UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 28, 1999

Zelleka Getahun,	)
Complainant,	)
	)
	) 8 U.S.C. § 1324b Proceeding
v.	) OCAHO Case No. 94B00187
	)
Dupont Pharmaceuticals	)
Company,	)
Respondent.	)
_____	)

FINAL ORDER REGARDING RELIEF

Background

On May 10, 1999, the undersigned issued an Order Entering Summary Decision in Favor of Complainant, concluding that DuPont Pharmaceuticals Company (respondent or DuPont) had engaged in document abuse in the course of having improperly rejected the Employment Authorization Document (EAD) application receipt which Getahun (complainant or Getahun) had proffered. That Order also advised that the parties were to submit concurrent briefs addressing the amount of the civil money penalty to be assessed against DuPont, as well as the relief to which Getahun is entitled.

DuPont's brief captioned Respondent Dupont Pharmaceuticals Company's Brief Regarding Penalties and Relief to Which Complainant is Entitled addresses issues that are well beyond the scope of penalties and remedies. In its brief, DuPont improperly seeks to again argue the question of its liability and pursues a variety of arguments, including ones based on the Administrative Procedures Act and good faith reliance. These arguments were previously presented and therefore have been preserved for appeal and will not be addressed in this Order since they bear on the

already decided issue of liability rather than the present question concerning the assessment of penalties and appropriate relief.

Summary of Evidence

DuPont's evidence consists of excerpts from the deposition of Getahun, along with two attachments including Getahun's Curriculum Vitae and a list of Getahun's job experiences since her termination at DuPont, labeled Exhibit A. DuPont also provides a document captioned Affidavit of Dr. George Trainor in Support of Respondent, Dupont Pharmaceuticals Company's, Brief Regarding Penalties and Relief to Which Complainant is Entitled, labeled Exhibit B. Trainor's affidavit is accompanied by three attachments including a chart containing the names of DuPont's Cancer Research employees, a chart listing, among other information, the names of DuPont's Chemical and Physical Sciences employees, and a breakdown of Chemical and Engineering News (C&EN) job advertisements for the period between November 1993 and April 1998. DuPont also compiled a list of Getahun's job search efforts based on documents submitted in response to discovery requests, labeled Exhibit C. Finally, DuPont submitted four binders containing C&EN's classified advertisements for the period November 1, 1993 to April 27, 1998, Exhibit D.

Getahun's evidence consists of her affidavit, Exhibit A, and four attachments thereto, including a statement of earnings from DuPont, financial information, documentation of Getahun's job search efforts, and a C&EN salary and employment survey of American Chemical Society (ACS) members, attachments 1–3 respectively. In addition, Getahun submitted a table of Internal Revenue Service (IRS) interest rates, Exhibit B. Lastly, Getahun's evidence includes an affidavit of Ann Massey Badmus regarding attorney's fees, Exhibit C.

Prior to her October 27, 1993 termination from DuPont's Cancer Section, Getahun earned an annual salary of $57,300 plus medical benefits. In addition, DuPont contributed 3% of Getahun's salary to a retirement plan.

Following her termination, Getahun states that she searched for jobs using a variety of approaches, including calling on friends and colleagues, contacting recruiters, checking the National Institute of Health's electronic database, attending local American Chemical Society (ACS) meetings and posting a letter in its data-

base, writing to companies whose addresses she found in library books containing company profiles, searching the Chronicle of Higher Education and the Chemical and Engineering News (C&EN), and making cold calls in hopes of meeting potential contacts and learning of employment opportunities.

Though DuPont asserts through Dr. Trainor's affidavit testimony that unsolicited contacts and walk-ins are unreasonable methods of conducting a job search, Getahun found at least two of her post-DuPont positions by the use of those methods. Getahun secured her summer teaching position at Temple University by walking in and introducing herself to the faculty and also secured her present Fellowship by sending unsolicited resumes to professors with whom she had no prior contacts.

Getahun asserts that the documentation of her job search is not fully reflective of her efforts. She had also changed her place of residence twice since her termination from DuPont, the first time in an attempt to prevent foreclosure proceedings. She notes that some documentation was lost or misplaced during the moves, and that perhaps even a full computer diskette storing job search letters was lost. She also indicates that she may have been lax in saving copies of letters that she had mailed.

Though Getahun provides documents, including letters she sent, post marked envelopes, and company responses, she does not provide the total number of jobs for which she applied. Some of the documents she has submitted concern the same position. DuPont provides a compilation of these documents and arrives at totals quite close to those derived from viewing Getahun's documents with the goal of counting the number of positions for which she applied rather than the total number of pieces of correspondence. Based on both the compilation and an independent count, Getahun has presented documentation showing that, at minimum, she applied for two positions in 1993, 64–69 positions in 1994, 8–9 positions in 1995, 6 positions in 1996, 10 positions in 1997, and 19 positions in 1998. Getahun attests to having pursued approximately two jobs per week since her termination until beginning her current full time position at the University of Pennsylvania, in July 1998.

After leaving DuPont and prior to securing a full time fellowship, Getahun held the following salaried positions in academia: tutor at the University of Delaware; adjunct assistant professor at Tem-

ple University; adjunct faculty member at Salem Community College; adjunct faculty member at Chestnut Hill College; and instructor at West Chester University. In addition, she held positions outside academia including a clerical job with Dial Direct/Telespectrum and a position with Primerica Financial Services.

The evidence submitted further establishes that Getahun, who has her Ph.D. in organic chemistry from the University of Vermont and specializes in anti-tumor compounds, synthesis, and analysis, is the Raiziss Fellow at the University of Pennsylvania. She began working at the University of Pennsylvania on a full time basis in July of 1998, but previously held a part time position there since March 25, 1998. She earns $43,200 per year as the Raiziss Fellow. That fellowship consists of three consecutive one-year terms.

At one point in her deposition, Getahun indicated that she viewed her current position at the University of Pennsylvania to be at least equivalent to her former position at DuPont, notwithstanding the disparity in salary. She explained that statement in response to a follow up question by her attorney. In redirect examination, she stated that it was not an equivalent job and that she had accepted the position only to reestablish her position in the research arena.

Dupont offers the affidavit of Dr. George Trainor to support its contention that Getahun would have lost her job on one of two occasions even in the event that she had not been terminated in 1993. First, Trainor states that because of a reorganization which took place between January and March 1994, the Cancer Section, in which Getahun worked, was abolished. Trainor further attested that, of the 50 persons employed in the Cancer Section, all had been either laid off or transferred.

Two named individuals with jobs and skills comparable to Getahun's were transferred into the Chemical Preparations Group. Trainor further attested that it was reasonably likely that Getahun would not have been transferred in place of one of these scientists, because she was junior to them and had also graduated from a less reputable university, but he reached those conclusions without providing either the names of the other schools or any other additional information about the relative expertise of the individuals. Trainor identified the two scientists transferred to the Chemical Preparations Group, named three individuals who were laid

off, and tagged three individuals who resigned voluntarily or were laid off. Therefore, Trainor accounts for only eight of the fifty individuals who were employed in the Cancer Section. The fate of the other 42 is not clear from Trainor's affidavit or the organizational charts attached thereto.

Trainor's affidavit alternatively asserts that Getahun would have been laid off in the Spring of 1998, when it was apparent that DuPont's growth as a premier research company left no positions for people with skills comparable to Getahun's. Trainor notes that the last of the "Ph.D. holdout chemists" were laid off in the Spring of 1998 and identifies one such individual. Trainor does not, however, give any indication of the number of "holdout chemists" or comment on whether the two scientists transferred to the Chemical Preparations Group with skills comparable to Getahun were among the "holdouts."

Discussion, Findings, and Conclusions

The majority of remedies contained in 8 U.S.C. § 1324b are discretionary. Upon a finding of liability, however, an administrative law judge must issue a cease and desist order. 8 U.S.C. § 1324b(g)(2)(A). Discretionary remedies include ordering the following: compliance with § 1324b with respect to individuals hired for a period of up to 3 years; retention of the names and addresses of those who apply for employment for a period up to 3 years; hiring of the aggrieved party with or without back pay; payment of the applicable civil penalty; posting of notices informing employees about their rights and about the employer's obligations under § 1324b; and education of the hiring personnel. 8 U.S.C. § 1324b(g)(2)(B).

The cornerstone presumption when awarding remedies is that the finding of a violation will result in an award of back pay. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421–22 (1975); *United States v. Lasa Marketing Firms*, 1 OCAHO 141, 973 (1990) (embracing the presumption, though denying back pay based on the limited facts of the case).[1] Having found that DuPont engaged

[1] Citations to the Office of the Chief Administrative Hearing Officer (OCAHO) precedents, reprinted in bound volumes 1–7, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1–7 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations

Continued on next page—

in document abuse, a strong presumption in favor of back pay arises. That presumption limits the discretionary ability to deny back pay. *See Lasa Marketing*, 1 OCAHO 141 at 973.

Though there is a presumption favoring back pay, the aggrieved party nonetheless must mitigate his or her damages. 8 U.S.C. § 1324b(g)(2)(C). The duty to mitigate is satisfied if the party makes an honest, good faith effort. *See United States v. Educational Employment Enter.*, 1 OCAHO 283, 1837 (1991). The employer bears the burden of showing that the aggrieved party failed to mitigate. *See Lasa Marketing*, 1 OCAHO 141, at 974. Given that the plaintiff only needs to make an honest, good faith effort, the defendant's burden is significant.

The plaintiff's duty to mitigate only requires seeking employment that is substantially similar to the position from which he or she was terminated. Substantially similar employment includes those positions offering almost identical opportunities for promotion, pay, responsibility, working conditions, and status. *See Booker v. Taylor Milk Co.*, 64 F.3d 860, 866 (3d Cir. 1995).

Declining to take or seek employment that would require relocation generally does not constitute a failure to mitigate damages. *See Hegler v. Board of Educ.*, 447 F.2d 1078, 1081 (8th Cir. 1971) (holding that the plaintiff was not required to leave her community or state to find alternate employment); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 712 (E.D. Wis. 1978). An employer cannot establish a plaintiff's failure to mitigate simply by pointing to available jobs that would require the plaintiff to relocate. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 625 (6th Cir. 1983) (holding that the plaintiff did not fail to mitigate by refusing travel 223 miles for an interview). Therefore, failure to pursue or accept positions that would require making a move does not necessarily demonstrate a failure to mitigate.

In limited instances, a plaintiff may be required to relocate to fulfill the obligation to mitigate damages. When a company frequently expects its employees to relocate within the company, the refusal to do so may constitute a failure to mitigate. *Wehrly v.*

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to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

American Motors Sales Corp., 678 F. Supp. 1366, 1386 (N.D. Ind. 1988).

DuPont bears the burden of showing that Getahun failed to mitigate her damages. DuPont has not shown that it or the industry of which it is a part frequently requires relocation of employees. Thus, the general rule that an aggrieved party need only pursue a job in the same geographical region applies. DuPont has failed to prove that the job announcements for positions outside the geographic region in which Getahun lives demonstrate a failure to mitigate.

DuPont has submitted four binders containing comparable employment opportunities for the relevant period. That submission, however, is of limited use since a great many of those positions would have required Getahun to relocate. DuPont did not filter the job listings to pinpoint only those in a reasonable geographic region. As such, the four binders containing C&EN classifieds from the period November 1, 1993 to April 27, 1998 contain simply a mass of undifferentiated data. Dr. Trainor's analysis of that data is also not helpful to DuPont because it includes jobs from many geographical regions. For instance, he includes positions located in Washington, Northern California, Illinois, Maryland, Arizona, North Dakota, Vermont, Colorado, Virginia, and Michigan, among others.

Getahun attests that she applied for approximately two jobs each week between the date of her termination and the time she secured the fellowship at the University of Pennsylvania. In addition, she presents documentation of various attempts to secure jobs throughout the relevant time period. Her evidence is sufficient to show that she made the requisite honest, good faith effort to secure employment. The burden to show a failure to mitigate accordingly shifts to DuPont, and it has failed to meet its burden of proof. DuPont failed to show that there were substantially similar employment opportunities that Getahun ignored. DuPont's submission of undifferentiated data fails to meet its burden.

When fashioning a back pay award, three elements must be considered: (1) the appropriate time period; (2) the items to be included in the award; and (3) reductions to the award. *See United States v. A.J. Bart, Inc.*, 3 OCAHO 538, 1388–89 (1993). The employer must prove that any requested reductions to the award are warranted.

The compensation that Getahun lost as a result of DuPont's conduct should be included in the award. Between October 27, 1993 and December 31, 1993, Getahun would have been compensated in the amount of $10,743.75, but for DuPont's unlawful termination of her employment. For the following years, she would have been paid a salary of $57,300. Neither party has addressed the issue of periodic increases in salary that Getahun would have potentially earned, thus it will not be considered. In addition, the value of lost contributions to her retirement fund should be included at the rate of 3% of her compensation.

DuPont must prove any amounts by which Getahun's back pay award should be reduced. DuPont argues that offsets to the award should include the amount of money that Getahun actually earned, the amount of money that Getahun would not have earned during periods she was unable to work, the amount of income tax Getahun would have paid, the amount of unemployment compensation that Getahun received, and the amount of expenses that Getahun saved by not working.

DuPont correctly asserts that Getahun's back pay award should be reduced by the amount that Getahun actually earned. In 1994, Getahun earned a total of $8,610 for her jobs at the University of Delaware and Temple University. The following year, in 1995, she earned $9,100 at Temple University and Salem Community College. In 1996, she earned a total of $6,930 at Salem Community College and Dialdirect, Inc. In 1997, while at Telespectrum Worldwide, Inc., Chestnut Hill College, and West Chester University, she earned a total of $26,995.27. Prior to securing her full time Fellowship at the University of Pennsylvania in July of 1998, Getahun's earnings at West Chester University totaled $15,411.54. Therefore, Getahun, between her termination from DuPont and beginning her position at the University of Pennsylvania on March 25, 1998, earned a total of $67,046.19. While working part time at the University of Pennsylvania between March 25, 1998 and July 1998, Getahun earned $4,878.60, a figure derived by adding her earnings at the University for 1998, or $22,878.60, and subtracting the value of five months of her annual $43,200 salary, or $18,000.

The award should be further adjusted to account for the period of time during which Getahun could not work owing to her delivery and post-natal care in December, 1996. DuPont cites three cases for the proposition that Getahun cannot receive back pay that

corresponds to any period when she was unable to work. *See EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 670 (8th Cir. 1992) (upholding the district court's decision to toll back pay for voluntary periods of unemployment to spend more time with a child and for health reasons); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 401 (3d Cir. 1976) (upholding decision to reduce back pay award for period of unemployability due to illness); *Walston v. City of Suffolk.*, 566 F.2d 1201, 1206 (4th Cir. 1977) (affirming judge's decision to reduce back pay award for period that teacher was unable to work due to pregnancy and childbirth).

Getahun was unavailable to work during the month of December, 1996, because of the previously mentioned delivery and post-natal care. It is, therefore, reasonable to deduct one month's salary, or $4,775, from Getahun's back pay award.

DuPont erroneously proposes to reduce Getahun's back pay award by the amount of income tax that Getahun would have paid on her salary if she had remained an employee at DuPont. Under the existing Internal Revenue Code, Getahun's recovery will be taxed in the year she receives the payment from DuPont. Therefore, reducing her award would essentially cause her to be taxed twice—once in the form of a reduction and again when she receives the remainder. Upon receipt of the back pay award, Getahun will have to pay the appropriate income tax on that amount.

DuPont cites a Lexis version of the District Court's holding in *Robinson v. Southeastern Pennsylvania Transportation Authority*, No. 87–5114, 1992 U.S. Dist. Lexis 538, at * 10–11 (E.D. Pa. Jan. 17, 1992), for the proposition that the award should be reduced for income tax that would have been paid, but fails to note that the Third Circuit remanded that case with directions to the District Court to reinstate the portion of the award reduced for income tax. *See Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 898 (3d Cir. 1993). A careful analysis of DuPont's brief leads one to the conclusion that such a setoff is simply not available to reduce Getahun's award.

DuPont's proposition that Getahun's back pay award be reduced for the amount of unemployment compensation that she received is not supported in case law, either. DuPont's brief similarly misconstrues other Third Circuit precedents regarding setoffs for unemployment compensation. The Third Circuit has allowed such a setoff when a state employer was required to provide back pay.

See Dillon v. Coles, 746 F.2d 998, 1007 (3d Cir. 1984). The setoff was proper because the state paid both the back pay and the unemployment compensation. In the case of a private sector employer, rather than a state agency, the Third Circuit disallowed such a setoff. *See Craig v. Y&Y Snack, Inc.*, 721 F.2d 77, 83 (3d Cir. 1983). Since DuPont is not a state entity, it is not entitled to receive the benefit of state-paid unemployment compensation.

DuPont's request to reduce the back pay award for expenses that Getahun saved by virtue of her unemployment is attenuated. DuPont does not offer any evidence about the value of those expenses so saved. Therefore, DuPont has also failed to meet its burden of proof on that issue. Furthermore, the pertinent statute expressly requires a reduction of back pay only for those amounts actually earned or reasonably earnable. *See* 8 U.S.C. § 1324b(g)(2)(C). Accordingly, it is not necessary to entertain unsubstantiated and attenuated claims for offset purposes.

The Supreme Court has acknowledged that an award of prejudgment interest is a normal incident of suits arising under Title VII and operates to fully compensate a victim. *See Loeffler v. Frank*, 486 U.S. 549, 557 (1988) (addressing the liability of the U.S. Postal Service for prejudgment interest). The Third Circuit strongly supports the award of prejudgment interest to compensate an individual for the lost time value of money. *See Booker*, 64 F.3d at 868–69. OCAHO case law has looked to the short-term rate for the underpayment of taxes utilized by the Internal Revenue Service to calculate prejudgment interest. *See, e.g., United States v. Southwest Marine Corp.*, 3 OCAHO 429, 382 (1992).

Getahun seeks $9,402.20 for her commuting costs. That claim is being denied since that award would be quasi-speculative in that Getahun has changed her residence twice and has held several jobs in different locations. Though the first move arguably resulted from a threatened foreclosure that would not have arisen but for DuPont's conduct, it is nonetheless speculative to argue about the cause of the second move and the effect that such move should have on DuPont's liability for increased commuting distances. If such an award were granted in this case, it would be equally appropriate to examine whether DuPont should receive an offset for periods, if any, when commuting distances were shortened.

An order of reinstatement is not a prerequisite to an award of back pay. *See United States v. Marcel Watch, Corp.* 1 OCAHO

143, 1015–16 (1990). Though awarding reinstatement is a discretionary decision, it is generally ordered except in extraordinary circumstances. *See Jones v. De Witt Nursing Home*, 1 OCAHO 189, 1256 (1990). Reinstatement may be awarded even when the aggrieved party has found alternate employment, but it may nonetheless be inappropriate unless reinstatement would further the remedial purpose of making a plaintiff whole and extinguishing discriminatory practices. *Id*. (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196 (1941)). Reinstatement may be denied when there is friction between the parties or the aggrieved party has, or should have, obtained other employment. *See Vant Hul v. City of Dell Rapids*, 462 F. Supp. 828, 834 (D.S.D. 1978); *Brito v. Zia Co.*, 478 F.2d 1200, 1204 (10th Cir. 1973);

Getahun has secured a comparable position as a research chemist at the University of Pennsylvania. Therefore, reinstatement to her former position is not in order.

An administrative law judge may, in his or her discretion, grant an award of attorney's fees to the prevailing party "if the losing party's argument is without reasonable foundation in law and fact." 8 U.S.C. § 1324b(h). Since Getahun is the prevailing party, the pivotal issue is whether DuPont's argument lacked a reasonable foundation in law and fact.

OCAHO case law adopts the Supreme Court's dual standard for the award of attorney's fees. *See Lee v. Airtouch Communications*, 7 OCAHO 926, 50–51 (1997). Prevailing plaintiffs are more likely to receive an award of attorney's fees than are prevailing defendants. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–21 (1978). The Third Circuit has also adopted the dual standard. *See EEOC v. L.B. Foster, Co.*, 123 F.3d 746, 750 (3d Cir. 1997). The policy behind the dual standard is to make it more possible for plaintiffs to bring meritorious claims against defendants found to have violated federal laws.

Getahun seeks attorney's fees of $60,000 plus $1,339.50 in miscellaneous expenses. The affidavit of Ann Massey Badmus, Esquire, attests that she has spent some 400 hours on Getahun's case and that her hourly rate is $150. Ms. Badmus states that she expended an additional $1,339.50 for photocopying and courier costs and she has also correctly excluded from her request the $440.90 that DuPont was ordered to pay by the Court of Appeals. Accordingly, the attorney's fees sought are found to be reasonable

in amount, supported in fact, and warranted under the applicable standard.

Imposition of other discretionary remedies including the education of staff and posting of notices is unnecessary under the circumstances of this case. It is further found that an assessment of a civil money penalty is similarly inappropriate.

Order

DuPont is hereby ordered to cease and desist from further violating the provisions of 8 U.S.C. § 1324b.

DuPont is further ordered to pay Getahun the sum of $199,628.84 in back pay. Further, DuPont is ordered to pay prejudgment interest, which will accrue commencing with the last day of each calendar quarter of the back pay period for the amount due and owing for each quarterly period and continuing until full compliance is achieved.

In addition, Getahun is awarded attorney's fees in the amount of $61,339.50.

Joseph E. McGuire
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.