done in the spring, other than to say it was based on her knowledge of the labor market and 'looking at hiring trends.'") (citation omitted)).

[112] *Id*. at 3, 17.

[113] The Assistant Secretary correctly notes that obtaining interim jobs is evidence of reasonable diligence in seeking work. *See* Assistant Secretary's Br. at 28 (citing *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 411 (7th Cir. 1989); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975)); *Johnson I*, ARB No. 1999-0111, slip op. at 15 n.14.

[114] Becker does not appeal the ALJ's ruling that he was discharged from Rodriguez Landscape for gross or egregious misconduct.

[115] *Johnson II*, ARB No. 2001-0013, slip op. at 10-11; *see also Cook*, ARB No. 1997-0055, slip op. at 6-7.

after being discharged from interim employment for gross or egregious misconduct, is precluded from eligibility for back pay after resuming reasonable efforts to mitigate damages.[116]

Smithstonian terminated Becker's employment in violation of the STAA on November 30, 2010. Becker next obtained employment[117] with Rodriguez Landscape, where he worked from at least April 2011, to November 29, 2012, when his employment was terminated. Finding that Rodriguez Landscape terminated Becker's employment because he engaged in gross or egregious misconduct, the ALJ concluded that Becker's right to collect lost wages from Smithstonian was tolled from the date his employment was terminated from Rodriguez Landscape until he secured his next interim employment with Birchwood Snow & Landscape (Birchwood) during the week ending on November 30, 2013.[118]

We agree with the ALJ's conclusion that the calculation of lost wages is tolled between the date of Becker's firing from Rodriguez Landscape and his recommencement of employment at his next interim employer.[119] By failing to maintain his employment with Rodriguez Landscape for the reasons set forth in the D.O.R, Becker failed to reasonably mitigate his damages as the law requires. As

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[116] *Thurman*, 90 F.3d at 1169 (finding that the employee's back pay award should not be tolled after his subsequent employer fired him following an unintentional driving accident); *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927, 937 (5th Cir. 1996) (vacating back pay award only with respect to the period after his involuntary termination); *Brady*, 753 F.2d at 1280 (finding "that periods of unemployment following justified discharges are to be completely excluded from the back pay period" but that back pay recommenced upon reemployment); *NLRB v. Pepsi Cola Bottling Co. of Fayetteville,* 258 F.3d 305, 312-13 (4th Cir. 2001) (merely upholding NLRB rule that "a discharge for any reason other than 'moral turpitude' does not support a [deemed wages offset] and distinguishing *Brady* because it arose in Title VII context wherein no deference to an administrative agency is required); *NLRB v. Pessoa Constr. Co.*, 632 F. App'x 760, 766 (4th Cir. 2015) (finding employer failed to establish its affirmative defense that employee was unavailable for work).

[117] After his discharge from Smithstonian, Becker performed part-time work for Northern Exposure Landscaping in December 2010, earning $1,140.00. 2014 Jt. Stip. at 4, ¶ 37; Ex. 129-2. As this job was part-time and not full-time, it was not comparable to Becker's employment at Smithstonian. *See Hobby*, ARB Nos. 1998-0166, -0169, slip op. at 20 ("Both logically and practically, a court cannot demand that a complainant conduct the 'perfect' job search, finding every suitable job. Inevitably, there will be cases where a complainant simply does not find the comparable jobs that may, in fact, exist.").

[118] D.O.R. at 19 ("Cross-referencing the 2014 Joint Stipulations with the Prosecuting Party's back pay calculations, it appears Mr. Becker secured interim employment with Birchwood the week ending on November 30, 2013.") (citing 2021 Complainant's Exhibit at 146-4 which shows that $529.87 was entered into the "Interim Earnings" column for week of November 30, 2013)).

[119] D.O.R. at 19.

such, the ALJ correctly found that Becker's claim for back pay was appropriately tolled from November 29, 2012, through the week ending November 30, 2013.[120]

C. *The ALJ Failed to Apply an Offset for Deemed and/or Interim Wages Following Becker's Termination for Gross or Egregious Misconduct*

In the alternative, Smithstonian argues that the ALJ erred in not providing it a deemed wages offset, credited against extrapolated gross lost wages, as a result of Becker's firing from Rodriguez Landscape for gross or egregious misconduct. We agree that the ALJ erred in his application of the law in this regard.

As the Board confirmed in *Johnson II*, an employee's termination from subsequent interim employment for gross or egregious misconduct operates to toll—that is, to suspend and not extinguish—the lost wages extrapolation relevant to a back pay award, and that tolling remains in place until new interim employment is secured.[121] Once new employment is commenced, the discriminating-employer is entitled to an offset measured as a reduction of the gross lost wages, thus a reduction in back pay liability, measured at no less than that which the employee would have earned had he remained in the interim employment throughout the remainder of the claim period.[122] Although the ALJ cited to this authority, he failed to calculate any offset based on it. Becker did not remain removed from the job market after he was fired by Rodriquez Landscape. By securing new employment, briefly with Birchwood and then full-time with Winter Services, Becker acted to again reasonably mitigate his damages and therefore restored his right to collect lost wages from Smithstonian in an award of back pay. In calculating that award, the ALJ properly offset Becker's interim earnings from Northern Exposure and

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[120] Citing to and relying on the parties' stipulations in the record, the ALJ found that Becker began his next employment at Birchwood during "the week ending on November 30, 2013." D.O.R. at 19. In the very next sentence of the D.O.R., the ALJ tolled the lost wages calculation "from November 29, 2012, to November 30, 2013." *Id*. Given the record's absence of support for a definitive date of Becker's start of employment at Birchwood, a more accurate identification of the tolling period would have been "from November 29, 2012, [through the week of] November 30, 2013," which we have used in our analysis. As set forth in the calculations and the chart below, the mathematical result is the same. DOL Ex. 146 charts Becker's earnings on a weekly basis, using a Sunday through Saturday week for computational purposes. Because November 30, 2013 was a Saturday, the phrase "to November 30, 2013" and "through the week of November 30, 2013" have the same computational effect.

[121] *Johnson II*, ARB No. 2001-0013, slip op. at 11.

[122] *Id.*

Rodriguez Landscape, both of which Becker had worked for in a reasonable effort to mitigate his damages after Smithstonian's unlawful discrimination.[123]

But the ALJ did not go far enough. As discussed in the authorities cited above, because of the egregious misconduct which resulted in Becker's termination from Rodriguez Landscape, Smithstonian is legally entitled to receive an additional offset for the remaining claim period measured as **the greater of** (1) the deemed wages Becker would have earned had he remained at Rodriguez Landscape, or (2) his subsequent interim earnings, the wages he earned in subsequent interim employment.[124] Because the ALJ failed to calculate that offset, we do so here with reference to the undisputed facts in the record.[125]

When he was unlawfully terminated by Smithstonian on November 30, 2010, Becker was earning regular wages of $800 per week plus $210 per week in overtime, for a total of $1,010 per week.[126] When he was terminated from Rodriguez Landscape for gross or egregious misconduct on November 29, 2012, Becker was earning regular wages of $880 per week, with no overtime.[127] Becker next worked for Birchwood during the week ending on November 30, 2013, and earned $529.87,[128] then took a job with Winter Services in December 2013 earning $746.67 per week until the week ending January 11, 2014, after which he earned $857.55 per week through the end of his employment with Winter Services at the end of March 2014.[129] All of these post-termination jobs paid less than the $880/week wage rate Becker was earning at Rodriguez Landscape, as did all of his remaining interim employment positions except one: Becker worked for Pro-Seal Asphalt for ten weeks from September to November, 2015 and earned an average of $1,380.13 per week during that period.[130]

From these facts, it is clear that Becker's deemed wages, measured at his Rodriguez Landscape wage rate of $880 per week, is greater than the rate of Becker's actual interim earnings for the vast majority, but not all, of Becker's post-

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123 *Id.*

124 *See Cook*, ARB No. 1997-0055, slip op. at 8-11; *Johnson II*, ARB No. 2001-0013, slip op. at 11 (emphasis added) (citing *Brady*, 753 F.2d at 1277-79).

125 The parties stipulated to these underlying facts in the 2014 Joint Stipulations and the 2021 Joint Stipulations, including as referenced in DOL Ex. 146.

126 DOL Ex. 146.

127 *Id.*

128 D.O.R at 19.

129 2014 Jt. Stip. at 4, ¶ 43; DOL Ex. 146.

130 *See* DOL Ex. 146-47; 2014 Jt. Stip. at 4, §§ 39-40.

termination employment.[131] In one instance, that being the ten weeks Becker worked for Pro-Seal Asphalt and earned an average of $1,380.13 per week, Becker's interim earnings were greater than the deemed wages calculated at the Rodriguez Landscape wage rate. Therefore, between the week ending November 30, 2013 (Becker's post termination job at Birchwood), and January 2, 2016 (the claim period end date), Smithstonian is entitled to a deemed wages offset measured at $880 per week for the weeks in which the Rodriguez Landscape rate was greater than Becker's interim earnings rate). For the ten weeks when Becker earned more from Pro-Seal Asphalt than he had earned at Rodriguez Landscape, Smithstonian is entitled to an offset in the calculation of lost earnings because, during those ten weeks, Becker did not suffer a loss due to Smithstonian's original discrimination; he earned more than he would have earned at the Smithstonian wage rate.

Having thoroughly examined the factual record and applied the relevant legal analysis as detailed above,[132] we calculate the appropriate back pay award in this case by applying the formula defined above, as follows:

Back Pay Award = Lost Wages – Allowed Offsets

As supported by the record and set forth in the following chart, we calculate an extrapolated total of $105,520 in gross lost wages at the Smithstonian wage rate of $1,010 per week from the date of Becker's unlawful firing by Smithstonian until the date of his employment termination from Rodriguez Landscape. Consistent with the ALJ's conclusion that Becker's employment with Rodriguez Landscape was terminated for gross or egregious misconduct, we toll—and thereby reduce to zero—the calculation of additional gross lost wages for the period of time measured from the date of Becker's employment termination from Rodriguez Landscape (November 29, 2012) until he began his next job (week ending November 30, 2013). The extrapolation of gross lost wages then recommences and continues for the 99 weeks[133] in which the Smithstonian wage rate of $1,010 per week was greater than Becker's actual earnings, through the claim period end date (January 2, 2016),

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131 DOL Ex. 146.

132 As the relevant facts are undisputed in the record before us, there is no need to remand this case for further calculations. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 473-74 (1947) ("it is needless to remand [a] case" where "[t]he facts pertinent to that issue are not seriously disputed . . . .").

133 The 99 weeks is the total of the 91 weeks before Becker's employment at Pro-Seal Asphalt (commencing on the week ending December 7, 2013, that being the timeframe immediately after the "week ending November 30, 2013,") and continuing through the week ending August 29, 2015) plus the 8 weeks after his November 14, 2015 employment with Pro-Seal Asphalt and before the claim period end-date on January 2, 2016.

totaling $99,990.[134] Altogether, the gross lost wages calculation totals $205,510 ($105,520 + $0 + $99,990).

From that total of gross lost wages, we apply the offsets due to Smithstonian under the law. First, we subtract Becker's interim earnings garnered at jobs he held after Smithstonian but before the employment termination from Rodriguez Landscape, totaling $73,144.06.[135] We then additionally subtract $87,120 as the offset due to Smithstonian for Becker's deemed wages, measured at the Rodriguez Landscape wage rate at the time of Becker's termination for gross or egregious misconduct ($880 per week) for the 99 weeks in which the Rodriguez Landscape wage rate was greater than the rate of his other interim employment between the cessation of tolling and the claim period end date. Based on these calculations, we conclude that Becker is entitled to an award of back pay in the principal amount of $45,245.94.

Back Pay Award = Lost Wages – Allowed Offsets

$45,245.94 = $205,510 – (73,144.06 + $87,120)

The statute requires that back pay be awarded with interest.[136] In a STAA whistleblower case, interest is owed from the claim date until the award is paid.[137] In essence, both pre-judgment interest and post-judgment interest are calculated at

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[134] The ten weeks in which Becker earned more than the Smithstonian wage rate are not included so as to prevent Becker from a duplicate recovery of lost wages from Smithstonian plus the greater wages earned from Pro-Seal Asphalt.

[135] The subtracted interim earnings include only the following: Northern Exposure - $1,140; Rodriguez Landscape - $72,004.06. To avoid duplicated offsets, Becker's additional interim earnings (Birchwood Snow & Landscape - $529.87; Winter Services - $23, $397.43; Villani Landshapers - $6,795; Pro-Seal Asphalt - $13,081.27; and Poblocki Paving Corp. - 5,748.75) are not separately subtracted but rather are subsumed within the offset granted Smithstonian for deemed wages and/or the lost wages calculation (Pro-Seal Asphalt), discussed above.

[136] 49 U.S.C. § 31105(b)(3)(A)(iii) (the Secretary of Labor shall order the person [who violated the whistleblower protection provisions of the STAA] to pay compensatory damages, including backpay with interest . . . .").

[137] *Dale v. Step 1 Stairworks, Inc.*, ARB No. 2004-0003, ALJ No. 2002-STA-00030, slip op. at 8 (ARB Mar. 31, 2005) (citing *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 1999-0041, 1999-0042, 2000-0012, ALJ No. 1989-ERA-00022, slip op. at 20-21 (ARB May 17, 2000) (other citation omitted) ("interest accrues . . . until [Respondent] pays the damages award"); *see also U. S. Dep't of Lab. v. Copart Inc.*, 431 F. App'x 758, 762-63 (10th Cir. 2011) (ordering that interest accrue until the back pay award was paid in full relying on the STAA statute and ARB precedent).

the same rate in these cases.[138] Interest is calculated utilizing the required interest rates applicable to underpayment of taxes under 26 U.S.C. § 6621, compounded daily.[139]

CONCLUSION[140]

The Board **AFFIRMS** the ALJ's determinations that (1) Becker failed to mitigate his damages by being discharged by Rodriguez Landscape for gross or egregious misconduct and so the calculation of lost wages is tolled, having the effect of reducing it to zero, from November 29, 2012, to the week ending November 30, 2013; (2) Becker's entitlement to back pay resumed with the resumption of his interim employment during the week of November 30, 2013, and ended on January 2, 2016; (3) Smithstonian did not establish that Becker failed to mitigate his damages during periods of unemployment after December 2013; and (4) Becker mitigated his damages by obtaining employment between December 2013 and January 2016.

The Board **VACATES** the ALJ's conclusion that Becker is entitled to $132,248.12 in back pay with interest and **ORDERS** an award of back pay in the principal amount of $45,245.94, consistent with the applicable law set forth in this Decision and Order on Reconsideration. The Board also **ORDERS** that interest accrue on the back pay award until the date the award is paid, as specified herein. All backpay and interest awarded is in addition to the award of $2,000.00 in punitive damages and the injunctive relief ordered in the ALJ's July 2015 Decision and Order.

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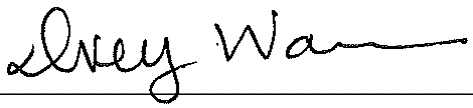
138 *Murray v. Air Ride, Inc.*, ARB No. 2000-0045, ALJ No. 1999-STA-00034, slip op. at 9 (ARB Dec. 29, 2000) (noting that post-judgment interest is calculated in the same manner as pre-judgment interest); *see also Doyle*, ARB Nos. 1999-0041, 1999-0042, 2000-0012, slip op. at 21 (noting that "[i]n whistleblower cases, we award the same rate of interest on back pay awards, both pre- and post-judgment.")

139 *See* 29 C.F.R. § 1978.109(d)(1); *see also Laidler v. Grand Trunk Western R.R. Co.*, ARB No, 2015-0087, ALJ No. 2014-FRS-00099, slip op. at 12 (ARB Aug. 3, 2017) ("The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on back pay in whistleblower cases.").

140 In any appeal of this Decision and Order that may be filed, the appropriately named party is the Secretary, Department of Labor, and not the Administrative Review Board.

SO ORDERED.

TAMMY L. PUST
Administrative Appeals Judge



IVEY S. WARREN
Administrative Appeals Judge