U.S. Department of Labor

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

In the Matter of:

KENNETH TIPTON,

COMPLAINANT,

v.

INDIANA MICHIGAN POWER COMPANY,

RESPONDENT.

ARB CASE NO. 04-147

ALJ CASE NO. 02-ERA-30

DATE: September 29, 2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
John T. Burhans, *Burhans Law Offices*, St. Joseph, Michigan

***For the Respondent*:**
J. Patrick Hickey, *Shaw Pittman LLP,* Washington, D.C.

FINAL DECISION AND ORDER

Kenneth Tipton filed a complaint alleging that the Respondent, Indiana Michigan Power Company (I&M), terminated his employment in violation of the employee protection provisions the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), and its implementing regulations at 29 C.F.R. Part 24 (2006). A United States Department of Labor Administrative Law Judge (ALJ) concluded in a Recommended Decision and Order (R. D. & O.) that I&M violated the ERA when it fired Tipton in retaliation for his whistleblower activities. The ALJ also awarded Tipton back pay, front pay, and compensatory damages. I&M appealed the ALJ's decision.

Enclosure

BACKGROUND

We have carefully reviewed the record and find that it supports the ALJ's lengthy recitation of the facts. Therefore, we briefly summarize the facts relevant to Tipton's discharge.

Tipton worked as a test engineer for I&M at the Donald C. Cook Nuclear Power Plant (Cook Plant) in Bridgman, Michigan, from November 1999 until his termination on October 5, 2001. R. D. & O. at 4-5, 15. In August 2001 I&M shut down the Cook Plant to perform maintenance on its Essential Water Service System (ESW). R. D. & O. at 4. The ESW draws water from Lake Michigan to cool the plant's emergency diesel generators, which provide power in the event of a power outage. Silt and sand from Lake Michigan had built up in the ESW to the extent that the two reactor units at the plant could not operate safely. As a result, the plant shut down so that employees could clean out the silt and repair the systems. After I&M completed the repairs, testing of the ESW commenced and continued virtually around the clock. Because there was such an emphasis on testing and because of understaffing, individuals worked in excess of the hours permitted by regulation. Excessive hours were the "norm" for the test engineering group at the plant, and management expected that employees would in some instances exceed the work-hour limitations. R. D. & O. at 26; JX-37 at 4.

The Maintenance Testing Group had to complete an ESW Flow Balance Test before I&M could re-start the plant. Tipton was the day shift test engineer for the Maintenance Testing Group, and Anthony Chacon was the night shift test engineer. As a test engineer, Tipton performed testing and revision of testing procedures for the ESW flow balance testing under the direct supervision of Ed Brouwer. R. D. & O. at 5; Tr. 696. Because Brouwer was new to the testing group, Mark Stark, Maintenance Manager, took charge of the overall supervision of test performance. *Id.*

On September 25, 2001, when it appeared testing was complete, Tipton decided to take the following day off because he believed that he had reached or exceeded his work hour limitations for the previous seven-day period. R. D. & O. at 7. During the ensuing night shift, I&M management ordered its engineering department to perform an engineering analysis to justify a tolerance of "+ or – 2 turns" in certain valve settings. R. D. & O. at 8. This analysis was to be contained in a Design Information Transmittal (DIT) to be prepared by I&M's engineering department and forwarded to the Maintenance Testing Group. R. D. & O. at 6. Anthony Chacon had responsibility for preparing a draft Technical Data Book (TDB) revision during the night shift. The TDB was a reference document for valve settings in plant operations. *Id.*

At 6:30 a.m. on the morning of September 26, 2001, Chacon engaged in a "turnover"[1] meeting with Mark Turcotte, who at that point took over responsibility for

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[1] The term "turnover" as used at Cook did not have a universal definition. Employees used the term to describe the transfer of one shift's worth of work assignments to the next shift so that work on projects proceeded with continuity. R. D. & O. at 8-9.

incorporating the DIT into Chacon's draft TDB and issuing the final TDB revision. R. D. & O. at 8. Tipton was not included in the turnover meeting because the two employees did not expect him to come to work that day. R. D. & O. at 9. At approximately 7 a.m. on September 26, after discovering that Tipton was not at work, Brouwer phoned Tipton at home and asked him to come in. By that time Tipton had worked seven straight days. R. D. & O. at 9. According to Tipton, he told Brouwer that he had too many hours and that if Brouwer wanted him to come in, he needed to get confirmation from upper management. Brouwer called Tipton a second time about 10 minutes later and confirmed that management wanted him to come in. R. D. & O. at 9; Tr. 720.

After Tipton's arrival at the plant, Turcotte came into his office with the test procedure, and the two men discussed Chacon's draft TDB revision as well as the remaining work to be done on it. Tr. 726, 728. Chacon also came into Tipton's office twice and spoke with Turcotte. Tr. 729. During one of Chacon's visits, Brouwer stopped by Tipton's office and told Tipton and Turcotte about a 9 a.m. staff meeting with plant management. Tipton asked Brouwer several times for a copy of his approved work hours deviation request. Tr. 332, 334, 1727. Later in the morning of September 26, Brouwer asked Stark to sign a deviation request for Tipton's excessive hours and informed Stark that Tipton's hours were over the regulatory limits. Tr. 333; JX-10, JX-11.[2] Stark refused to sign the form because he thought it should have been presented before Tipton began to work. Brouwer then threatened to take the deviation request to the plant manager, but Stark discouraged him from doing so. R. D. & O. at 10; Tr. 351.

At the 9 a.m. staff meeting, the plan to revise the TDB was discussed. Tipton was responsible for reviewing the listed data in Turcotte's TDB revision, and Brouwer was responsible for approving the revision. Stark began the meeting by saying "something to the effect that [they] needed to get Tipton out of here." Tr. 741. Twice during the meeting, Tipton asked for a signed deviation request. Richard Tinkle, Manager of Maintenance, Testing and Installation Services, reminded Tipton that his time should not include turnover time, and Tipton explained that even excluding turnover time, he was exceeding 72 hours in seven days. Tr. 738-739, 1456, 1499. Neither Tinkle nor Stark responded to Tipton. At the same meeting Mark Turcotte also raised the issue of Tipton's excessive work hours. Finally, at the end of the day on September 26, Tipton wrote an e-mail to Stark, Tinkle, and Brouwer, again asking for authorization to work more than 72 hours in a 7-day period. R. D. & O. at 11.

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[2] According to Brouwer, this meeting occurred prior to the staff meeting. Stark, however, testified that Brouwer did not present the form to him until much later in the day. This testimony conflicted with his deposition testimony, in which he stated that he received the deviation request in the late morning after the 9 a.m. meeting. Tr. 1546-1547. The ALJ credited Brouwer's version of the events surrounding presentation of the deviation request to Stark. R. D. & O. at 11.

At some time during the morning of September 26, Turcotte discovered that Chacon's draft TDB revision was full of errors and would have to be corrected. Because receipt of the DIT was delayed in the engineering department, Turcotte went to work on revising Chacon's draft without the valve tolerances that the DIT was to provide. Turcotte planned to incorporate the DIT into his draft as soon as the testing group received it. R. D. & O. at 11. Before receipt of the DIT, Tipton reviewed Turcotte's draft for errors in the listed data, and Brouwer approved it for issuance. Immediately after issuance of the draft revision, I&M Vice President Chris Bakken and Plant Manager Joe Pollock learned that the TDB revision lacked the necessary tolerance data, that Turcotte had not used the Chacon draft, and that a new TDB revision would be required. Because they considered this a direct contravention of their orders, they asked Stark, Ken Rollins, who was the plant's Mechanical Maintenance Manager, and Donna Kelly, who was the Human Resources Administrator, to conduct a fact-finding investigation into why the Chacon draft was not used. R. D. & O. at 13.

The fact-finding investigation concluded with a recommendation from Stark and Kelly to terminate Tipton. Neither Tipton's supervisor, Brouwer, nor Brouwer's supervisor, Tinkle, participated in this decision. On September 27 Tipton's access to the plant was denied, and his access to his computer and e-mail was cut off, and on October 5, 2001, I&M fired Tipton allegedly for failure to follow management's instructions to wait for the DIT before issuing the TDB revision, for lying during the fact-finding investigation about his presence at a turnover where the TDB revision was discussed, and for his poor disciplinary history at the plant. R. D. & O. at 15.

On October 5, 2001, after Tipton informed I&M's Employee Concerns Department that he believed I&M terminated his employment because he raised concerns about work hours limitations, I&M hired an independent investigator, Brad Williamson, to investigate Tipton's allegation. JX-37, T. 1826. Williamson issued an investigative report on December 4, 2001, concluding that I&M terminated Tipton solely because of his past poor performance. JX-37 at 1-4.

Tipton filed a complaint with DOL's Occupational Safety and Health Administration, alleging that he was fired because he made internal complaints implicating nuclear safety. On July 11, 2002, OSHA notified Tipton that his allegations were not substantiated. Thereafter, Tipton requested a formal hearing, which was held on July 22-30, 2003. In his R. D. & O., issued on June 29, 2004, the ALJ concluded that Tipton had engaged in protected activity when he refused to report to work without management approval of his excessive hours, when he complained to supervisors that he needed a deviation request signed by management to work in excess of the hours permitted by regulation, and when he sent an e-mail to supervisors requesting approval of his excessive work hours at the end of the work day on September 26. The ALJ further concluded that management knew about his protected activity and terminated his employment because of that activity. Finally, the ALJ found that I&M had failed to demonstrate by **clear and convincing evidence** that its proffered reasons for Tipton's termination were legitimate and nondiscriminatory. R. D. & O. at 113.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB) the authority to review an ALJ's recommended decision in cases arising under the ERA's whistleblower protection provisions and to issue the final agency decision. 29 C.F.R. § 24.8 (2006).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in a de novo review of the recommended decision. 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997).

DISCUSSION

I. Merits of the Complaint

The ERA provides that an employer may not "discharge" or "otherwise discriminate" against an employee "with respect to his compensation, terms, conditions or privileges of employment" because the employee has engaged in certain protected activity. 42 U.S.C.A. § 5851(a). The protected activity includes making an informal complaint about nuclear safety hazards to a supervisor. *See, e.g., Bechtel Constr., Inc. v. Sec'y of Labor*, 50 F.3d 926, 931-33 (11th Cir. 1995). To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Res., Inc., v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998).

To prevail on his claim, Tipton must prove by a preponderance of the evidence that he engaged in protected activity, that I&M knew about the activity and took adverse action against him, and that his protected activity contributed to the adverse action. *Kester v. Carolina Power & Light Co.,* ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 7-8 (ARB Sept. 30, 2003).

Even if Tipton has established a violation, the Secretary may not grant relief if I&M demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of" protected activity. 42 U.S.C.A. § 5851 (b)(3)(D).

A. Protected Activity

Tipton alleges that I&M fired him because he engaged in protected activity, *i.e.*, complaining about I&M's violations of Nuclear Regulatory Commission (NRC) Generic Letter 82-12, which limits the amount of overtime that staff members performing safety-related functions may work. I&M contends that Tipton did not engage in protected

activity and that his complaints about alleged violations of the work hours limitations amounted to mere administrative requests for a form and did not implicate nuclear safety. We disagree.

The clearly stated objective of the NRC's Generic Letter 82-12 concerning staff working hours is "to prevent situations where fatigue could reduce the ability of operating personnel to keep the reactor in a safe condition." In accordance with this NRC policy, the plant's technical specifications limited hours that could be worked without a deviation request to no more than 16 hours straight, no more than 16 hours in any 24-hour period, no more than 24 hours in any 48-hour period, and no more than 72 hours in any seven-day period. JX-129 at § 6.2.2.e; JX-5 at 2-3.

Although deviations from the work hour limitations are allowed, such deviations are meant to be a limited exception. R. D. & O. at 21. Generic Letter 82-12 specifically provides that the norm should be for operating personnel to work an 8-hour day and a 40-hour week while the plant is operating. The policy permits employees to work overtime only when "unforeseen problems require substantial amounts of overtime to be used, or during extended periods of shutdown for refueling, major maintenance or major plant modifications, on a temporary basis . . . ." JX-5 at 4. Deviations from the stated policy are permitted only for "very unusual circumstances," and any "deviation shall be authorized by the plant manager or his deputy, or higher levels of management." *Id.*

When I&M management ordered Tipton to report to work on the morning of September 26, Tipton had worked more than 72 hours in the previous seven-day period without formal authorization by management. Moreover, his work involved testing the ESW, a critical safety system at the plant, which provided water to cool the plant's emergency diesel generators. R. D. & O. at 23. Yet I&M management repeatedly refused to give him the authorization he had requested – the authorization that was mandated by the NRC and the plant's own technical specifications. Like the ALJ, we conclude that Tipton engaged in protected activity when he raised his concerns about exceeding overtime limits without the formal management authorization mandated by NRC guidelines and Cook Plant technical specifications. R. D. & O. at 28.

B. Contributing Factor

I&M subjected Tipton to adverse action when it fired him. Therefore, we must consider whether Tipton proved by a preponderance of the evidence that I&M fired him because he engaged in protected activity.

The fact that I&M's adverse action closely followed Tipton's protected activity leads to an inference of discriminatory intent. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22, slip op. at 9 (ARB Nov. 30, 2005). This inference is supported by evidence of I&M's hostility toward work hours limitations. Brouwer, a supervisor, believed he could be terminated for adhering to the work hours limitations policy by sending an employee home for exceeding the work hour limitations. R. D. & O. at 47. According to Williamson's investigative report, "Working hour limitations

were historically disregarded with the Test Engineering Group." JX-37 at 4. Management required Tipton to work on September 26 even though they knew he had exceeded the NRC limits. Stark ordered Tipton to work, but refused to sign a deviation request for him. Stark also discouraged Brouwer from taking Tipton's deviation request to a higher management level. R. D. & O. at 8.

I&M contends that it fired Tipton for (1) lying during the fact-finding investigation about whether he had attended a "turnover meeting" where management's plan for updating the TDB was discussed, (2) failing to carry out its instructions to hold off on issuing the TDB revision until he received the DIT from Engineering, and (3) having a poor performance record. The evidence supports the ALJ's conclusion that all three reasons were false.

I&M's allegation that Tipton lied about attending a turnover meeting is unsubstantiated. The record supports the ALJ's conclusion that none of Tipton's responses during the fact-finding investigation "rise to the level of lies or a lack of candor." R. D. & O. at 64. "Turnover" sometimes was used interchangeably with the more generic term "meeting." R .D. & O. at 8; Tr. 723-724, 1943. As Williamson concluded, "[Tipton] may not have recognized [the 8:30 a.m meeting in his office] as a turnover meeting. He was not the focus of the turnover, because Tony Chacon knew that Ken was going home, and would not be there for long. Even Mark Turcotte testified that he did not know it was a turnover meeting." JX-37 at 5. The ALJ completely rejected I&M's contention that it fired Tipton for "lying" about his attendance at a turnover meeting, concluding that the fact-finding "investigation" interviews were "orchestrated by Stark, acting in concert with Rollins, in such a way that Respondent could justify Complainant's termination" R. D. & O. at 64. Thus, the ALJ viewed this false reason for termination as evidence supporting Tipton's claim of discrimination. R. D. & O. at 64.

I&M's second reason for firing Tipton was Tipton's failure to adhere to management directions with regard to the TDB update, which resulted in a delay in issuing the TDB revision. But the fact-finding team concluded that Turcotte, not Tipton, had the assignment and responsibility to do the TDB update. Tipton was only a reviewer of listed data on the TDB project; his role was limited, but I&M inexplicably ascribed more responsibility for the problems with the project to Tipton than it did to Brouwer and Turcotte. I&M offered no evidence to refute Turcotte's and Tipton's assertions that the Chacon draft was full of errors, and that it made no sense for Turcotte to follow management's initial instructions to use the erroneous Chacon data. The ALJ concluded that this "mendaciously proffered reason" for firing Tipton was evidence of I&M's discriminatory intent.

Finally, I&M presented evidence of Tipton's past performance problems, including previous suspensions, as a third reason for his termination. Recognizing that Tipton did have a "significant disciplinary history," the ALJ nevertheless concluded that I&M's personnel policies did not permit consideration of past performance problems until after a determination of misconduct had occurred. Since the ALJ had found no evidence of wrongdoing on Tipton's part, past performance should not have been

considered. Thus, Tipton's performance history did not justify adverse action, absent any other wrongdoing by Tipton.

Since none of I&M's proffered reasons for firing Tipton is legitimate, it has failed to establish by clear and convincing evidence that it would have taken adverse action in the absence of Tipton's protected activity. We therefore affirm the ALJ's determination, that I&M violated the whistleblower provisions of the ERA by terminating Tipton.

II. Remedies

We turn next to the remedies. The ALJ awarded Tipton back pay in the total amount of $79,220, which includes Tipton's lost 3% per year salary increase, 10% bonus pay for 2002, and 33% of salary for fringe benefits, as well as $10,774 in costs of medical and dental coverage replacement. He also awarded front pay of $91,038, compensatory damages of $25,000, and interest on all amounts from the last day of the hearing through the date of compliance with the order. Erratum and Recommended Order. The ALJ also ordered that I&M pay Tipton's attorney fees in an amount to be determined after briefing.[3]

A. Period of Recovery

The ALJ's back pay award covered the time period from the date of Tipton's termination to the last day of the hearing, July 29, 2003. I&M contends that the time period for the back pay award should have ended in March 2002, when I&M discovered an independent basis for Tipton's termination, i.e., Tipton's alleged second violation of I&M's Electronic Communications Policy. Specifically, I&M alleges that it would have terminated Tipton in March 2002 for a repeat offense of misusing its computers by sending and storing personal e-mails. The ALJ, however, concluded that I&M failed to prove that it would have discharged Tipton for violating its e-mail policy.

We have previously held that evidence of legitimate grounds for termination of employment, acquired by the employer after termination, is relevant to the issue of damages. *Timmons v. Mattingly Testing Servs.*, 95-ERA-40, slip op. at 5 n.13 (ARB June 21, 1996), *citing McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995). In this case, however, Tipton's alleged violations of the plant's electronic communications policy are not legitimate grounds for termination. A supervisor and three employees testified that they had received prohibited e-mails and forwarded them to others without being disciplined. The three employees stated that they received no counseling, warnings or suspensions for sending prohibited e-mails despite the fact that they forwarded the e-mails to supervisors as well as other employees. In addition, the supervisor testified that he had never disciplined any employee for violations of the plant's e-mail policy. R. D. & O. at 114.

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[3] We note that the matter of fees is still pending before the ALJ. Also, we have before us a motion to Motion to Direct Administrative Law Judge to Issue Preliminary Order of Payment of Attorney Fees and Costs. We deny that motion.

Like the ALJ, we conclude that I&M's assertion that it would have terminated Tipton for violating its e-mail policy is tantamount to an acknowledgment that I&M would have treated Tipton differently from other employees if he had still been employed. Therefore, I&M's argument that the ALJ should have limited Tipton's damages to the time period before its discovery of his e-mail history is without merit.

B. Back Pay and Fringe Benefits

Tipton is entitled to back pay. 42 U.S.C.A. § 5851(b)(2)(B). The purpose of a back pay award is to make the injured employee whole. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 90-ERA-30, slip op. at 12 (ARB Feb. 9, 2001), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490 (table) (11th Cir. 2002); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The back pay award should reflect not just lost base earnings; it should reflect attendant losses such as "interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay." *Hobby*, slip op. at 12 (internal citations omitted). Correspondingly, the back pay amount should not be reduced for an employee who is paid by the hour and works overtime. Otherwise, the employer would benefit from, and the innocent employee be penalized for the employee's additional hours of work. *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039; ALJ No. 2000-WPC-5, slip op. at 9 (ARB June 30, 2003).

After his termination, Tipton obtained employment as a contractor with American Maintenance & Engineering Services, Inc. (AMES) from June 3, 2002, to January 17, 2003, and as a permanent employee with Nuclear Management Company (NMC) from January 27, 2003, to the last day of the hearing on July 29, 2003. He requested front pay for three years from July 29, 2003, to July 29, 2006. In computing Tipton's back pay, the ALJ correctly ordered that Tipton receive the difference between what he would have earned if he had remained in his position at the Cook Plant and his annual earnings at AMES and NMC. The ALJ also did not err in deducting overtime earnings at AMES and NMC, which Tipton had included in his back pay calculation. R. D. & O. at 116. *See Moder,* slip op. at 10. Finally, we agree with the ALJ that per diem received from AMES should not be deducted from Tipton's back pay award because such amounts were intended to reimburse Tipton for travel and living expenses while working away from home. Erratum and Recommended Order at 1 n.1.

The ALJ awarded Tipton fringe benefits in the amount of $44,074 (or 33% of Tipton's annual salary). An award of back pay may include fringe benefits. *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 93-ERA-24 (Sec'y Feb. 14, 1996). With regard to Tipton's request for lost fringe benefits at 33% of base pay, the ALJ correctly concluded that Tipton met his burden of establishing his right to fringe benefits and appropriately identified those benefits. R. D. & O. at 117. We agree with the ALJ that any uncertainty in the exact dollar amount of fringe benefits must be resolved in favor of Tipton and against I&M as the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6, slip op. at 7 (ARB Sept. 24, 1997).

A complainant may recover the value of health insurance fringe benefits paid by his employer or the cost of purchasing substitute coverage, but not both. The ALJ awarded $10,774 to reimburse Tipton for his costs in purchasing replacement of his health and dental insurance. The ALJ also awarded Tipton $44,074 to cover the net lost value of fringe benefits. The fringe benefit award presumably includes premiums I&M would have paid on Tipton's behalf for health and dental insurance. R. D. & O. at 117. Since Tipton has therefore received a double recovery of health and dental insurance benefits, we reverse the ALJ's award of $10,774 for replacement insurance. Finally, because Tipton's fringe benefit award represents only amounts contributed by I&M to his fringe benefit package, we reject I&M's contention that the award should have been reduced by the amount of health insurance premiums Tipton would have paid if still employed at the Cook Plant.

C. Reinstatement and Front Pay

As stated above, the primary remedial purpose of the whistleblower protection provisions is to make the individual victim of discrimination whole. *See, e.g., Hobby*, slip op. at 7. To effectuate this purpose, Congress gave the Secretary of Labor broad authority to "(i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant." 42 U.S.C.A. § 5851(b)(2)(B).

At the hearing, Tipton stated that he desired reinstatement, but was wary of returning to his job at I&M. He therefore requested reinstatement. CX-15. Tr. 865. Under the ERA, reinstatement is an automatic remedy for a successful complainant. 42 U.S.C.A. § 5851(b)(2)(B). Although reinstatement is the statutory remedy, we have held that circumstances may exist in which reinstatement is impossible or impractical, and alternative remedies are necessary. *See Creekmore,* slip op. at 9. The preference of the prevailing complainant is not determinative. *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (ARB Mar. 31, 2005) (the ALJ erred in accepting at face value a statement from the complainant that he was not seeking reinstatement).

Here, the ALJ noted in his decision that I&M had not offered Tipton reinstatement to his former position at the Cook Plant and that Tipton had expressed a desire for reinstatement as well as trepidation about returning to his former employment. R. D. & O. at 119; Tr. 865. Without further discussion, the ALJ ordered front pay in lieu of reinstatement. Under the applicable law and the record before us, reinstatement would have been the appropriate remedy. But neither party has raised the issue of reinstatement on appeal. *See* 29 C.F.R. § 1979.110(a) (a party's petition for review to the ARB must specifically identify the findings, conclusions, or orders to which exception is taken; any exception not specifically urged ordinarily shall be deemed to have been waived). Therefore, although the ALJ erred in not addressing reinstatement, we deem the issue

waived and accept the ALJ's recommended remedy of front pay. *See Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 03-AIR-35, slip op. at 10 (ARB June 29, 2006).

I&M contends that the ALJ should have applied a discount rate of 5% to front pay since he applied a prejudgment interest rate of 5% to most of the back pay award. I&M concedes that the amount of the first year of front pay need not be reduced to present value. A front pay award is typically discounted to present value, based on the theory that interest may be safely earned on the amount that is awarded. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536-37 (1983). An appropriate discount rate represents the value of having the money now rather than later. Here, however, it is unnecessary to adjust Tipton's front pay award to account for the diminishing value of the dollar because the period of front pay ended on July 29, 2006, and Tipton still has not received his front pay.

CONCLUSION AND ORDER

The ALJ analyzed all the evidence and correctly applied relevant law. We have examined the record and conclude that it fully supports the ALJ's finding that I&M violated the whistleblower protection provisions of the ERA when it terminated Tipton's employment. Tipton has proven by a preponderance of the evidence that his protected activity contributed to the termination of his employment. We reverse the ALJ's award of $10,744 to cover his replacement insurance expenses because it constitutes a double recovery for Tipton. We accept the remainder of his recommended decision.

Tipton's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, I&M shall have 30 days from its receipt of the fee petition to file a response. Therefore, we **AFFIRM** the ALJ's finding and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge