Date: February 9, 1998
Case Nos. 94-TSC-00003
94-TSC-00004

IN THE MATTER OF

MARRITA M. LEVEILLE

and

DANIEL J. LEVEILLE

Complainants

v.

NEW YORK AIR NATIONAL GUARD

Respondent

Before: Robert D. Kaplan
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
(UPON REMAND BY THE SECRETARY OF LABOR)

1. Procedural History

This case arises from a joint complaint filed with the Department of Labor on January 6, 1994 by Mrs. Marrita M. Leveille and Mr. Daniel J. Leveille against their employer, the New York Air National Guard (Respondent), under the employee protection provisions of six environmental statutes, pursuant to the procedures set forth in the regulations at 29 C.F.R. Part 24.[1] The complaint alleges that Respondent discriminated against the Complainants by disseminating negative employment references because they had engaged in protected activity consisting of reporting alleged environmental problems at the military base where they were employed.

[1]The statutes are: Toxic Substances Control Act, 15 U.S.C. § 2622 (1988); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (i) (1988); Clean Air Act, 42 U.S.C. §7622 (1988); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1988); Water Pollution Control Act or Clean Water Act, 33 U.S.C. §1367 (1988); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1988).

A hearing was held before Administrative Law Judge Joel R. Williams on July 18 and 19, 1994. On January 19, 1995 Judge Williams issued Recommended Decision and Orders (ALJ D&O) recommending that the complaint be dismissed in its entirety.

On December 11, 1995 Secretary of Labor Robert Reich issued a Decision and Order of Remand (Secy. D&O) in which he found that Mrs. Leveille had prevailed "on a portion of the complaints." However, the Secretary found that Mr. Leveille had not filed a timely complaint. Moreover, the Secretary found, although Mr. Leveille had engaged in protected activity, there was no evidence that Respondent had discriminated against him.

The Secretary ruled that Respondent had blacklisted Mrs. Leveille because of her protected activity by providing adverse employment recommendations on two occasions, and that Respondent failed to prove it would have done so in the absence of the protected activity. (Secy. D&O at 22). The Secretary ordered Respondent to refrain from blacklisting Mrs. Leveille and to withdraw any adverse reference pertaining to her that was on file with the United States Office of Personnel Management (OPM).

The Secretary remanded the case to the Office of Administrative Law Judges for findings on compensatory damages, attorney fees, costs and expenses. As Judge Williams was not available, the case was assigned to me.

On June 5, 1997 I issued Post-Remand Order No. 12 in which it was noted that Respondent had advised that adverse comments had been removed from Mrs. Leveille's file at OPM. The Order directed that the parties either stipulate to the foregoing or submit evidence relevant to that matter. On July 18, 1997 I received Respondent's response, which includes an affidavit by Richard Hughes, Mrs. Leveille's OPM Official Personnel Folder, and letters from OPM dated February 5 and 14, 1997. (RX 1)[2] These documents reveal that on March 5, 1996 Respondent made its first inquiry of OPM regarding whether adverse remarks were contained in OPM records; no adverse comments were discovered. In October 1996 Respondent learned that OPM maintained an "investigative" file on Mrs. Leveille. On November 20, 1996 Respondent requested that OPM "take immediate steps to withdraw any adverse reference pertaining to M[r]s. Leveille filed by [Respondent]." In its letter dated February 14, 1997, OPM stated:

> We are removing any adverse reference provided by [Respondent] from M[r]s. Leveille's investigative file at OPM. We have notified all prior recipients of this amendment action, including M[r]s. Leveille.

After receiving RX 1, counsel for Mrs. Leveille filed a response in which questions were raised about the impact of Respondent's request that OPM remove adverse matter, including whether OPM had

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[2]The following abbreviations are used herein: CX denotes Complainant's exhibit; RX denotes Respondent's exhibit; TR denotes the transcript of the hearing before Judge Williams on July 18-19, 1994.

fully complied with the request. On July 15, 1997 I issued Post-Remand Order No. 13 in which I gave the parties the opportunity to submit evidence regarding this subject. On September 15, 1997 Mrs. Leveille submitted the unsworn statement of Paul Katz, who states that adverse comments remain in OPM's records (CX 68). RX 1 and CX 68 are received in evidence.

II. Contentions of the Parties

Complainants contend that Mrs. Leveille should be awarded compensatory damages for past and future emotional distress, related past and future medical services, damage to her marriage, impairment of her earning capacity, damage to her professional reputation, and reimbursement for costs and expenses including attorney's fees. (Complainants' Position on Damages and Remedies, pp. 19-29). Complainants propose the award of the following compensatory damages for Mrs. Leveille:

- $500,000 for past emotional distress
- $500,000 for future emotional distress
- $529.28 for past medical services
- $50,000 for future medical expenses
- $250,000 for harm to the marriage

No specific monetary amount has been proposed for injury to Mrs. Leveille's earning capacity or her professional reputation.

Complainants also claim that Mr. Leveille is entitled to damages for emotional distress, damage to professional reputation, and loss of consortium. Complainants seek $250,000 in compensatory damages for Mr. Leveille. (*Id.*, p. 29)

Further, Complainants contend that $500,000 should be awarded for exemplary damages. (*Id.*, p. 30) Finally, Complainants request that the affirmative relief ordered by the Secretary — that Respondent refrain from future blacklisting and to remove any adverse reference pertaining to Mrs. Leveille — be "enforced".[3] (*Id.*, pp. 33-34)

Respondent contends that Mr. Leveille is not entitled to an award of damages because he is not a prevailing party. Respondent also argues that attorney fees attributable to the representation of Mr. Leveille should be disallowed, and that the fees for the presentation of Mrs. Leveille's case should be reduced. Respondent further maintains that the amount requested for Mrs. Leveille's emotional distress is excessive, and that the record fails to establish damage to her professional reputation (Respondent's Position on Damages, pp. 8, 10). Finally, Respondent contends that exemplary damages are not warranted.

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[3] As it appears that Respondent already has removed all adverse references pertaining to Mrs. Leveille from its records and has requested that OPM also expunge its records, it is unclear what more Respondent can be ordered to do.

III. Issues

The issues to be resolved herein are:

1. Is Mr. Leveille entitled to damages?

2. Is Mrs. Leveille entitled to damages for emotional distress and loss of professional reputation and, if so, the extent of such damages?

3. Are exemplary damages appropriate?

4. What is an appropriate attorney's fee for Complainants' counsel?

IV. Findings of Fact and Conclusions of Law

This case has been remanded for the limited purpose of making findings with respect to compensatory damages and attorney's fees. (Secy. D&O at 22). Complainants request that the record remain open for the presentation of additional evidence regarding damages related to Mrs. Leveille's loss of earning capacity and injury to her professional reputation. (Complainants' Position on Damages and Remedies, p. 34). In his decision issued on July 15, 1995 Judge Williams noted that Complainants had full opportunity to submit evidence and that the record was closed. (ALJ D&O at 2) Complainants provide no support for their belated request to re-open the record and no offer of proof. Therefore, Complainants' request to re-open the record for these purposes is denied.[4]

1. Mr. Leveille is Not Entitled to Damages

Complainants contend that Mr. Leveille should be considered to be a prevailing party and to be entitled to compensatory and exemplary damages. However, no authority has been offered in support of this assertion. The regulations provide that a complainant is entitled to a remedy (including damages), "If the Secretary concludes that the party charged has violated the law ...." 29 C.F.R. § 24.6(b)(2). The whistleblower statutes contain similar language. E.g., 15 U.S.C. § 2622(b)(2)(B).

In the instant case, the Secretary found that violations had occurred vis-`a-vis Mrs. Leveille only. (Secy. D&O 9, 22) The Secretary specifically named only Mrs. Leveille as a prevailing party. (*Id.*) Finally, the Secretary adopted Judge Williams' findings that, although Mr. Leveille had engaged

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[4]Complainants also requested that the record be re-opened for the admission of evidence regarding their allegation that Respondent has not complied with the Secretary's order of affirmative relief because of records maintained by OPM. I granted this request in my Post-Remand Orders Nos.12 and 13, referred to above, allowing the submission of evidence regarding expungement of adverse statements made to OPM. This evidence is discussed below at pp. 8-9.

in protected activity, there was no timely complaint regarding adverse actions taken against him and the record was "devoid of evidence that Respondent blacklisted Mr. Leveille." (*Id.* at. 7-9). As noted above, Complainants have offered no authority in support of the contention that Mr. Leveille is entitled to damages although he is not a prevailing party.

Based on the foregoing, I find that Mr. Leveille is not a prevailing party and thus he is not entitled to either compensatory or exemplary damages.

Complainants contend that damages for loss of consortium should be awarded to Mr. Leveille, even if he is not a prevailing party. (Complainants' Position on Damages and Remedies, p. 13) However, again, Complainants have provided no legal authority supporting their propositions that loss of consortium is an appropriate whistleblower's remedy or that a non-prevailing party is entitled to such damages. For these reasons, I find that Mr. Leveille is not entitled to an award of damages for loss of consortium.

2. Compensatory Damages for Mrs. Leveille

Since I have found that Mr. Leveille is not a prevailing party, the term "Complainant" will hereafter refer to Mrs. Leveille only.

Complainant does not contend she is entitled to damages for lost wages per se. Indeed, Complainant does not allege that the termination of her employment was retaliatory. And the Secretary found that Mrs. Leveille's termination was not related to her protected activity. (Secy. D&O at 8) For the foregoing reasons, Mrs. Leveille is not entitled to damages for lost wages or for front pay.

A. Emotional distress

The Secretary found two instances in which Respondent provided adverse references about Complainant. One violation occurred when Respondent provided an adverse employment recommendation to a business named Documented Reference Check (DRC), which had telephoned Respondent at Complainant's request.[5] Respondent told DRC that Complainant's marriage interfered with her job performance, was critical of Complainant's "interpersonal skills" and labeled her as "combative". Respondent concluded the conversation by stating, "I think you know how to listen between the lines". (CX 41)

The second violation occurred when Respondent provided adverse employment information to OPM, stating that it would not recommend Complainant for government employment or a government security clearance. (CX 67) (The record does not contain all the information Respondent

[5]Complainant testified that, "Documented Reference Check is an agency that will verify any negative or derogatory information that a previous employer is providing about you to other potential employers." TR 90. See CX 39, 40.

provided to OPM. Complainant was precluded from obtaining some information because a source requested confidentiality under the Privacy Act.) The Secretary held:

> Having an adverse reference on file with a central government employment agency and accessible for hiring decisions concerning security is tantamount to having an adverse performance appraisal on file in an employer's personnel office and accessible for decisions pertaining to promotion and layoff.

(Secy. D&O at 21) According to OPM, "Other agencies requesting [Complainant's] investigative file will receive a copy unsanitized. The retention schedule for [the] investigative file is 15 years." (CX 57)

The Secretary may order violators of whistleblower statutes to pay compensatory damages to the victims of their discriminatory acts. 29 C.F.R. § 24.6(b)(2); 15 U.S.C. § 2622(b)(2)(B) Compensatory damages are appropriate for intangible injury, such as mental anguish, when the economic impact cannot be quantified. *Blackburn v. Martin*, 982 F.2d 125, 132 (4th Cir. 1992). In order to recover, a complainant must show that he or she experienced mental and emotional distress and that it was caused by the violation. *Id.* at 131; *Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978). The testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant's case for entitlement to compensatory damages. *Thomas v. Arizona Public Service Co.*, 89-ERA-19, (Sec'y Sept. 17, 1993), slip op. at 27-28.

In the instant case, there is ample evidence that Complainant experienced emotional pain and suffering and mental anguish that warrant entitlement to compensation. The record reveals that Complainant suffered severe anxiety attacks, shortness of breath, and dizziness because of the stress caused by Respondent's acts of blacklisting. (TR 98) Complainant testified she felt that she "wasn't the same person", that she could not concentrate, stopped talking to friends, and no longer enjoyed "anything in life". (TR 96, 98) Further, Complainant experienced distress over Respondent's negative comments to DRC. (TR 93; CX 40, 41) Complainant also believed that her husband failed to "protect her" from Respondent's blacklisting, and that she "needed to ask...for a divorce". (TR 95-96)

Complainant sought professional counseling from a psychologist, Dr. Edwin Carter, whose testimony at the hearing corroborated Complainant's contentions. Dr. Carter characterized Complainant's condition as "one of the worst cases of a negative reaction", and diagnosed depressive disorder dysthmia, which he stated consists of panic attacks and physical manifestations of stress. (TR 148-49) Dr. Carter opined that these symptoms were the direct result of Respondent's violative conduct. (TR 165) Further, Dr. Carter testified that the "employment problems" with Respondent created constant marital tensions that may have "done the marriage in". (TR 155) Finally, Dr. Carter stated that Complainant has suffered permanent emotional effects that will require future counseling or therapy. (TR 158)

Based on the foregoing, I find that Complainant is entitled to an award of damages for emotional stress. The next question is how to measure these damages: Complainant requests $500,000 for past distress, $500,000 for future distress, $50,000 for future medical expenses and $250,000 for harm to her marriage.

An important standard for assessing whether an award for compensatory damages is reasonable is "whether the award is roughly comparable to awards made in similar cases." *Gaballa v. Arizona Public Service Co. And the Atlantic Group, 94-ERA-9, slip op. at 4 (Sec'y Jan. 18, 1996).* Complainant contends that because Dr. Carter's testimony is unrebutted, she is entitled to an award that is significantly higher than in cases in which no expert provided corroboration of injury to the psyche. Although a psychologist's testimony will strengthen a case for entitlement to damages, the damages must be at least in rough accord with awards made in similar cases. *See EEOC v. AIC Security Investigations, LTD., 55 F.3d 1276, 1285 (7th Cir. 1995). The Secretary has awarded* compensatory damages in the following amounts for emotional suffering or distress: $10,000 for mental and emotional distress for discharge - *Smith v. Littenburg*, 92-ERA-52, slip op. at 7 (Sec'y Sept. 9, 1995); $10,000 for emotional distress from harassment, blacklisting and discharge - *McCuistion v. TVA, 89-ERA-6, slip op. at 21-22 (Sec'y Nov. 13, 1991); $25,000 for emotional* distress from blacklisting - *Gaballa, supra*; $40,000 for emotional distress from layoff - *Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24, slip op. at 14 (Sec'y Feb. 14, 1996);* $50,000 for mental anguish and depression, aggressive and intimidating treatment, and potential damage to reputation - *Marcus V. TVA,* 92-TSC-5, slip op. at 10 (Sec'y July 3, 1995).

In *Smith v. Littenburg*, a psychiatrist testified that the complainant was "depressed, obsessing, ruminating," and "had post traumatic problems". 92-ERA-52, slip op. at 4. The complainant was subsequently awarded $10,000 for emotional distress, $1,250 for medical expenses, and up to $10,000 for future psychiatric fees, provided that complainant availed himself of counseling and presented bills to the respondent for payment. *Id.* at 5. Similarly, in the *Gaballa* case, Dr. Edwin Carter (the same psychologist whom Complainant relies upon in the instant case) testified that the employment confrontation, the employer's failure to support the complainant, and a subsequent discriminatory reference initiated a process of emotional distress, leading the complainant to view himself as a "pariah". 94-ERA-9, slip op. at 4. In that case the complainant testified that he suffered emotional malaise which affected his marriage. *Id.* The Secretary awarded $25,000 for mental and emotional suffering, taking into account "prior awards in various cases, [and] the fact that [complainant] ha[d] already received compensation through settlement for part of the emotional suffering caused...." *Id.* at 4-5.

Taking into account the testimony of Complainant, Mr. Leveille and Dr. Carter, as well as prior awards in comparable cases, I find that Complainant is entitled to compensatory damages in the amount of $45,000 for past and future emotional distress (including harm to marriage),[6] $529.28 for

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[6]This finding is not dependent on my subsequent determination that adverse material remains in Complainant's OPM records. On the other hand, I conclude that these damages are not increased by the latter finding.

past medical expenses and $10,000 for future medical expenses— provided that Complainant does in fact seek counseling and presents her bills to Respondent for payment.

Interest does not accrue on the compensatory damages award. *Creekmore*, 93-ERA-24, slip op. at 14.

B. Damage to vocational reputation

Respondent's discriminatory acts have been set forth at length above. Respondent has been ordered by the Secretary to "withdraw any adverse reference pertaining to [Complainant] on file with [OPM]", and Respondent has attempted to do so.

Complainant argues that OPM has not completely expunged the adverse comments about her, and supports its contention with the written statement of Paul Katz, a former Assistant Director of OPM (CX 68). Katz, states that, "The negative information about [Complainant] provided by Respondent to OPM in 1993 is still indexed and/or accessible by OPM and future employers." Katz states that the original file created by OPM was put on Microfilm, and that in his opinion there exists a permanent record of the negative information. Further, Katz claims that there exist negative OPM files created to process Complainant's FOIA and Privacy Act appeal, and that Respondent caused OPM to create a permanent document when Respondent requested Complainant's Official Personnel folder from OPM on March 5, 1996.[7] Finally, Katz states, and the record shows, that OPM sent copies of documents containing adverse information to Complainant's former employer, the Federal Highway Administration (FHA), on two occasions. Katz opines that the negative information would remain accessible to future employers through the FHA.

As noted above, the Secretary has found that the OPM record is "tantamount to having an adverse performance appraisal on file in an employer's personnel office."[8] I find that Respondent has taken reasonable action to cause OPM to remove all adverse comments regarding Complainant. I find that, nevertheless, OPM records have not been completely expunged of adverse comments. Despite Respondent's reasonable efforts to comply with the Secretary's order, Respondent is responsible for the fact that Complainant will be affected by the continuing presence of adverse remarks in the OPM records: Respondent is liable for the effects of its misconduct which it could

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[7]A copy of the document, a "Standard Form 127," is attached to Katz's statement. Complainant suggests that the mere existence of this form will alert employers to "dig" further and to discover the adverse information on OPM's permanent file.

[8]Therefore, it can be inferred that the Secretary was well aware that there could be difficulty in obtaining total expungement of the adverse comments from OPM records. However, as OPM is not a party, I have no authority to direct OPM to take any action.

have reasonable anticipated. For the foregoing reasons, I find that the evidence supports a claim of damage to Complainant's vocational reputation.[9]

I find that Complainant has suffered and continues to suffer injury to her vocational reputation due to Respondent's discrimination against her and that these damages amount to the sum of $25,000.

3. Exemplary damages

Several of the whistleblower statutes upon which Complainant has based her cause of action authorize exemplary damages "where appropriate". Exemplary damages are appropriate where the wrongdoer's conduct exhibits reckless or callous indifference to the federally protected rights of others. *See Smith v. Wade*, 461 U.S. 30, 56 (1983). The Secretary in *Johnson v. Old Dominion Security, 86-CAA-3 (Sec'y May 21, 1991), described a two-step analysis. The threshold inquiry* centers on the wrongdoer's state of mind: Did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights. *Id.* at 16-17. The "state of mind" thus is comprised of both intent and the resolve actually to take action to effect harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence. *Id.* at 17.

I find that the record does not support the conclusion that Respondent acted with the requisite state of mind necessary to warrant an award of exemplary damages. Generally, a bare statutory violation is insufficient to substantiate such an award. *Id.*, citing *Guzman v. Western State Bank of Devil's Lake, 540 F.2d 948, 953 (8th Cir. 1976). There is no evidence in the record to suggest that* Respondent's retaliatory discrimination went beyond the statutory violation of two instances of blacklisting. Respondent's conduct thus falls short of that present in a number of cases in which exemplary damages were awarded, including those relied on by Complainant. *Rowlett v. Anhueser Busch, Inc. 832 F.2d 194, 207 (1st Cir. 1987); Fishman v. Clancey, 763 F.2d 485, 489 (1st Cir.* 1985); *Keenan v. City of Philadelphia*, 983 F.2d 459, 471-72 (3d Cir. 1992). Because I do not find the existence of the requisite state of mind and conduct, I need not decide the question of deterrence.

Accordingly, exemplary damages are not awarded.

4. Attorney's fees

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[9]Complainant has offered no discrete evidence supporting her contention that she has suffered a loss of "earning capacity". However, the concept of damage to "professional reputation" seems simply another way of describing injury to earning capacity. I view these concepts to be almost interchangeable.

The Secretary may order a violator to pay "a sum equal to the aggregate amount of all costs and expenses (including attorney's and expert witness fees) reasonably incurred...." 29 C.F.R. § 24.6(b)(3).

Counsel for Mr. and Mrs. Leveille requests through June 17, 1996, costs of $12,736.07 and an attorney's fee of $58,225.75, calculated as follows:

Attorney	Hours	Rate Per Hour	Lodestar
Lead Attorney (1993-1994)	178.76	$190	$35,752.00
Lead Attorney (1995)	56.55	$225	$12,723.75
Lead Attorney (To 6/17/96)	13.00	$225	$3,250.00
Associate Attorney	45.00	$100	$4,500.00
Legal Intern	40.00	$50	$2,000.00

Finally, in a letter dated January 20, 1998, counsel requested the opportunity to submit a supplemental fee application covering services and costs for the period subsequent to June 17, 1996.

Respondent contends that recovery of an attorney's fee and costs is permissible only for the representation of Mrs. Leveille, as Mr. Leveille is not a prevailing party. I agree.

Respondent also argues that Mrs. Leveille's attorney's fees should be reduced to account for time spent on her husband's case. I disagree with that contention. Virtually all of the preparation for Mr. Leveille's case was directly related to the issues involved in the investigation and trial preparation of Mrs. Leveille's case. Both Mr. Leveille and Mrs. Leveille were involved in reporting the same environmental concerns to Respondent during the same period of time. Complainant's counsel also points out that most of Mr. Leveille's testimony related directly to Mrs. Leveille's case. I find that the time spent in preparing Mr. Leveille's case was not duplicative. I further find that the issues and facts involved in the two cases, as well as the preparation to determine and present those facts and issues at hearing were "sufficiently intertwined" to warrant no reduction of the attorney's fee and costs. *Hilton v. Glas-Tec Corp.*, 84-STA-6 (Sec'y July 15, 1986).

Respondent concedes that the hourly rates requested for the attorneys and law clerks are reasonable. However, Respondent questions the reasonableness of the hourly rate of $200 for travel

time to Albany, New York, from Washington, D.C. for the deposition of Lt. Purple. Respondent claims that billing the full rate of $200 per hour for 7 ½ hours is unreasonable, and that the fee should be reduced by 50 percent. Although he does not agree with Respondents objection, Complainant's counsel states that he agrees to accept the $750 reduction. I therefore find that Complainant is entitled to the original amount requested for attorney's fee and costs, less the $750 reduction. Complainant is thus entitled to $57,475.75 for attorney's fee and $12,736.07 for costs, for a total award of $70,211.82 for attorney's fee and costs incurred through June 17, 1996.

Complainant contends that pre- and post-judgment interest on the attorney fee should be awarded, citing *Larry v. Detroit Edison Company*, 86-ERA-32 (Sec'y May 19, 1992). In *Larry*, the Secretary quoted the following language in *Nat. Ass'n. of Concerned Vets. v. Sec. of Defense*, 675 F.2d 1319, 1328-1329 (D.C. Cir. 1982):

> The lodestar fee may....be adjusted upward to compensate counsel for the lost value of the money he would have received resulting from delay in receipt of payment. [T]he hourly rates used in the "lodestar" represent the prevailing billing rate for clients who typically pay their bills promptly. Court-awarded fees normally are received long after the legal services are rendered. No precise formula is available to measure the delay factor. [W]here the hourly rate used in computing the lodestar is based on present hourly rates a delay factor has implicitly been recognized and no adjustment for delay should be allowed.

Id. at 2) The Secretary went on to calculate an adjusted Lodestar at current rates and to compare this with counsel's requested interest additur. *Id.* at 2. The Secretary found that the requested interest additur was substantially higher than the adjusted lodestar at current rates ($16,138 compared to $12,220), thus he reduced the requested additur by $3,000.

Respondent raised no objection to Complainant's request for pre-and post-judgment interest. In accord with *Larry*, I find that Complainant's counsel is entitled to interest on the award of the attorney's fee, and that the amount of the award will be the lesser amount of either the adjusted lodestar at current rates or the interest additur requested by Complainants. Complainant's counsel will be given the opportunity to submit the appropriate calculations. However, I note that counsel delayed for seven months in submitting his fee application — from December 11, 1995, when the Secretary issued his D&O until the application was submitted on July 19, 1996. As the seven-month delay was due to the fault of counsel, he is not entitled to interest during that period.

Finally, Complainant's counsel will also be given the opportunity to submit a fee application covering the post-June 17, 1996 period of time.

ORDER

Daniel J. Leveille's request for damages is DENIED.

The Complainants' request for exemplary damages is DENIED.

Respondent New York Air National Guard is ORDERED to pay Marrita M. Leveille the following amounts:

1. $45,000 for past and future emotional distress;

2. $25,000 for past and future damage to vocational reputation;

3. $529.28 for past medical expenses;

4. $10,000 for future medical expenses — provided that she obtains future medical treatment for related injury and presents her bills to Respondent for payment;

It is further ORDERED that Respondent shall pay Complainant's counsel an attorney's fee and costs for the period ending on June 17, 1996 in the amount of $70,211.82.

It is further ORDERED that Complainant's counsel, within thirty (30) days of the date hereof, may submit (1) an application which sets forth the calculation of the amount of interest to which he is entitled on the fee (excluding the seven-month period described above), and (2) a supplemental application for fees and costs for the period subsequent to June 17, 1996. Respondent shall have fifteen (15) days within which to file an opposition to these submissions.

Robert D. Kaplan
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).