

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

IN RE CHARGE OF
NATIVIDA ADAME-GOMEZ

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) CASE NO. 92B00162
MOJAVE, INC., d.b.a. CASA JOSE)
CAFE, a Texas Corporation)
Respondent.)
_____)

ERRATA

In my Final Order Regarding Requested Relief, issued February 9, 1992, the last paragraph on page 10 read as follows:

1. Respondent is to pay to Ms. Adame, by certified check, a total of four thousand three hundred eight dollars and twenty cents (\$4,308.20), plus 5% simple interest from February 22, 1992 until the date that payment is delivered to Respondent.

By this Errata, it shall now read as follows:

1. Respondent is to pay to Ms. Adame, by certified check, a total of four thousand three hundred eight dollars and twenty cents (\$4,308.20), plus 5% simple interest from February 22, 1992 until the date that payment is delivered to Complainant.

IT IS SO ORDERED this 4th day of March, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge

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

IN RE CHARGE OF
NATIVIDA ADAME-GOMEZ

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324b Proceeding
) CASE NO. 92B00162
MOJAVE, INC., d.b.a. CASA JOSE)
CAFE, a Texas Corporation)
Respondent.)
_____)

FINAL ORDER REGARDING REQUESTED RELIEF

I. Procedural History

On November 13, 1992, I issued an Interim Decision and Order Granting Complainant's Motion For Default Judgment in which I set out a detailed summary of the procedural history of this case. In that Order, I held that Respondent had violated 8 U.S.C. 1324b in that it had discriminated against Ms. Adame based on her citizenship status and that it had acted against her in retaliation for filing a charge with the Office of Special Counsel (OSC), as enumerated in Counts I and II of the Complaint. Based on my findings, I ordered Respondent:

1. to cease and desist from the discriminatory practices described in Counts I and II of the Complaint;
2. to retain for a period of three years the names and addresses of each individual who applies, either in person or in writing, for employment in the United States, to any business entity associated with Respondent; and
3. to comply with the provisions of 8 U.S.C. 1324a.

In addition, I deferred ruling on Complainant's requests for civil penalties and Respondent's relief pending Complainant's filing of a memorandum supporting its requests, should it wish to, Respondent's filing of a response.

Complainant timely filed its memorandum with supporting documentation on December 14, 1992 and a Supplemental Memorandum, on January 27, 1993. Consistent with its behavior in this case, Respondent has not filed any response. As such, determination of the remaining issues of civil penalties and Ms. Adame's relief are appropriate.

II. Discussion

A. Relief Requested

Complainant has requested:

1. \$4,307.81 in back pay for Ms. Adame, plus 8% simple interest from the date of discharge until the date of Respondent's payment in compliance with my Order; and
2. A civil penalty of \$4,000 for Respondent's two unfair immigration-related employment practices.

B. Back pay for Ms. Adame

1. Legal Standard

The dual purpose of back pay is to restore the discriminatee to his proper financial position, in other words, to make him whole, and to further the public interest in deterring such discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); Blackburn v. Martin, 1992 U.S. App. Lexis 26914 4th DCA (1992); U.S. v. Marcel Watch Corporation, 1 OCAHO 143 (3/22/90); Jones v. De Whitt Nursing Home, 1 OCAHO 189 (6/29/90), appeals withdrawn, Nos. 90-4104, 90-4120 (2nd Cir. 11/2/90), citing to N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 175 (2nd Cir. 1965), cert. denied 384 U.S. 972 (1966). Thus, the injured party must show economic damage due to the unfair immigration-related practice to be eligible for this fundamental remedy which, although an equitable remedy, should only be denied in extraordinary circumstances. Albemarle at 421; United States v. Southwest Marine Corp., 3 OCAHO 429 (5/15/92) at 31 (citations omitted); Jones v. De Whitt Nursing Home; Cohen v. Westhaven Board of Police Commissioners, 638 F.2d 496 (2nd Cir. 1980).

Under 8 U.S.C. 1324b(g)(2), when determining the amount of my discretionary award of backpay, I must take into consideration the discriminatee's interim earnings, or amounts that the discriminatee

would have earned using reasonable diligence. 8 U.S.C. 1324b(g)(2)(C); Jones v. De Whitt Nursing Home, 1 OCAHO 189, citing to Ford v. E.E.O.C., 458 U.S. 219, 231 (1980). Should mitigation be an issue, the burden of proof showing the lack thereof falls on Respondent. Ford v. E.E.O.C., 458 U.S. 219, 231 (1982); U.S. v. Lee Way Motor Freight Inc., 625 F.2d 918, 937 (10th Cir. 1979); Jones v. De Whitt 1 OCAHO 189 at 22.

2. Determining the Amount of Backpay

In determining the amount of backpay to award, the court tries to determine the dollar amount that the discriminatee lost due to the illegal discriminatory employment practice, i.e., the amount of compensation lost as a direct result of the employer's discriminatory discharge. Albemarle. My usual practice in determining this amount is to first examine all financial data and/or documentation supplied by the parties. In this case, Ms. Adame has supported her representations of her salary and work hours only by affidavit. Ordinarily, I would expect, and request, additional financial information from Ms. Adame such as pay stubs, deposit slips and/or tax returns to support her relief request. However, as Respondent has been in receipt of Ms. Adame's affidavit since approximately December 14, 1992 and has not objected to any of its affirmations, including Ms. Adame's representations regarding her work schedule, overtime hours and rates of pay, I find that Ms. Adame's affidavit, along with the full record, is sufficient for my determination of the backpay amount. See Blackburn 1992 U.S. App. Lexis 26914 at 15.

The record in this case shows that Ms. Adame was discriminatorily fired from Respondent's employment on February 22, 1992 and obtained comparable employment on April 8, 1992 and this lasted for a period of thirteen (13) weeks until July 8, 1992 when illness forced Ms. Adame to leave. Ms. Adame asserts, by affidavit, that she made at least six (6) job inquiries to businesses similar to Respondent's during her period of unemployment.

Based on the credibility of the undisputed record, I find that Ms. Adame was unemployed from February 22, 1992 through April 8, 1992 due to Respondent's discriminatory discharge and that during that time Ms. Adame used reasonable diligence in finding a comparable position. I find further that Ms. Adame worked at her new employment for thirteen weeks until she left due to illness. Therefore, based on Complainant's unrefuted representations, I find that Ms. Adame would have worked for Respondent until her illness forced her to stop working on July 8, 1992 except for the discriminatory discharge.

Albemarle. Thus, based on my findings and the relevant law, I will award Ms. Adame full backpay, including overtime pay, from February 3, 1992 through July 8, 1992 taking into consideration her salary from her subsequent employment.

According to Ms. Adame's unrefuted affidavit and Complainant's representations, when Ms. Adame worked for Respondent, her regular schedule included eleven (11) hours per day, six days a week, amounting to sixty-six (66) hours per week. Based on this schedule, her pay was computed at forty (40) hours at straight time pay and twenty six (26) hours at overtime pay of time and one-half. She earned four dollars and fifty cents (\$4.50) per hour for straight time pay and six dollars and seventy five cents (\$6.75) per hours for overtime.

Ms. Adame is entitled to backpay for the period February 22, 1992 through April 8, 1992 in the amount of \$2,3107.50, determined as follows:

Rate of Pay For Straight Time	\$4.50
<u>Number of Hours Weekly at Straight time</u>	<u>40</u>
WEEKLY BACK PAY FOR STRAIGHT TIME	\$180.00
Rate of Pay For Overtime	\$6.75
<u>Number of Hours Weekly at Overtime</u>	<u>26</u>
WEEKLY BACK PAY FOR OVERTIME	\$175.50
<u>TOTAL WEEKLY BACK PAY</u>	<u>\$355.50</u>
<u>TOTAL BACK PAY FOR SIX AND ONE-HALF WEEKS</u>	<u>\$2,310.75</u>

Ms. Adame's economic loss continued past the time that she obtained new employment on April 8, 1992; her new job paid her less money per hour than the one with Respondent (four dollars and twenty-five cents [\$4.25] as opposed to four dollars and fifty-cents [\$4.50]) and she did not work as many overtime hours (five [5] hours as opposed to twenty-six [26]) as she had before. Thus, to make Ms. Adame whole, Complainant has requested that the amount of relief granted include the difference between Ms. Adame's weekly pay at her new job and her previous salary before her discriminatory discharge from April 8, 1992 until July 8, 1992.

As I have previously found that Ms. Adame would have been able to work at Respondent's restaurant until her illness, I find that Complainant's request is just, fair and equitable. In addition, I find that awarding this amount is in line with the intent of the statute, the

purpose of backpay, and case law regarding the termination of the period to which a discriminatee is entitled to back pay. See, e.g., Southwest Marine Corp., 3 OCAHO at 429 at 39; Castle Valley Sales.

Therefore, Ms. Adame is entitled to additional backpay in the amount of \$1,997.45, determined as follows

:

Difference In Hourly Rate Of Pay	\$.25
<u>Number of Hours Weekly</u>	<u>40</u>
DIFFERENCE IN STRAIGHT TIME PAY FOR ONE WEEK	\$10.00
TOTAL BACKPAY FOR STRAIGHT TIME FOR 13 WEEKS	\$130.00
Difference in Hourly Overtime Pay	.38
<u>Number of Hours Worked Weekly</u>	<u>5</u>
Difference in Overtime Pay For Hours Worked	1.90
TOTAL BACKPAY FOR OVERTIME WORKED FOR 13 WEEKS Weekly	\$24.70
Hourly Overtime Pay Lost Due To Discriminatory Discharge	\$6.75
Number of Hours of Overtime Lost Weekly Due To Discriminatory Discharge	<u>21</u>
TOTAL WEEKLY OVERTIME PAY LOST DUE TO <u>DISCRIMINATORY DISCHARGE</u>	<u>\$141.75</u>
TOTAL OVERTIME PAY LOST FOR 13 WEEKS	\$1,842.75
<u>TOTAL BACKPAY LOST FOR 13 WEEKS</u>	<u>\$1,997.45</u>
<u>GRAND TOTAL OF BACKPAY FROM 2/8/92-7/8/92</u>	<u>\$4,308.20</u>

Therefore, Ms. Adame is entitled to receive a total payment of backpay in the amount of four thousand three hundred eight dollars and twenty cents (\$4,308.20) from Respondent.

INTEREST

OSC has requested that Respondent pay Ms. Adame interest on her grand total amount of backpay, to be computed from the date of the discriminatory discharge until the date of Respondent's compliance with my Order. I find that this request is reasonable and just and is necessary to fully compensate Ms. Adame. See, e.g., South West Marine 2 OCAHO 429 at 37.

In determining an appropriate and fair rate of interest I have reviewed the intent of the statute and various cases where interest has been awarded. Southwest Marine, citing to E.E.O.C. v. Pacific Press Publishers Association, 482 F.Supp. 1291, 1319 (N.D. Cal. 1979) aff. 676 F.2d 127 (9th Cir. 1982)(set interest rate using IRS standard following N.L.R.B. standard); U.S. v. Padnos Iron & Metal Co., 3 OCAHO 414 (3/27/92)(interest rate was set at 7% as fair and realistic, as opposed to 11% requested by Complainant); U.S. v. Castle Valley Sales, 3 OCAHO 407 (3/5/92)(interest at set at 5% as fair and reasonable).

Based on my review of the above cited cases and the present economic conditions, I have determined that I will follow my reasoning in Castle Valley Sales and set the interest rate in this case at five percent (5%) simple interest as it is fair and reasonable. Respondent will be responsible for paying this interest on the grand total amount of backpay for the period from February 22, 1992, the date of the discriminatory discharge, until the date of its compliance with this Order.

Civil Penalties

Complainant has requested civil penalties in the maximum amount permitted by 8 U.S.C. 1324b, two thousand dollars (\$2,000), for each of Respondent's two unfair employment practices against Ms. Adame. 8 U.S.C. 1324b(g)(2)(B)(iv)(I). Complainant has argued that this civil penalty is fair, just and appropriate as Respondent has not contested any of the allegations or arguments Complainant has put forth and has completely ignored this proceeding.

Complainant further supports its request by citing to prior agency cases where the maximum statutory penalty amount was granted in default cases. See United States v. Educ. Employment Enter., 2 OCAHO 257 (10/30/90); United States v. Prime Landscape Management, Inc., 2 OCAHO 204 (7/25/90); United States v. Nogales Body Shop And Trailer Repair, 1 OCAHO 30 (10/19/88). Complainant also cited cases granting default wherein the Court looked at the appropriateness of the requested civil penalty and found that since the requested fine was within the statutory guidelines, it was appropriate. United States v. Kissel, 1 OCAHO 61 (6/5/89); United States v. DAR Distrib., 1 OCAHO 60 (6/5/89).

Complainant does not rely solely on agency precedent for support of its civil penalty request. It points to Respondent's "egregious" violations of both the discrimination provisions and the knowingly hiring

provisions of the Immigration Reform and Control Act (IRCA). Further, Complainant stresses that Respondent's retaliation against Ms. Adame occurred after it was advised of the illegality of this type of action and yet Respondent attempted to preclude Ms. Adame from working at her new job.

Based on the record in this case, I find that Respondent has not challenged Complainant's request for maximum penalties. I find further that Respondent's violations of IRCA, its discrimination against Ms. Adame in favor of an illegal alien, and its subsequent retaliatory action after being advised that this type of action would be a subsequent violation of the law, are egregious. Thus, I find that a civil penalty of two thousand dollars (\$2,000) for each of Respondent's violations of IRCA is fair and appropriate.

Therefore, my Order is summarized as follows:

1. Respondent is to pay to Ms. Adame, by certified check, a total of four thousand three hundred eight dollars and twenty cents (\$4,308.20), plus 5% simple interest from February 22, 1992 until the date that payment is delivered to Complainant.
2. Within thirty (30) days after this Order becomes final, Respondent is to pay to Complainant, by certified check, a total of four thousand dollars (\$4,000) in civil penalties for its violations of 8 U.S.C. 1324b as set out in the Complaint in this case.

This Decision and Order is the final decision and order of the Attorney General. Pursuant to 8 U.S.C. 1324b(i) and 28 C.F.R. 68.53(b), any person aggrieved by this final Order may, within sixty (60) days after entry of the Order, seek its review in the United States Court of Appeal for the circuit in which the violation is alleged to have occurred, or in which the Respondent transacts business.

IT IS SO ORDERED this 9th day of February, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge