IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-10916

ARB Nos. 98-166 & 90-ERA-30

GEORGIA POWER COMPANY,

Petitioner,

versus

U.S. DEPARTMENT OF LABOR,

Administrative Review Board,

Respondent,

MARVIN B. HOBBY,

Intervenor.

Petition for Review of a Final Decision

and Order of the Administrative Review Board,

United States Department of Labor

_____

(September 30, 2002)

Before EDMONDSON, Chief Judge, CARF*NES and SILERF** , Circuit Judges.

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SILER, Circuit Judge:

Complainant and Intervenor Marvin B. Hobby filed a complaint with the Department of Labor in 1990, alleging that the Georgia Power Company ("Georgia Power") violated the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851, when it terminated his employment as general manager of Georgia Power's Nuclear Operations Contract Administration (NOCA). Georgia Power appeals both the finding of liability by Respondent Department of Labor in its 1995 decision and the award of damages, including reinstatement, in the 2001 decision of the Administrative Review Board (ARB). We affirm.

I.

Hobby filed his complaint with the Department of Labor in 1990. In 1995, the Secretary of Labor ("Secretary") rejected the recommended decision and order of the Administrative Law Judge (ALJ) dismissing Hobby's complaint, found in Hobby's favor, ordered reinstatement, and remanded the case for calculation of damages.2 Hobby v. Georgia Power Co., No. 90-ERA-30 (Sec'y Aug. 4,1995).

The ALJ issued a recommended decision and order on remand in 1998, reiterating the reinstatement order and awarding Hobby back pay, perquisites, costs,

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and compensatory damages. Hobby v. Georgia Power Co., No. 90-ERA-30 (ALJ Sept. 17, 1998). Both parties appealed the ALJ damages decision to the ARB, which affirmed the decision in most respects although permitting Hobby to submit a petition for attorney's fees. Hobby v. Georgia Power Co., No. 90-ERA-30 (ARB Feb. 9, 2001). The facts underlying this dispute are described in detail in those three decisions. The basic facts are as follows.

Before being terminated by Georgia Power in 1990, Hobby had a lengthy career in the electric power industry, with extensive experience in the nuclear power field. In 1988, Georgia Power created a new entity within the company, NOCA, to serve as an interface between Georgia Power and the Southern Nuclear Operating Company (SONOPCO), a central entity created by the Southern Company, Georgia Power's parent corporation, to operate its nuclear power plants. Hobby was appointed as NOCA's general manager at a Level 20 pay scale and an annual salary of $103,104.

Beginning in 1989, Hobby engaged in two activities, which he later alleged were protected under the ERA's whistleblower protections. First, in January 1989 Hobby was called upon by Georgia Power to participate as a company witness in an ERA whistleblower case that had been brought against the company by John Fuchko, another Georgia Power employee (the Fuchko case). Hobby later alleged that at a pre-hearing

meeting with Georgia power's attorneys he raised strong objections to an outline of his proposed testimony, stating that it was false.

Second, several months later in an April 1989 memorandum, Hobby raised concerns within Georgia Power about whether the organizational structure of SONOPCO complied with the Nuclear Regulatory Commission's (NRC) legal requirements for nuclear plant operators. Hobby's concerns about the reporting structure of the SONOPCO operation were prompted in part by questions raised by Oglethorpe Power's project director, Dan Smith, who had been involved in the contract negotiations with Georgia Power. Oglethorpe held a partial ownership interest in some of the nuclear plants managed by Georgia Power.3

Hobby's immediate supervisor recommended to Georgia Power's senior management in January 1990 that Hobby's position be eliminated; this action was implemented on February 2,1990.4 Hobby filed his whistleblower complaint with the Labor Department on February 6,1990, alleging that Georgia Power eliminated his job in retaliation for his protected activities.

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In November 1991, the ALJ issued a decision finding in Georgia Power's favor and recommending that the complaint be dismissed. The ALJ concluded that Hobby did not engage in protected activity regarding the Fuchko trial. With regard to the concerns raised by Hobby in the April 1989 memo, the ALJ found that Hobby's actions were protected activities. Ultimately, however, the ALJ found that Georgia Power's decision to eliminate Hobby's position was motivated by legitimate business concerns, not retaliatory animus.

Hobby appealed to the Secretary of Labor, who reversed. Like the ALJ, the Secretary concluded that Hobby's April 1989 Memo raised protected concerns; however, the Secretary disagreed with the ALJ and concluded that Hobby was fired for this activity.5 As a result, the Secretary remanded the case to the ALJ, ordering Georgia Power "to offer Complainant reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits, to pay Complainant the back pay to which he is entitled, and to pay Complainant's costs and expenses in bringing this complaint, including a reasonable attorney's fee." Hobby, No. 90-ERA-30, slip op. at 28 (Sec'y Aug. 4, 1995).

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On remand the case was reassigned to ALJ Edith Barnett, who conducted extensive evidentiary hearings. ALJ Barnett died before issuing a recommended decision on damages, and the case was reassigned to ALJ Daniel A. Sarno, Jr. In his September 1998 decision, ALJ Sarno recommended that Hobby be awarded:

* reinstatement to a Level 20 (10) position 6 at Georgia Power (with restoration of all Level 20 (10) perquisites and benefits);

* back pay equal to the midpoint of a Level 20 (10) position from the date of Hobby's termination to the date of reinstatement;

* reimbursement for all lost benefits at the mid-point of a Level 20 (10) employee, plus interest;

* training necessary to the completion of his duties in his reinstated position;

* $250,000 in compensatory damages;

* $23,721.27 as compensation for loss of use of automobile benefits as provided by the company, plus interest;

* $20,384.21 for health and life insurance expenses, plus interest;

* $6,3345.12 for repayment for tax penalties incurred by Hobby when he withdrew retirement account funds prematurely, plus interest;

* $3,605.31 for reimbursement of job search expenses, plus interest;

* the cash value of 19 weeks of vacation time, plus interest;

* expungement of any negative references or commentaries in his employment record;

* and issuance of a "welcome back" memorandum.

Hobby, No. 90-ERA-30, slip op. at 69-70 (ALJ Sept. 17,1998). On appeal, the ARB affirmed the ALJ's order of damages in a detailed opinion. The only exception was to

provide for attorney's fees, as originally directed in the Secretary's 1995 order, which petition Hobby could submit to the ALJ.7

II.

A. Liability

On matters of law, we review de novo but also pay deference to the Secretary in construing the statutes he is charged with administering. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984); Bechtel Construction Co. v. Sec'y of Labor, 50 F.3d 926, 931, 933 (11th Cir. 1995). On matters of fact, we review the Secretary's order for substantial evidence to support the decision. 5 U.S.C. § 706(2)(E). We ask whether such relevant evidence exists '"as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389,401, 91 S. Ct. 1420, 1427 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938)). We do not reweigh the evidence or substitute our judgment for that of the Secretary, but review the entire record to determine if the decision reached is reasonable and supported by substantial evidence. Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991).

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Where the ALJ and the Secretary of labor differ, as here, we have observed that, "[t]his disagreement causes us to review the Secretary's order more critically. Ultimately, however, the decision is the Secretary's. We ensure only that the Secretary's conclusion, if different from the ALJ'S, is supported by articulate, cogent, and reliable analysis." Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568,1572 (11th Cir. 1997) (citations and quotations omitted).

B. Damages

The ARB's determinations as to reinstatement and mitigation are dependent on findings of fact and, thus, are to be reviewed under the same "substantial evidence" standard described above. The ARB's award of compensatory damages should be reviewed for abuse of discretion. See 42 U.S.C. § 5851(c)(1) (incorporating standards of 5 U.S.C. § 706(2)(A), requiring that the decision will be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law). "[O]nce liability has been found, the [district court] has a great deal of discretion in deciding the level of [compensatory] damages." Stallworth v. Shuler, 777 F.2d 1431, 1435 (11th Cir. 1985).

III.

A. Whether the findings of the Secretary that Georgia Power illegally retaliated against Hobby for engaging in protected conduct are supported by substantial evidence.

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Appellant raises four separate assignments of error as to the finding of liability.

1. Whether the Secretary committed reversible error by failing to find that Hobby established a prima facie case.

In its principal argument, Georgia Power argues that the Secretary erred as a matter of law by failing to make findings as to each prima facie element of Hobby's case in reversing the ALJ's decision and finding Georgia Power liable.

The prima facie elements referred to by Georgia Power relate to the burdenshifting (or McDonnell Douglas) framework applicable to ERA complaints. The employee must initially present a prima facie case, showing that (1) the employer is covered by the Act, (2) the employee engaged in protected activity, (3) the employee suffered adverse action, and (4) there is an inference of causation between the protected activity and the adverse action. Bechtel, 50 F.3d at 934. Once the employee makes a prima facie showing, the burden of production shifts to the employer to produce evidence that its action was motivated by a legitimate nondiscriminatory reason. Id. The employer can meet this burden of production simply by articulating legitimate, non-discriminatory reasons for taking the adverse action against the employee. If the employer does so, then the presumption raised by the prima facie case disappears from the case, and the "factual inquiry proceeds to a new level of specificity." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089,1095 (1981). The

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employee bears the burden of proving that "the employer's proffered reason is pretextual by establishing either that the unlawful reason, the protected activity, more likely motivated [the employer] or that the employer's proffered reason is not credible and that the employer discriminated against him." Bechtel, 50 F.3d at 934.

While a complainant may shift the burden of production to the employer by establishing a prima facie case, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 113 S. Ct. 2742, 2747 (1993).

In the 1991 decision, the ALJ found that Hobby failed to establish a prima facie case of retaliatory discharge or other adverse action. In reviewing that decision, and ultimately reversing it, the Secretary stated:

Considering the posture of this case and the magnitude of the record, I will not belabor the question of whether Complainant established a prima facie case. Respondent articulated legitimate, non-discriminatory reasons for removing Complainant from his job as manager of NOCA and modifying his office and parking privileges. Thus, the question becomes whether Complainant proved by a preponderance of the evidence that Respondent retaliated against him for engaging in activity protected by the ERA's whistleblower provision. While the ALJ proceeded in the analysis and reached an alternative, ultimate conclusion that Respondent was not motivated in whole or in part by any protected activity, that conclusion is not supported by the evidence. After thoroughly reviewing the entire record before the ALJ, I find that Complainant met his burden of proof on the ultimate issue and thus, as logic dictates, also presented a prima facie case.

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Hobby, No. 90-ERA-30, slip op. at 8-9 (Sec'y Aug. 4,1995). The principal complaint of Georgia Power with this decision might be described as the failure to "belabor."

The range of dispute over the prima facie elements is small; the final element is the only real element in dispute, that there is an inference of causation between the protected activity and the adverse action. Therefore, all that the Secretary did in not "belaboring" was to proceed to the ultimate issue of whether Hobby proved causation between the adverse action and protected activity. In the alternative, the Secretary might have found an inference, creating a presumption of discrimination, then considered if Georgia Power articulated non-discriminatory reasons for the action, which would have caused the prima facie presumption to disappear. Then, the Secretary could have proceeded to address whether Hobby had proven the causation between the protected activity and adverse employment action by a

preponderance of the evidence. At the appellate level, however, it is not error to omit a formalistic analysis when the ultimate conclusion implicitly includes a finding of an inference as to that same conclusion. See United States Postal Service v. Aikens,460 U.S. 711,103 S.Ct. 1478 (1983).

Because this case was fully tried on the merits, it is surprising to find the parties and the Court of appeals still addressing the question whether [the complainant] made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non.... The prima facie case method established

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in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether the defendant intentionally discriminated against the plaintiff

Id. 460 U.S. at 713-15, 103 S. Ct. at 1491-82 (citations, quotations and note omitted).

2. Whether the Secretary's factual findings and inference of motive and intent are based on substantial evidence.

3. Whether the Secretary made credibility determinations that are not based on substantial evidence.

4. Whether the Secretary committed reversible error by making a finding of pretext that is not based on substantial evidence.

All of the above issues raised by Georgia Power attempt to attack the Secretary's ruling "piecemeal." It is not the province of this court to assess whether the

credibility determinations are based on substantial evidence or whether various factual findings are based on substantial evidence. We review the entire record to determine if the decision reached is reasonable and supported by substantial evidence, not reweighing the evidence or substituting our judgment. Likewise, though the ALJ and the Secretary differed as to this ultimate issue of causation, our standard of review is no different. We affirm if the Secretary's conclusion is supported by articulate, cogent, and reliable analysis. Therefore, the issue is not how they differed, but is the Secretary's decision

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based on substantial evidence? In challenging this holding as not based on substantial evidence, Georgia Power takes a "divide and conquer" approach. This approach is exemplified in the following overview of its argument made in its reply brief:

To reach his ultimate findings regarding pretext, the Secretary makes two critical yet unsubstantiated conclusions which provide the necessary pieces of retaliatory animus: (1) that Hobby's concern regarding the reporting relationship between McDonald and Dahlberg was "implicit in his complaints about McDonald's lack of cooperation with NOCA" (Sec'y Order at 22-23) (emphasis added), and (2) that the May 5, 1989 meeting marked the point at which Georgia Power executives began plotting Hobby's employment demise. (Sec'y Order at 25). Because neither of these conclusions is grounded in the record evidence, these two conclusions (and the Secretary's reliance on them) fail to rise to the necessary level of substantial evidence

Throughout, Georgia Power makes similar arguments, such as "[t]he Secretary's conclusion that the contents of the entire memo are inexplicably [sic] intertwined is not based on substantial evidence." Only the overall conclusion by the Secretary that there was causation between the adverse action and protected activity is reviewed by this court.

In any event, Georgia Power's arguments as to these two findings it alleges lack substantial evidence in the above quotation at best only raise alternative interpretations. Those arguments do not demonstrate that the Secretary's conclusions are unreasonable. For example, regarding the Memo, Georgia Power

argues at great length in its pleadings that the Memo included "six full pages reflecting Hobby's perception that he

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was not receiving adequate cooperation in his position as NOCA General Manager, and . . . McDonald is repeatedly identified as an individual who interfered with Hobby's efforts and was somewhat antagonistic to NOCA since its inception" but "not until page seven of this memo does Hobby mention any licensing concern arising from McDonald's reporting relationship with Dahlberg and the possibility that Georgia Power could be in violation of its NRC license." In essence, Georgia Power portrays the memo as a whining memorandum by Hobby concerning McDonald's "stonewalling" of him, which includes a regulatory concern at the end. But it is just as reasonable to view the Memo as cataloging a list of the ways that McDonald, as the head of SONOPCO, was stonewalling NOCA, the arm of Georgia Power designed to liaison with that entity concerning nuclear operations that it managed under the aegis of Georgia Power's federal license. NOCA was established and supported by senior Georgia Power management. Therefore, such "stonewalling" could be considered evidence of McDonald's rogue operation of SONOPCO as an independent entity without oversight by Georgia power, which Hobby concluded likely violated the terms of Georgia Power's federal license. Georgia Power treats this concern dismissively, offering an organizational chart showing that McDonald reported directly to Dahlberg, the head of Georgia Power. But an organizational chart proves nothing, and it certainly would not have satisfied a federal regulatory inquiry regarding this matter. What in

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theory should happen and what in practice was happening, according to Hobby, might be very different.

In sum, it is not clear that the Secretary's interpretation was without basis. Georgia Power simply offers another interpretation of the Memo, with which the original ALJ also happened to agree. Concluding which is the correct interpretation is outside our purview. The Secretary's interpretation was an equally valid interpretation of the same document. Similarly Georgia Power's objection to the Secretary's reliance on the May 5, 1989, meeting between Dahlberg, Baker and Farley a few days after Williams received the Memo suffers from the same defect. Georgia Power argues

that Hobby was discussed but not the Memo, but the Secretary did not credit the testimony of those at the meeting, in light of their discussions of the Memo prior to the meeting, its closeness in time to the meeting, and her evaluation of those witnesses and their potential for bias. We cannot say such conclusion was unreasonable.

In addition to these two arguments, Georgia Power also argues that the temporal connection is too removed between the April Memo and the November evaluation of Hobby as performing below average and lacking any potential. Such argument, however, ignores the May 5 meeting and the other instances in which Hobby raised these concerns after submitting the Memo. Furthermore, the cases cited by Georgia Power purporting to require a shorter temporal link between the adverse activity and

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protected activity are not on point. In those cases, the complainants relied exclusively on the temporal connection to establish an inference of causation. Here, much more evidence is in the record than simply a temporal relationship between the protected activity and adverse employment action.

Georgia Power further challenges the Secretary's finding of shifting defenses. Before the ALJ, Georgia Power at times argued that it terminated Hobby because it was terminating the entire NOCA entity as redundant. At other times in that proceeding, it argued that Hobby was evaluated as performing below average and lacked any future potential with the company, as evidenced by the November 7 evaluations - in stark contrast to all other evaluations and comments on his work prior to that date. Georgia Power, however, attempts to reconcile these two defenses by arguing that the two reasons are inseparable: Hobby was rated poorly because NOCA was a failure and as Georgia Power was shifting its nuclear management to SONOPCO, there was no potential for Hobby at Georgia Power. It does not seem obvious that a manager would be rated as performing below average because the evaluator did not approve of the program to which he was assigned to manage, regardless of how well he was performing the management tasks assigned to him. To conclude otherwise is certainly not unreasonable.

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Georgia Power offers several other similar criticisms, but, as with the examples discussed, we find these criticisms do not remotely demonstrate that the Secretary's ruling lacked substantial evidence to support it.

IV.

In addition to challenging the Secretary's ruling on liability, Georgia Power also challenges several aspects of the ARB decision related to damages. It challenges the order of reinstatement of Hobby because it claims that his position has been eliminated, no substantially similar position is available, and it is otherwise impracticable. Georgia Power also challenges the back pay award because it alleges that Hobby failed to mitigate his damages. Finally, it contends that the award of compensatory damages of $250,000 is excessive. The ARB exhaustively addressed and dismissed these same issues.

A. Reinstatement

The ERA provides that a wrongfully terminated individual shall be reinstated "to his former position." 42 U. S. C. § 5851(b)(2)(B)(ii). This provision is based upon the principle that a complainant should be restored to a position equivalent to that which he or she would have occupied but for the illegal action of the employer. As the Secretary observed, reinstatement is the default or presumptive remedy in wrongful termination cases under the ERA. See, e.g., Creekmore v. ABB Power Sys. Energy

Servs., Inc., No. 93-ERA-24 (Dep. Sec'y Feb. 14, 1996); Smith v. Littenberg, 92-ERA-52 (Sec'y Sept. 6, 1995). In addition to making the whistleblower whole again, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offender.

Certainly, there are circumstances in which alternative remedies to reinstatement are permitted. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship." Creekmore, No. 93 -ERA-24, slip op. at 9 (Dep. Sec'y

Feb. 14, 1996), or where reinstatement otherwise is not possible, see, e.g., Doyle v. Hydro Nuclear Servs., Inc., No. 89-ERA-22 (ARB Sept. 6, 1996) (holding reinstatement impractical because company no longer engaged workers in the job classification occupied by complainant, and had no positions for which complainant qualified); cf. Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1449 (11th Cir. 1985) (holding in ADEA case, reinstatement, not front pay, was appropriate remedy where there was no evidence that "discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy").

In support of its argument before the ALJ, Georgia Power presented the testimony of Dr. Diane Davenport, who concluded that Hobby was not qualified for any position in Georgia Power. The ALJ gave no credit to that testimony, finding that

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Davenport omitted several positions in her consideration and ignored much of Hobby's work history. Likewise, the ALJ rejected Davenport's and Georgia Power's argment that since it had finally transferred all of its nuclear activities to SONOPCO, no position would be substantially similar to Hobby's previous position. The ALJ found that Hobby performed many non-nuclear tasks while in Georgia Power's employ, was not limited in qualification to the nuclear field, and his experience did qualify him for other executive positions at the utility. These conclusions are based on substantial evidence.

Georgia Power next argued that Hobby's long absence from the field, more than ten years, renders it impracticable for him to assume a senior management position. This argument failed both before the ALJ and ARB because his absence from the field was the direct result of Georgia Power's wrongful termination of him. It would be patently unfair for Georgia Power to avoid reinstatement because this case has proceeded slowly and, due to the circumstances of his termination coupled with his age, Hobby has not been able to find another job in the industry.

Finally, Georgia Power argues that it is inappropriate to require reinstatement of an employee into a high-level managerial position in certain situations involving pervasive animosity between the employer and the employee. First, there does not appear to be any evidence that such animosity exists. In fact, all of the people involved in the retaliation toward Hobby - Baker, Evans, Williams, Dahlberg, McDonald, and

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Farley - no longer work for Georgia Power. Furthermore, "[t]he presence of some hostility between parties, which is attendant to many lawsuits, should not normally preclude a plaintiff from receiving reinstatement." Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1339-40 (11th Cir. 1999).

B. Back Pay

The ERA does not explicitly require victims of employment discrimination to attempt to mitigate damages, but the Secretary and the ARB have consistently imposed such a requirement, in keeping with the general common law "avoidable consequences" rule and the parallel body of damages law developed under other anti-discrimination statutes. Georgia Power bears the burden of proving that Hobby did not properly mitigate. See Jones v. EG&G Defense Materials, Inc., ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29,1998); Doyle, No. 89-ERA-22 (ARB Sept. 6,1996). To meet this burden, it must show that (1) there were substantially equivalent positions available; and (2) Hobby failed to use reasonable diligence in seeking these positions. Johnson v. Roadway Express, Inc., ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 15 (ARB Mar. 29, 2000); see also Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir. 1983). "Substantially equivalent employment" would be a position providing the same promotional opportunities, compensation, job

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responsibilities, working conditions, and status. See Ford Motor Co. v. EEOC, 458 U.S. 219, 232-35, 102 S. Ct. 3057, 3065-66 (1982).

Just as the burden of proving a failure to mitigate falls on Georgia Power, so the "benefit of the doubt" ordinarily goes to Hobby. As the Sixth Circuit has observed,

A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant's burden is not onerous,

and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market.

Rasimas, 714 F.2d at 624 (citations omitted).

Both Georgia Power and Hobby presented extensive evidence on the issue of mitigation. The ALJ, however, ultimately was not persuaded by Georgia Power's evidence, and concluded the company failed to carry its burden of showing that Hobby failed to mitigate his damages. In addition, the ALJ found that Hobby "carried out a diligent search for employment."

The ARB recognized that the lack of a diligent search has been viewed as dispositive by our precedent in Title VII cases. See Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir. 1991), superseded by statute on other grounds. The ARB, however, concluded:

Both Weaver and Sellers were cases under Title VII of the Civil Rights Act of 1964, and not under the Energy Reorganization Act. Although the

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Secretary and this Board frequently look to case law under Title VII for its persuasive authority (see discussion at 16, supra), the anti-discrimination language of Title VII is different from the ERA's employee protection text. In addition, Title VII is designed primarily to vindicate private rights rather than promote the public health and safety enforcement goal of the ERA whistleblower provisions. As such, we do not find the standard articulated in Weaver to be controlling in this case; however, we conclude that even under the 2-pronged standard adopted by the Eleventh Circuit in Weaver, Georgia Power's argument fails because Hobby actively searched for alternative employment, albeit with limited success.

Hobby, No. 90-ERA-30, slip op. at 26-27 (ARB Feb. 9, 2001). As the above quotation demonstrates, it is not necessary, however, for the Court to determine whether Weaver applies to ERA cases. As the ARB held, even were it to apply Weaver, Georgia Power has failed to demonstrate that Hobby did not mitigate his damages.

On appeal, Georgia Power has failed to show that such factual finding was not supported by substantial evidence.

C. Compensatory Damages

The ALJ awarded and the ARB affirmed $250,000 in compensatory damages, which Georgia Power claims is high in relation to other similar cases. The ARB affirmed this award based on the following reasoning by the ALJ:

> In light of Complainant's high level position, his unemployment and underemployment for over eight years, his inability to find any work within the nuclear community, and the detrimental effect his protected activity has had on any chances of future promotion and future salary increases, and in light of the emotional stress Complainant endured due

> to his termination and inability to find comparable employment, I find that an order of compensatory damages in the amount of $250,00.00 is reasonable. I recognize that this amount is higher than those awarded in other cases, but I find that the situation here merits such a high award.

Hobby, No. 90-ERA-30, slip op. at 67 (ALJ Sept. 17, 1998). The ARB also noted the unlikely chance of a future promotion after reinstatement as a basis for this ruling, which Georgia Power objects to but offers no authority why such consideration in addition to the above considerations is relevant. It has now been twelve years since Hobby was terminated. He went from being a senior executive with Georgia Power, a large corporation, to working in a menial capacity for United Parcel Service after years of trying to return to the industry, which no doubt Georgia Power made difficult. On these facts, the damages determined by the ALJ and affirmed by the ARB did not constitute an abuse of discretion.

V.

The decisions of the Secretary as to liability and the ARB as to remedy are AFFIRMED.

[ENDNOTES]

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2 The Secretary issued final agency decisions in ERA whistleblower cases prior to 1996. In April 1996, the Secretary delegated this authority to the newly-created ARB. Sec'y Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996).

3 Questions about the lawfulness of Georgia Power's and Southern Company's decision to consolidate various nuclear plant operations, and Georgia Power's reaction to these questions, were implicated in another ERA whistleblower case brought by Allen Mosbaugh, a Georgia Power manager at the company's Alvin Vogtle Nuclear Plant. Mosbaugh v. Georgia Power Co., No. 91-ERA1, 11 (Sec'y Nov. 20, 1995). The Mosbaugh case subsequently was settled. Mosbaugh v. Georgia Power Co., No. 91-ERA-1, 11 (ARB Aug. 23, 1996).

4 Hobby remained on the payroll at Georgia Power until February 23, 1990.

5 Contrary to the ALJ, the Secretary also concluded that Hobby did engage in protected activity at the January 1990 pre-hearing meeting regarding the Fuchko case; however, the Secretary held that this protected activity did not motivate Georgia Power to terminate Hobby.

6 In 1995 Georgia Power adopted a new pay grade structure. Position levels were revised such that a position at the old Level 18 became Level 9, and Level 20 became Level 10.

7 Despite the allowance of an attorney's fee petition to be submitted to the ALJ, the ARB's order was a final order for purposes of appeal to this court. See Fluor Constructors, Inc. v. Reich, 111 F.3d 94, 96 (11th Cir. 1997).