Monohon v. BNSF Ry. Co.

United States District Court for the Southern District of Iowa, Central Division

June 14, 2022, Decided

4:14-cv-00305

Reporter
2022 U.S. Dist. LEXIS 107240 *

DANIEL MONOHON, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.

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Opinion

[*1] ORDER Before the Court are Plaintiff Daniel Monohon's Motion for Reinstatement and Restoration, Gap Pay, Interest, and Expungement. ECF No. 215. Defendant BNSF Railway Co. has responded to the Motion. ECF No. 220, and Plaintiff has replied, ECF No. 221. On May 23, 2022, the Court held a hearing on Plaintiff's Motion. See ECF No. 229. The matter is fully submitted.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September 2012, Plaintiff worked for Defendant as a railroad track inspector. *SeeMonohon v. BNSF Ry. Co., 17 F.4th 773, 777 (8th Cir. 2021)*. Plaintiff operated a hy-rail as part of his job, which is a truck that can be driven on roadways and railroad tracks through the use of both rubber tires and steel wheels. *Id. at 776-77*. Defendant requires its employees to wear seatbelts while operating hy-rails, although it has not consistently enforced this safety rule. *Id. at 777*.

During a meeting on September 4, 2012, Defendant's Roadmaster Tyson Pate reminded Plaintiff and other track inspectors of Defendant's safety rule requiring them to wear their seatbelts while operating hy-rails. *Id.* After the reminder, Plaintiff stated he did not think the

seatbelt rule was safe because he was worried that if a train approached the hy-rail while he was wearing a seatbelt, he [*2] would not be able to get out of the truck safely and would instead be killed. *Id.* Pate stated he understood Plaintiff's concern but reiterated that Plaintiff must follow the seatbelt rule. *Id.*

The following day, Plaintiff was operating his hy-rail on the tracks when he was stopped by Defendant's Line Chief Steve Anderson and Assistant Roadmaster Michael Paz. *Id.*

Anderson observed that Plaintiff was not wearing his seatbelt, and Plaintiff admitted he was not.

Id. Anderson asked Plaintiff to put on his seatbelt, and Plaintiff complied. *Id.* Anderson told Plaintiff he would receive an "operations test failure" violation and asked Plaintiff to agree to wear his seatbelt going forward. *Id.* Plaintiff expressed the same concern that he had during the meeting the day before: he was worried that if he wore his seatbelt, he would not be able to get out of his truck quickly enough if a train was approaching. *Id.* at 777-78. Plaintiff was not argumentative, did not raise his voice, nor did he disobey any of Anderson's orders when talking with him. *Id.* at 778. Nevertheless, Anderson sent Plaintiff home for the day. *Id.* Anderson then e-mailed Defendant's Director of Line Maintenance Timothy Knapp informing [*3] him that Plaintiff had not been wearing his seatbelt when he stopped him. *Id.* Anderson wrote he "had a good discussion [with Plaintiff, but] it became apparent any compliance around system expectations was going to be a struggle." *Id.*

Upon receiving the e-mail, Knapp initiated a formal investigation to determine whether Plaintiff had violated the safety rule by failing to wear his seatbelt and whether Plaintiff had been "insubordinat[e]" toward Anderson during their encounter. *Id.* Defendant views "insubordination toward an officer [a]s an act of willfully disobeying an authority." *Id.* At the investigative hearing, Pate testified he had not always worn a seatbelt while operating a hy-rail.

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Id. Nevertheless, following the meeting on September 4, everyone was required to wear one. *Id.*

Pate further testified Plaintiff had expressed his safety concerns about wearing a seatbelt but never refused to wear one. *Id.* Paz testified Plaintiff had not been insubordinate toward Paz or Anderson on September 5, but that Plaintiff had been sent home because he did not fully commit to wearing

one going forward. *Id.* Plaintiff testified he had told Anderson upon being stopped that he disagreed with Defendant's [*4] safety rule but understood he had to wear a seatbelt and was "okay with that." *Id.* The hearing officer determined that, because Plaintiff had engaged in a discussion with Anderson about his disagreement with the seatbelt rule, he was appropriately charged with "the more serious charge of insubordination" and recommended suspension or dismissal. *Id.* Knapp thereafter terminated Plaintiff's employment for committing a serious rules violation by failing to wear his seatbelt and for insubordination by failing to commit to wearing a seatbelt in the future. *Id.* Prior to the termination of Plaintiff's employment, an employee's failure to wear a seatbelt while operating a hy-rail was not treated as a serious rules violation. *Id. at 777*. Instead, Defendant treated the violation as an "operations test failure," resulting in a disciplinary action of coaching or counseling about the rule. *Id.*

Plaintiff filed an administrative complaint with the U.S. Department of Labor's Occupational Safety and Health Administration challenging his employment termination and asserting he had raised a legitimate, good-faith concern of a hazardous safety condition; his complaint was later dismissed. ECF No. 1 ¶¶ 17, 19. [*5] Plaintiff also internally appealed his employment termination, which was also denied. *Id.* ¶ 18. On August 1, 2014, Plaintiff filed suit, alleging Defendant had violated the Federal Rail Safety Act (FRSA), 49 U.S.C.

§ 20109(b)(1)(A), when it terminated his employment for his good-faith reporting of a hazardous safety condition. ECF No. 1 ¶ 26. In his Complaint, Plaintiff requested (1) "[r]einstatement with

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the same seniority status that [he] would have had, but for the discrimination;" (2) "[b]ackpay, with interest;" (3) "[e]xpungement of all adverse references in his personnel record;"

(4) "[c]ompensatory damages"; (5) "[l]itigation costs including expert witness fees and reasonable attorney fees;" (6) "[p]unitive damages; and," (7) "[a]ny and all further relief the court deems just and equitable." *Id.* ¶ 31. The case proceeded to a four-day jury trial before Judge Jarvey in May 2016. *See* ECF Nos. 133, 134, 140, 142.

The jury found in favor of Plaintiff and awarded $269,500 in past lost wages, $131,500 in past lost benefits, and $99,000 in emotional distress damages, for a total award of $500,000. ECF No. 145. On December 27, 2016, Judge Jarvey entered an Order denying Plaintiff's request for reinstatement [*6] based on Plaintiff's relatively short tenure working for Defendant and his disciplinary record and instead awarded three years of front pay in the amount of $301,734, plus attorneys' fees and costs. ECF No. 167 at 4-5, 6; ECF No. 166. Defendant then filed a renewed motion for judgment as a matter of law and an alternative motion for new trial. ECF No. 174. On October 1, 2018, Judge Jarvey granted Defendant's renewed motion for judgment as a matter of law, concluding "[P]laintiff's claim to have reported a hazardous safety condition is not objectively reasonable and is not supported by the facts of this case." ECF No. 193 at 3-4. The Court set aside the judgment in favor of Plaintiff and ordered judgment to be entered in favor of Defendant. *Id.* at 5; *see* ECF Nos. 168, 194. Plaintiff appealed. *See* ECF No. 196.

The Eighth Circuit concluded the FRSA does not include a reasonableness requirement in its "reporting, in good faith" provision. *Monohon, 17 F.4th at 780*. Next, the appellate court held that there was "a 'legally sufficient evidentiary basis to' support the jury's finding" that Plaintiff's "report regarding the danger of wearing a seatbelt while hy-railing [was] a report of a hazardous safety condition" [*7] and that BNSF had intentionally retaliated against Plaintiff for his

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report. *Id. at 783*. Thus, the Eighth Circuit concluded the district court had erred in granting Defendant's renewed motion for judgment as a matter of law and abused its discretion in conditionally granting Defendant's motion for new trial. *Id. at 784*. Having concluded the jury's verdict should stand, the Eighth Circuit turned to Plaintiff's argument that the district court had erred in awarding front pay instead of reinstatement. *Id. at 784-85*. The Eighth Circuit remanded with an instruction to reconsider Plaintiff's request for reinstatement. *Id. at 785*. Ultimately, the Eighth Circuit vacated the judgment entered in favor of Defendant, reversed Judge Jarvey's Order granting Defendant's renewed motion for judgment as a matter of law, and remanded for "reinstatement of the jury's verdict and for the entry of such further relief as is consistent with the views set forth in this opinion." *Id.* Upon remand, the case was transferred to the undersigned.

Plaintiff now moves for reinstatement of his employment; restoration of his seniority and vacation benefits; expungement of the retaliatory discipline underlying this case from his employment record; gap [*8] pay, including lost wages and benefits, for the time between the jury's verdict and Plaintiff's future reinstatement, plus prejudgment interest; and postjudgment interest on the jury's award. ECF No. 215.

II. ANALYSIS

A. Reinstatement

The FRSA prohibits railroads from retaliating against an employee for "reporting, in good faith, a hazardous safety or security condition." *49 U.S.C. § 20109(b)(1)(A)*. As the Eighth Circuit noted in this case, "[a]n employee who prevails in a FRSA action . . . 'shall be entitled to all relief necessary to make the employee whole.' That relief 'shall include' reinstatement.'" *Monohon, 17 F.4th at 784* (first quoting § 20109(e)(1); and then quoting

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§ 20109(e)(2)(A)). Thus, the Eighth Circuit concluded "the FRSA unambiguously requires reinstatement." *Id. at 785*. Still, the FRSA's reinstatement "requirement is not absolute." *Id.*

For example, the Eighth Circuit recognized the following circumstances "in which reinstatement would not be possible: if the employee were incapacitated or in prison or if the employer were to have closed its United States operations." *Id.*

Plaintiff asserts reinstatement is required in this case because none of the circumstances recognized by the Eighth Circuit are present here. Plaintiff is not incapacitated or imprisoned, [*9] and Defendant is still widely operating in the United States. *See id.* Thus, Plaintiff claims, it is not impossible for him to be reinstated.

Defendant argues the Court must first address the standard for reinstatement that should be applied in this case. Defendant insists the Eighth Circuit did not adopt a literal "impossibility" standard, but that the appellate court's discussion of impossibility merely clarified that district courts do not have unfettered discretion in choosing between reinstatement and front pay under the FRSA. Defendant also asserts the Eighth Circuit's impossibility discussion did not establish a standard for this Court to apply but instead simply acknowledged that there are circumstances in which reinstatement is impossible. Defendant contends "the Eighth Circuit was not saying that reinstatement is required unless it is impossible." ECF

No. 218-1 at 6. But that is exactly what the Eighth Circuit's opinion says. The Eighth Circuit concluded "the FRSA unambiguously *requires* reinstatement," although the "requirement is not absolute." *Monohon, 17 F.4th at 785* (emphasis added). The Eighth Circuit then provided specific examples of when reinstatement would not be appropriate because it would, [*10] in fact, be impossible. *Id.* This Court thus interprets the Eighth Circuit's decision to say that reinstatement is *required* under the FRSA *unless* it is impossible.

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Defendant argues it is impossible to reinstate Plaintiff to his position as a railroad track inspector ten years after his employment was wrongfully terminated because (1) Plaintiff has not unequivocally committed to following all of Defendant's safety rules, including wearing a seatbelt while hy-railing; (2) Plaintiff has an unsafe employment record; (3) Plaintiff's physical condition and mental health prevent him from completing the job duties; and (4) Plaintiff has been dishonest about his physical and mental health.

Defendant has failed to demonstrate why Plaintiff should not be reinstated. Defendant contends Plaintiff's refusal to commit to wearing a seatbelt while hy-railing is reason enough not to reinstate him given how important safety is to Defendant. Defendant likens Plaintiff's alleged equivocation about wearing a seatbelt during his post-remand deposition to a situation in which a truck driver cannot be reinstated because he is uninsurable due to his driving record. *See Neb.Bulk Transp., Inc. v. NLRB, 608 F.2d 311, 316 (8th Cir. 1979)*. But Defendant has failed to produce any [*11] evidence that Plaintiff cannot operate a vehicle safely or that he has refused to follow Defendant's safety rules, including wearing his seatbelt while hy-railing. In Plaintiff's deposition following remand, when asked whether he would commit to wearing a seatbelt if he were reinstated, Plaintiff testified, "I would put it on." ECF No. 215-3 at 37. Defense counsel repeatedly asked Plaintiff if he was "committed to wearing [his] seatbelt while h[y]-railing," and Plaintiff repeatedly responded, "I'll put it on." *Id.* at 39. Defense counsel then asked, "Are you willing to keep it on while you're h[y]-railing?" *Id.* at 40. And Plaintiff responded, "I'll wear it while I'm h[y]-railing." *Id.* Additionally, Plaintiff agreed to follow all of Defendant's safety rules if reinstated. *Id.* When specifically asked whether Plaintiff would follow Defendant's safety rules even if he saw others not following them, Plaintiff responded affirmatively. *Id.*

Plaintiff further stated, "I'll follow the rules," when asked whether he was "committed to

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following [Defendant]'s safety rules." *Id.* Plaintiff also agreed to "obey all the safety rules related to [his] job" if he were reinstated. *Id.* at 41. The Court is [*12] uncertain what other assurances Plaintiff can give that he is willing to wear his seatbelt while hy-railing if he is reinstated and that he will follow all safety rules. Since his discharge, Plaintiff has worked as an over-the-road truck driver. *Id.* at 6. He has not had any traffic violations or been involved in any accidents.

Id. at 18, 20. He has maintained his CDL and personal driver's

license. *Id.* at 20. In sum, there is no indication in the record that Plaintiff is unable to operate a hy-rail truck or that he is unwilling to follow Defendant's safety rules.

Defendant also contends Plaintiff has an unsafe employment record that disqualifies him from being reinstated. At trial, Timothy Knapp, who was then Defendant's Director of Line Maintenance, testified regarding Plaintiff's safety record with Defendant. Knapp testified that in July 2010, Plaintiff was disciplined for failing to properly inspect and protect the track.1ECF No. 226-13 at 4. In December 2011, Plaintiff was disciplined for his involvement in a crossing accident. *Id.* at 6. And in September 2012, Plaintiff received the seatbelt violation and insubordination charge that underlie this case. *Id.* Neither of the violations [*13] for which Plaintiff was disciplined in 2010 or 2011 resulted in discharge; rather, Plaintiff received only record suspensions for these violations. Additionally, Plaintiff presented evidence at trial that Defendant had not previously discharged other employees for failing to wear a seatbelt.

Monohon, 17 F.4th at 784. Finally, Plaintiff received the insubordination charge only for reporting, in good faith, his concern regarding wearing a seatbelt while hy-railing. Based on the record, the Court concludes Plaintiff's disciplinary record, which contains only "standard" rules

1 Plaintiff was also disciplined in October 2011 for failing to protect a track defect, but the record suspension he received was later reversed. ECF No. 226-13 at 5-6.

violations and just one "serious" rules violation,2 *see* ECF No. 226-13 at 6 (describing the 2011 accident as a "Level S" serious rules violation), does not make it impossible to reinstate Plaintiff. Next, Defendant argues Plaintiff is in poor physical and mental health and unable to

perform the duties of a track inspector. *See Starrett v. Wadley, 876 F.2d 808, 824 (10th Cir. 1989)* (concluding reinstatement was not appropriate because it would be detrimental to the plaintiff's psychological health). Specifically, Defendant contends [*14] Plaintiff has chronic low-back and bilateral-knee pain and significant anxiety when driving over bridges and thus is incapable of performing the essential functions of a track inspector. In support of this argument, Defendant relies on a declaration by its Chief Medical Officer, Dr. Theodore Aquino, who reviewed Plaintiff's medical records, *see generally* ECF No. 226-4, and statements made by a management employee in Defendant's Maintenance of Way Department, Stephen Pumphrey,3 *see generally* ECF No. 226-3.

In his deposition on remand, Plaintiff testified he was on medication for blood pressure and anxiety. ECF No. 215-3 at 25. Plaintiff denied having any debilitating pain in his back or knees. *Id.* at 29.

Pumphrey's declaration provides general information regarding the conditions track inspectors work under. *See generally* ECF No. 226-3. He states each of the track inspectors that he supervises is responsible for inspecting sixty miles of track. *Id.* ¶ 12. He further states the job is physically demanding and can involve working on uneven surfaces, steep slopes, and bridges.

2In Judge Jarvey's Order denying reinstatement, he explained that a "standard" rules violation is punishable by a [*15] ten-day record suspension with an increasing length of suspension for each subsequent violation within a twelve-month review period, up to a fifth rules violation, which could result in dismissal. ECF No. 167 at 4-5 n.2. While a "serious" rules violation is punishable by a thirty-day record suspension and can result in dismissal for any subsequent serious rules violation within a three-year review period. *Id.*

3 At the Motion hearing, Plaintiff objected to both Dr. Aquino's and Pumphrey's declarations. Those objections are overruled.

Id. ¶¶ 15, 17, 19, 20. Pumphrey surmises that a track inspector who has chronic low-back or knee pain conditions would have a difficult time performing the job tasks of a track inspector.

Id. ¶ 30.

Dr. Aquino states he has "significant concerns about [Plaintiff]'s ability to safely perform his regular job duties as a track inspector." ECF No. 226-4 ¶ 20. Dr. Aquino describes Plaintiff as having left-knee pain for which he saw a specialist in August 2020. *Id.* ¶ 13. Dr. Aquino also notes Plaintiff has experienced chronic low-back pain since at least 2011 when he received a lumbar MRI. *Id.* ¶ 12. Plaintiff underwent an MRI of his lumbar spine again in March 2021, [*16] which showed degenerative arthritis in his low back. *Id.* ¶ 15. Plaintiff received a steroid injection for back pain in April 2021. *Id.* ¶ 16. Plaintiff also has experienced anxiety. *See id.* ¶ 17. He was first prescribed anxiety medication in January 2020, which he takes as needed for his fear of heights when driving over bridges. *Id.* In April 2021, he was prescribed a daily-use anxiety medication. *Id.* Plaintiff continues to fulfill his prescription for the daily-use anxiety medication. *Id.*

Still, Dr. Aquino admits that the most recent medical record

he examined is Plaintiff's Department of Transportation (DOT) physical examination from October 2021, which "indicated no objective physical findings and no acute medical problems that would prevent [Plaintiff] from performing his job duties as a track[] inspector at BNSF." *Id.* ¶¶ 9, 19. He further admits that, "[w]ithout more recent information about his health or a full physical, I cannot truly know the current state of [Plaintiff]'s health. I cannot know whether his chronic low back condition and bilateral knee complaints have worsened or resolved." *Id.* He presumes Plaintiff's anxiety continues because Plaintiff routinely refills his anxiety [*17] medication, but Dr. Aquino does not have any evidence. *Id.* Dr. Aquino concedes "[m]ore recent medical records and a functional

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capacity exam would be helpful for determining [Plaintiff]'s current medical status related to his chronic low back pain, bilateral knee pain, and anxiety." *Id.* ¶ 23. Based on the information provided by the parties, although it appears it may be difficult for Plaintiff to perform the job tasks of a track inspector, it is not impossible, as Plaintiff merely experiences pain and is not incapacitated.

Finally, Defendant argues that Plaintiff should not be reinstated because he has been dishonest about his physical and mental health conditions. Dr. Aquino declares Plaintiff's declaration, deposition testimony, and DOT examination contradict his medical records and medication history, which "indicate [Plaintiff] has significant left knee and chronic low back problems that have required a specialist's care." *Id.* ¶ 10. Dr. Aquino further states that, when an employee fails to provide accurate medical information, he reports the apparent dishonesty to the relevant manager, which typically results in discharge of the employee for violating Defendant's rules concerning [*18] honesty. *Id.* ¶ 24. Again, Dr. Aquino concedes he does not have recent information about Plaintiff's health and can only guess as to Plaintiff's current physical and mental health. The physical and mental health conditions that Plaintiff has experienced- and that Defendant asserts would make it difficult for Plaintiff to perform the tasks of a track inspector-could be resolved. There is simply no proof Plaintiff has been dishonest about his physical or mental health. Therefore, this argument fails.

For the reasons above, the Court concludes it is not impossible for Plaintiff to be reinstated and that reinstatement is the appropriate remedy in this case. Accordingly, the Court orders Defendant to reinstate Plaintiff to his former position as track inspector.

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B. Restoration of Benefits

Plaintiff next contends that, in addition to reinstatement, he is entitled to the restoration of his seniority and vacation benefits. *See* *29 C.F.R. § 1982.114(b)* ("An employee prevailing in a [district court proceeding under the FRSA] shall be entitled to all relief necessary to make the employee whole, including, where appropriate: Reinstatement with the same seniority status that the employee would have had, but for the retaliation [*19] . . . ."). Section 20109(e) of the FRSA explicitly provides that among the relief an employee who prevails under the FRSA is entitled to, is "reinstatement *with the same seniority status that the employee would have had*, but for the [retaliation]." § 20109(e)(2)(A) (emphasis added). Defendant does not dispute that, if Plaintiff is reinstated, then he is also entitled to the restoration of benefits. The Court concludes, that to make Plaintiff whole, his seniority and vacation benefits must be restored upon reinstatement.

C. Expungement

Plaintiff also contends the Court should order the underlying disciplinary incident from his employment record expunged. *See* *49 U.S.C. 20109(e)*; Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the *Federal Railroad Safety Act, 80 Fed. Reg. 69115, 69126 (Nov. 9, 2015)* (recognizing that injunctive relief in the form of "an order requiring a railroad carrier to expunge certain records from an employee's personnel file" may "be an important element of making the employee whole") [hereinafter Procedures for Handling Retaliation Complaints Under the FRSA]. All evidence in the record shows that Plaintiff was not wearing a seatbelt on September 5, 2012, when he was stopped by Anderson and Paz. *Monohon, 17 F.4th at 777*. Because not wearing a seatbelt was a clear [*20] violation of Defendant's safety rules, the Court will not order this violation expunged from Plaintiff's employment record. However, because Plaintiff received the insubordination charge

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only for raising his concern about wearing a seatbelt to Anderson, which was determined by the jury to be reported in good faith, the Court agrees the insubordination charge should be expunged from Plaintiff's employment record.

D. Gap Pay

Next, Plaintiff requests an award of what he calls "gap pay" for lost wages and benefits due to the delay between the jury's verdict in May 2016 and now. Plaintiff contends denying him six years of wages he would have earned had he not been

illegally retaliated against does not make him "whole" as required by § 20109(e). Thus, he asks the Court to "bridge the gap" between the jury's back pay award and his reinstatement by awarding lost wages and benefits. Plaintiff also asks the Court to order Defendant to allocate the award to the appropriate months under the Railroad Retirement Act of 1974, *45 U.S.C. §§ 231-231v*. *See* 29 C.F.R.

§ 1982.105(a)(1) (permitting the allocation of a "back pay award to the appropriate months or calendar quarters" when appropriate).

Defendant argues Plaintiff's request for gap pay must be denied because it is (1) waived as Plaintiff [*21] never requested an award of gap pay from the Eighth Circuit, (2) not the law of the case, and (3) beyond the scope of the Eighth Circuit's mandate. Alternatively, Defendant argues that Plaintiff's request for gap pay is not a request for equitable relief but instead seeks legal relief that must be tried to a jury.4 Defendant also argues that granting an award of gap pay

4 Defendant's response suggests the judgment entered on December 30, 2016, was not reinstated by the Eighth Circuit when it reinstated the jury's verdict. However, the Eighth Circuit's Order of January 4, 2022, clearly contemplated the reinstatement of the judgment of December 30, 2016, when it ordered the district court "to grant post-judgment interest on the jury award of $ 269,500 in lost wages and $131,500 in lost benefits" and ran the interest from the December 30, 2016 date of judgment. ECF

No. 208. What is more, if Defendant did not truly believe the judgment of December 30, 2016, was reinstated, it would not have made payments to Plaintiff in satisfaction of the damages, fees, and expenses awarded to Plaintiff in the jury's verdict and the Court's Order of December 27, 2016, plus interest as ordered by the Eighth [*22] Circuit on January 4, 2022. *See* ECF Nos. 231, 232.

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would serve as a penalty and punish Defendant, which equitable remedies cannot do. Defendant further argues Plaintiff is not entitled to the full value of health insurance premiums included in Dr. Stan Smith's5 post-remand calculation of an award that would have been paid on his behalf had he been reinstated by Defendant in 2016 and should instead receive only the difference between the actual expenses Plaintiff incurred in obtaining substitute health insurance and any out-of-pocket medical expenses that would have been covered under Defendant's insurance plan but were not covered by Plaintiff's substitute plan. Additionally, Defendant argues Dr. Smith inflates the value of lost benefits during the gap-pay period by including the amounts that Defendant would have contributed under the Railroad Retirement Tax Act on Plaintiff's behalf because if the Court awards gap pay, then Defendant will be required to make the appropriate contributions anyway and a separate order granting these benefits will result in double-counting.

Defendant complains that Plaintiff did not request an award of gap pay from the Eighth Circuit or in any way suggest [*23] that he should receive additional pay if the Eighth Circuit reversed Judge Jarvey's Order granting judgment as a matter of law and ordered reinstatement. Plaintiff appealed Judge Jarvey's Order in October 2018. On appeal, Plaintiff argued both that the district court erred in granting judgment as a matter of law for Defendant and that the district court abused its discretion in awarding front pay instead of reinstatement. At that point, had Judge Jarvey's Order granting judgment to Defendant not had the effect of eliminating his earlier award of front pay, the front pay award would have continued through mid-May 2019. Plaintiff had no way of knowing the Eighth Circuit would not rule on his appeal until November 2021, or that it would take until June 2022 for this Court to order reinstatement-effectively twice as long as

5 Defendant objects to Dr. Smith's declaration and supplemental report, ECF Nos. 216, 216-2, 224, as irrelevant, lacking adequate and sufficient foundation, unfairly prejudicial, confusing the issues, and improper expert witness testimony, *see* Fed. Rs. Evid. 401, 403, 702. Defendant's objections are overruled.

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Judge Jarvey's original three-year front pay award that was entered almost two and [*24] a half years following the conclusion of the trial and that has since been vacated.

This Court does not elevate procedure over justice. Denying Plaintiff the wages and benefits he would have received for the past six years had he not been wrongfully retaliated against, had the jury's verdict not been overturned in error, and had Judge Jarvey applied the correct standard of impossibility in considering Plaintiff's request for reinstatement, is an egregious denial of justice. The Eighth Circuit instructed this Court to reconsider Plaintiff's request for reinstatement on remand, *Monohon, 17 F.4th at 785*; but it did not limit the Court's consideration to only reinstatement. The appellate court explicitly remanded "for the reinstatement of the jury's verdict and for the entry of *such further relief* as is consistent with the views set forth in this opinion." *Id.* (emphasis added). Under the FRSA, an employee who was wrongfully discharged "shall be entitled to all relief necessary to make the employee whole."

§ 20109(e). Awarding Plaintiff front pay from the time of the jury's verdict of back pay to when Plaintiff is reinstated is relief that is "necessary to make [Plaintiff] whole." *Id.*; *see* Pollard v.E.I. du Pont de Nemours & Co., 532 U.S. 843, 846 (2001) ("[F]ront pay is simply money awarded [*25] for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement."). The Eighth Circuit did this in *King v. Staley*, when it held that an employee who was illegally denied a promotion based on her race was not only entitled to back pay and reinstatement, but she was also entitled to front pay until she could be placed in a comparable position to the one she had been illegally denied. 849 F.2d 1143, 1145 (8th Cir 1988); *see alsoByers v. Augusta Sch. Dist. Bd. of Educ.*, No. 06-3599, 2007 WL 1575299, at *1 (8th Cir. May 7, 2007) ("Awards of front pay to compensate an injured plaintiff until he can be instated or reinstated are not prohibited and may be necessary to make a victim of discrimination whole.");

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Maschka v. Genuine Parts Co., 122 F.3d 566, 573 (8th Cir. 1997) (directing the district court to order the discriminating employer to pay the difference between the plaintiff's projected earnings for the job he lost due to discrimination and his salary elsewhere until his reinstatement); Brisenov. Cent. Tech. Cmty. Coll. Area, 739 F.2d 344, 348 (8th Cir. 1984) (remanding with instructions to award front pay until the plaintiff was placed in a comparable position to the one lost due to discrimination). The Supreme Court also approved of an award of front pay until reinstatement could occur in Pollard. 532 U.S. at 846. Therefore, the Court concludes Plaintiff is not precluded from seeking an award of gap pay on remand.

Alternatively, Defendant [*26] argues Plaintiff's request is akin to additional back pay that must be put to a jury. But Plaintiff is not now requesting back pay. That was determined by the jury in 2016. Instead, Plaintiff requests front pay-an award between the time of the jury's verdict of back pay and when Plaintiff is reinstated. *See id.* In the Eighth Circuit, the amount of front pay is an equitable determination to be made by the Court. *Dollar v. Smithway MotorXpress, Inc., 710 F.3d 798, 806 (8th Cir. 2013)*; Newhouse v. McCormick & Co., Inc., 110 F.3d 635, 643 (8th Cir. 1997). Thus, the Court has full authority to determine whether front pay is appropriate, and if so, how much.

Defendant also argues an award of front pay until reinstatement is a "penalty." *See* Liu v.Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1941 (2020) ("[E]quity never 'lends its aid to enforce a forfeiture or penalty.'" (quoting Marshall v. Vicksburg, 82 U.S. 146, 149 (1872)). Defendant contends that, had the Court reinstated Plaintiff in 2016, Defendant would have had the benefit of Plaintiff's labor in exchange for the compensation it paid to him. That is true. But ultimately, Defendant has only itself to blame. Plaintiff wanted to return to work with Defendant in exchange for wages and benefits after he was retaliated against and requested reinstatement in

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2016; it was Defendant that fought hard against reinstatement. Defendant could have had the benefit of Plaintiff's labor [*27] in exchange for compensation for at least the last six years, but it chose not to. Granting an award of front pay until reinstatement now, is not a penalty or punishment to Defendant.

Having determined that an award of front pay from the time of the jury's verdict in May 2016 until Plaintiff can be reinstated is appropriate, the Court must now determine what benefits should be included in that award so that it can determine the amount of the award. The goal of a front pay award is to make the plaintiff whole, in other words, to restore him to the position he would have been in had he not suffered the unlawful retaliation.

Defendant contends Plaintiff should only receive the difference between the actual expenses Plaintiff incurred in obtaining substitute health insurance and any out-of-pocket medical expenses that would have been covered under Defendant's insurance plan but were not covered by Plaintiff's substitute plan rather than the full value of the health insurance premiums that Defendant would have paid on Plaintiff's behalf absent Defendant's unlawful retaliation.

There is a circuit split on this issue. The Fifth, Seventh, and Ninth Circuits conclude the measure of a plaintiff's [*28] recovery is based on the plaintiff's actual out-of-pocket expenses for substitute insurance and any medical expenses not covered by the substitute insurance that would have been covered by the employer's plan. *See* Kossman v. Calumet Cnty., 800 F.2d 697, 703 (7th Cir. 1986), *overruled on other grounds by* Coston v. Plitt Theatres, Inc., 860 F.2d 834 (7th Cir. 1988); Galindo v. Stoody Co., 793 F.2d 1502, 1517-18 (9th Cir. 1986); Pearce v. CarrierCorp., 966 F.2d 958, 959 (5th Cir. 1992) (per curium) (agreeing with the Seventh and Ninth Circuits). Whereas the Fourth and Sixth Circuits measure a plaintiff's recovery based on the cost of health insurance premiums the employer would have paid. *See Fariss v. Lynchburg Foundry*,

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769 F.2d 958, 966 (4th Cir. 1985); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1185 (6th Cir. 1983). The Eighth

Circuit has not decided what measure to employ, *see* Tolan v. Levi Strauss &Co., 867 F.2d 467, 470 (8th Cir. 1989); however, in E.E.O.C. v. Dial Corp., 469 F.3d 735, 744 (8th Cir. 2006), the Eighth Circuit determined it was "reasonable" for the district court to award the amount of health insurance premiums that the plaintiff would have received but for the defendant's unlawful discrimination. The Eighth Circuit noted the Fourth Circuit's view that "Congress intended fringe benefits to be part of the monetary award compensating claimants for the discrimination they suffered" and later cited *Fariss* favorably when it determined the district court's award was reasonable. Dial Corp., 469 F.3d at 744 (quoting Fariss, 769 F.2d at 965-66). This Court follows the approach of the Fourth Circuit in *Fariss*, approved by the Eighth Circuit in Dial Corp., here and includes in [*29] the gap pay award the value of the health insurance premiums that Defendant would have paid on Plaintiff's behalf had Plaintiff been reinstated in 2016 when the jury determined Plaintiff was unlawfully discharged in retaliation.

Defendant next contends the value of lost benefits during the gap pay period should not include the amount Defendant would have contributed under the Railroad Retirement Tax Act on Plaintiff's behalf. Defendant argues that if the Court includes this amount, it will in effect double-count this benefit because Defendant will be required to pay the appropriate contribution on any gap pay award that Plaintiff will receive regardless of if it is separately ordered by the Court. *See* Hance v. Norfolk S. Ry. Co., 571 F.3d 511, 522 (6th Cir. 2009) ("The Railroad Retirement Tax Act and its accompanying regulations . . . require an employer to pay Tier I and Tier II taxes on all 'compensation' to employees, including payment 'for time lost.' *See* 45 U.S.C. § 231(h)(2); 20 C.F.R. § 211.2(a). Thus, [the defendant] will be required to report and pay Tier I and Tier II taxes on the back pay award, and [the plaintiff] will receive retirement

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credit for the time periods covered by the back pay award, putting him in the position he would have been in had he not been discharged."). [*30] The Court agrees with Defendant and declines to award a separate contribution to be paid under the Railroad Retirement Tax Act. The Court orders Defendant to comply with its existing obligation to pay Tier I and Tier II taxes on the gap pay award and to report retirement credit covering the six-year period from the jury's verdict of May 20, 2016, until the date of Plaintiff's reinstatement.

The Court cannot, however, determine a specific amount that is to be awarded to Plaintiff at this time. Plaintiff provides two calculations performed by Dr. Stan Smith of Smith Economics Group, Ltd., for the value of lost wages and benefits from the date of the jury's verdict on May 20, 2016, until April 1, 2022, and interest on that award. *See* ECF Nos. 216-2, 224. The first is calculated using the front pay amounts awarded in Judge Jarvey's Order of December 27, 2016, covering May 20, 2016, through May 19, 2019, with the additional lost wages calculation from May 20, 2019, through April 1, 2022, based on information obtained from the applicable union contracts minus Plaintiff's actual earned wages and the additional benefits calculation based on information obtained from the National Railway Labor [*31] Conference Health and Welfare Circulars (NRLC). ECF No. 216-2 at 2-3. Dr. Smith's calculation reached a total net wage and benefit loss of $511,169 from May 20, 2016, to April 1, 2022. *Id.* at 4, 7. Dr. Smith then calculated a prejudgment interest on the gap wage and benefit loss from May 20, 2016, to April 1, 2022, to be $70,133 using the interest rate provided in 26 U.S.C. § 6621. *Id.* at 5, 8-9.

The second, updated calculation uses only Plaintiff's actual earnings obtained from his tax returns for the relevant years and the actual wages and benefits paid to Defendant's employees from May 20, 2016, to April 1, 2022, based on information from union contracts and

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the NRLC rather than using the assumptions made in Judge Jarvey's front pay award for the first three years. ECF No. 224 at 4. This second calculation results in a lower net gap wage and benefit loss from May 20, 2016, to April 1, 2022, in the amount of $449,899. *Id.* at 5, 13.

Dr. Smith then calculates a prejudgment interest amount using the rate in § 6621 on this lower gap wage and benefit loss to be $57,948. *Id.* at 5, 14-15.

The Court finds using the updated calculation provided to the Court in Plaintiff's supplemental filing (ECF No. 224) to be [*32] a more accurate calculation of Plaintiff's lost wages and benefits since the jury's verdict. However, the Court notes the net wages and benefits calculation also includes additional Tier I and Tier II benefits to be paid by Defendant, which, as discussed above, the Court declines to award separately. Thus, the Court orders the parties to provide a stipulated calculation of Plaintiff's net lost wages and benefits from May 20, 2016, until the date of reinstatement for the Court consistent with this Order. If the parties are unable to reach an agreement as to the amount, the Court will appoint an independent expert to assist the Court in calculating an award amount. The Court's expert witness shall be entitled to compensation set by the Court and will be payable "by the parties in the proportion and at the time that the court directs." Fed. R. Evid. 706(c).

E. Interest

Finally, Plaintiff requests prejudgment interest6on any award of gap pay at the interest rate used by the Internal Revenue Service in 26 U.S.C. § 6621, which is generally the Federal short-term rate plus three percentage points, with interest compounding daily. Plaintiff bases his request on guidance published by the Department of Labor that provides § 6621 should [*33] be used

6 Plaintiff also requests postjudgment interest as ordered by the Eighth Circuit on January 4, 2022. ECF No. 208. The Court understands Defendant has paid to Plaintiff an amount of postjudgment interest, *see* ECF No. 231, but Plaintiff should inform the Court if the full amount of postjudgment interest owed has not been satisfied.

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to calculate interest in FRSA administrative actions. *See Procedures for Handling Retaliation Complaints Under the FRSA, 80 Fed. Reg. at 69124*; *see also 29 C.F.R. § 1982.105(a)(1)* ("Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. [§] 6621 and will be compounded daily.").

Defendant argues Plaintiff's request for interest on any award of gap pay, like a gap pay award itself, is precluded because Plaintiff did not previously request such an award. Alternatively, Defendant argues any interest awarded should be calculated using the postjudgment interest rate calculations set forth by *28 U.S.C. § 1961*.7 Defendant argues Eighth Circuit case law requires that § 1961 be applied even when calculating prejudgment interest for claims brought under federal statutes. *See Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1331 (8th Cir. 1995)*. But *Mansker* does not require the § 1961 rate be applied in all cases arising from a federal statute. *Mansker* cites *Dependahl v. Falstaff Brewing Corp.*, which noted only that "[§] 1961 provides useful guidance [*34] in the area of prejudgment interest" when it held "that while[, at the time,] federal law governs the issue of interest and its rate, state law should be incorporated in the determination of the proper rate to be allowed, once an independent finding is made concerning whether any prejudgment interest should be awarded." *653 F.2d 1208, 1219 (8th Cir. 1981)*. Thus, *Dependahl* focused on whether state law regarding interest rates should be considered in making a prejudgment interest award in federal court after the federal court had already determined prejudgment interest was appropriate. But *Dependahl* in no way requires a court to apply the § 1961 rate to all prejudgment interest awards in cases arising out of a federal statute. Instead, "the decision of which rate of interest to apply for prejudgment interest is

7 Section 1961(a) provides postjudgment interest should be calculated "at a rate equal to the weekly average [one]-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment."

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[generally] a '[m]atter[] confided to the district court's broad discretion.'" *Hite v. Vermeer Mfg.Co., 361 F. Supp. 2d 935, 949 (S.D. Iowa 2005)*, *aff'd*, *446 F.3d 858 (8th Cir. 2006)* (quoting

Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1071 (2d Cir. 1995)).

The guidance from the Department of Labor states, "[§] 6621 provides [*35] the appropriate rate of interest to ensure that victims of unlawful retaliation under [the] FRSA . . . are made whole." *Procedures for Handling Retaliation Complaints Under the FRSA, 80 Fed. Reg. at 69124*. It continues, "[§] 6621 provides the appropriate measure of compensation under . . . [the] FRSA . . . because it ensures the [plaintiff] will be placed in the same position he . . . would have been in if no unlawful retaliation occurred." *Id.* "The Secretary [of Labor] also believes that daily compounding of interest achieves the make-whole purpose . . . ." *Id.*

In *Fresquez v. BNSF Railway Co.*, the plaintiff brought a claim for retaliation under the FRSA and sought prejudgment interest at the rate provided in § 6621. *421 F. Supp. 3d 1099, 1117 (D. Colo. 2019)*, *appeal docketed*, No. 21-1118 (10th Cir. Apr. 7, 2021). The district court considered arguments similar to those the parties raise here and ultimately applied the § 6621 interest rate concluding it "ensures that [the plaintiff] is fully compensated for his damages without receiving a windfall," except that the court determined "monthly compounding better serves the purposes of the FRSA, more accurately reflects the plaintiff's losses, and balances the parties' competing requests for daily compounding . . . and annual compounding . . . ." *Id.*

Like the district court in *Fresquez [*36]* , this Court is persuaded to follow the guidance set forth by the Department of Labor. Although it is true the guidance and 29 C.F.R.

§ 1982.105(a)(1) apply only in administrative proceedings and a court is not required to follow them, "[§] 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the [plaintiff] and the employer's benefit from use of the

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withheld money) and thus provides the [plaintiff] with appropriate make-whole relief." *Procedures for Handling Retaliation Complaints Under the FRSA, 80 Fed. Reg. at 69124*; *seealso Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 752-53 (8th Cir. 1986)* (noting that prejudgment interest serves the purposes of making the plaintiff whole and deterring attempts to benefit unfairly from inherent delays in litigation). Accordingly, the Court directs the parties to calculate interest on the award of net lost wages and benefits from the time of the jury's verdict and reinstatement using the interest rate provided for in § 6621, with such interest to be compounded daily.

III. CONCLUSION

For the reasons stated herein, the Court grants Plaintiff's Motion for Reinstatement and Restoration, Gap Pay, Interest, and Expungement (ECF No. 215). Defendant shall reinstate Plaintiff to his former position as track inspector within thirty days. Defendant shall also restore Plaintiff's seniority [*37] and vacation benefits upon his reinstatement and expunge from Plaintiff's employment record the insubordination charge from September 5, 2012. The Court grants Plaintiff's request for gap pay from the date of the jury's verdict on May 20, 2016, through Plaintiff's reinstatement. The parties shall provide a stipulated calculation of Plaintiff's net lost wages and benefits for a gap pay award, including a calculation of interest on the award based on the § 6621 rate, subject to the Court's final approval. If the parties cannot stipulate, the Court will appoint an independent expert to assist the Court in calculating an award amount.

IT IS SO ORDERED.

Dated this 14th day of June, 2022.

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