

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

PHILLIP O'NEAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 5:16-CV-519 (MTT)
	)	
	)	
NORFOLK SOUTHERN RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	
_____	)	
MICHAEL SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 5:16-CV-520 (MTT)
	)	
	)	
NORFOLK SOUTHERN RAILROAD COMPANY,	)	
	)	
Defendant.	)	
	)	
_____	)	

**ORDER**

Plaintiffs Michael Smith and Philip O'Neal have jointly moved for an award of prejudgment interest, reinstatement, and expungement. *O'Neal*, 5:16-CV-519, Doc. 86; *Smith*, 5:16-CV-520, Doc. 77.<sup>1</sup> For the following reasons, that motion is **GRANTED in part**, as to reinstatement, expungement, and prejudgment interest on backpay; and it is **DENIED in part**, as to prejudgment interest on general damages.

<sup>1</sup> The Plaintiffs' motion is styled as a motion for equitable relief and to amend the judgments. However, judgment was vacated in both cases because the Court had not addressed the Plaintiffs' claims for equitable relief and judgment had, therefore, been entered prematurely. This Order addresses those claims. See *O'Neal*, 5:16-CV-519, Doc. 89; *Smith*, 5:16-CV-520, Doc. 80.

## BACKGROUND

Plaintiff Smith and Plaintiff O'Neal brought these actions against Defendant Norfolk Southern Railroad Company after they were discharged by the Defendant for allegedly lying about a workplace injury. See *O'Neal*, 5:16-CV-519, Doc. 1 at 5. O'Neal alleged he was retaliated against for reporting the personal injury and for reporting a hazardous safety condition. *Id.* at 6. He brought suit against Norfolk Southern under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, for negligence, and under the employee protection provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20109, for retaliation. *Id.* at 5-9. Plaintiff Smith alleged he was retaliated against for reporting O'Neal's injury to Norfolk Southern and for reporting a hazardous safety condition, and he brought suit under the FRSA for retaliation. *Smith*, 5:16-CV-520, Doc. 1 at 4-7. The Court consolidated Smith's and O'Neal's FRSA claims for trial, and the jury reached verdicts in favor of the Plaintiffs, awarding them backpay, damages for emotional distress, and punitive damages. *O'Neal*, 5:16-CV-519, Docs. 62; 81; *Smith*, 5:16-CV-520, Docs. 53; 72. The Plaintiffs now jointly move for additional relief. *O'Neal*, 5:16-CV-519, Doc. 86.<sup>2</sup>

## DISCUSSION

### A. Reinstatement

First, the Plaintiffs move for reinstatement to their previous positions. Doc. 86-1 at 3. Reinstatement with the same seniority status an employee would have had but for discrimination is a remedy available in a FRSA wrongful discharge case. 49 U.S.C. § 20109(e)(2)(A). In wrongful discharge cases under Title VII, reinstatement is the

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<sup>2</sup> Because the motions and briefings were jointly filed and are the same in each case, for the sake of convenience, all citations are to the docket in *O'Neal*, 5:16-CV-519, unless otherwise noted.

presumed remedy. *U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 619 (11th Cir. 2000) (citation omitted). In deciding whether to forgo reinstatement and instead award front pay, “courts look to whether discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy.” *Id.* (quotation marks and citation omitted). In its brief, the Defendant acknowledges that the FRSA allows for reinstatement, Doc. 90 at 3-4, and it does not point to the sort of “discord and antagonism” which could “render reinstatement ineffective as a make-whole remedy.” *W&O, Inc.*, 213 F.3d at 619. The Plaintiffs are, therefore, entitled to reinstatement.

### **B. Expungement**

Second, the Plaintiffs move for the equitable remedy of expungement of references to Norfolk Southern’s retaliatory actions in their personnel records. Doc. 86-1 at 5. They claim this relief would “remove[] the stain of the employer’s [retaliatory] actions from the Plaintiff’s work history.” *Id.* (quoting *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 863-64 (7th Cir. 2001)) (alterations in brief). They argue this record of adverse action in the Plaintiffs’ employment files is an ongoing injury and that money is not enough to make the Plaintiffs whole. *Id.* The Defendant, on the other hand, claims that the FRSA does not provide for expungement, that the Plaintiffs provided no notice before or at trial that they intended to seek expungement, and that the Plaintiffs fail to identify specific documents to be expunged. Doc. 90 at 5-7.

The FRSA allows a successful plaintiff to recover “all relief necessary to make the employee whole.” 49 U.S.C. § 20109(e). That relief “include[s]” reinstatement, backpay with interest, and compensatory damages, including fees, as well as punitive damages.” *Id.* The Defendant argues that list is exhaustive, but the plain language of

the statute makes expungement available when necessary to make the employee whole. See *James v. CSX Transp. Inc.*, 2017 WL 2535726, at \*1 (M.D. Ga. 2017).

Here, the Plaintiffs ask the Court to “order NSRC to expunge from their personnel files all documents, records, entries or references related to the charges and terminations that resulted from the January 30, 2016 incident.” Doc. 86-1 at 5. Those references to suspension and termination in the personnel files could potentially be harmful to the Plaintiffs in the future, and they are the direct result of the Defendant’s violation of the FRSA. Expungement is therefore necessary to make the Plaintiffs whole.

The Defendant makes two additional arguments for denying expungement. The first is that the Defendant did not have notice that the Plaintiffs would seek expungement until the Plaintiffs filed their motion requesting expungement. Doc. 90 at 5. In their pretrial brief, however, the “Plaintiffs also claim[ed] expungement, which is equitable relief for the Court to determine post judgment.” Doc. 45 at 4. That is sufficient notice.

Second, the Defendant argues that the Plaintiffs’ request does not identify documents with enough specificity, so expungement should be denied. Doc. 92 at 7. The Plaintiffs reply that all they can do is speculate on the identity of specific documents, since the files are maintained by the Defendant. *Id.* at 3. The Plaintiffs do identify in their reply “the charge letters, the termination letters, and the letters to the union upholding the termination” as documents to be expunged. *Id.* The Court agrees that those specific documents should be expunged. Additionally, the expungement of other documents in the Plaintiffs’ employment files which reference the adverse action

is necessary to make the Plaintiffs whole and is sufficiently specific for the Defendant carry out. The Plaintiffs are entitled to the expungement of the charge letters, the termination letters, and the letters to the union upholding the termination, as well as of all other references to the Plaintiffs' termination and suspension in the Defendant's employment files.

### **C. Prejudgment Interest**

The Plaintiffs also request prejudgment interest on backpay and on general damages. For backpay, the FRSA mandates that successful plaintiffs receive "any backpay, with interest." 49 U.S.C. § 20109(e)(2)(B). The Defendant does not contest the Plaintiffs' entitlement to prejudgment interest on backpay. Doc. 90 at 9. The Court finds the Plaintiffs are entitled to such interest, and judgment will be entered accordingly.<sup>3</sup> As to general damages, each Plaintiff was awarded \$150,000.00 for emotional pain, loss of reputation, personal humiliation, and mental anguish. *O'Neal*, 5:16-cv-519, Doc. 81 at 4; *Smith*, 5:16-cv-520, Doc. 72 at 4. Because the statute does not provide for prejudgment interest, whether to award prejudgment interest on general damages is a matter for the Court's discretion. *Oil, Chem. & Atomic Workers Int'l Union, Local No. 4-447 v. Am. Cyanamid Co.*, 546 F.2d 1144, 1144 (5th Cir. 1977).<sup>4</sup> General damages for emotional pain, loss of reputation, personal humiliation, and other nonpecuniary losses "are precisely the type of damages for which prejudgment interest has traditionally been denied." *Rau v. Apple-Rio Mgmt. Co.*, 85 F. Supp. 2d 1344, 1349

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<sup>3</sup> The Plaintiffs do not provide a basis on which the Court can determine how prejudgment interest will affect the monetary amount in the judgment.

<sup>4</sup> The Eleventh Circuit has adopted as binding precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

(N.D. Ga. 1999), *aff'd sub nom. Rau v. Apple Rio Mgmt. Co.*, 251 F.3d 161 (11th Cir. 2001). The Court finds that an award of prejudgment interest on general damages is not necessary to make the Plaintiffs whole.

### **CONCLUSION**

The Plaintiffs' joint motion (5:16-CV-519, Doc. 86; 5:16-CV-520, Doc. 77) is **GRANTED in part** and **DENIED in part**. It is **GRANTED** as to reinstatement, expungement of records, and prejudgment interest on backpay. The Defendant is **ORDERED** to reinstate Plaintiffs Smith and O'Neal with the same seniority status they would have had but for the termination, and to expunge the charge letters, the termination letters, and the letters to the union upholding the termination, as well as all other references to Smith's and O'Neal's termination and suspension in the Defendant's employment files. The judgment in both cases shall note that the Plaintiffs are entitled to prejudgment interest on backpay. The motion (5:16-CV-519, Doc. 86; 5:16-CV-520, Doc. 77) is **DENIED** as to prejudgment interest on general damages.

**SO ORDERED**, this 15th day of November, 2018.

S/ Marc T. Treadwell  
MARC T. TREADWELL, JUDGE  
UNITED STATES DISTRICT COURT