IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CHRISTINE BENGE,

Plaintiff, :

Case No. 3:01cv228

JUDGE WALTER HERBERT RICE

vs. :

GENERAL MOTORS CORPORATION,

Defendant. :

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FINDINGS OF FACT, OPINION & CONCLUSIONS OF LAW; JUDGMENT TO BE ENTERED IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT ON COUNTS THREE AND FOUR OF HER COMPLAINT IN THE AMOUNT OF $23,206.33 PLUS PRE-JUDGMENT INTEREST IN THE AMOUNT OF $4,486.16 AND POST-JUDGMENT INTEREST AT THE PREVAILING RATE; TERMINATION ENTRY

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On May 25, 2001, the Plaintiff filed the instant action against her employer, General Motors Corporation ("GM"), asserting claims of failure to accommodate a disability, in violation of 42 U.S.C. §12111, *et seq.*, the Americans with Disabilities Act ("ADA") and O.R.C. §4112 (Counts One and Two); retaliation for filing a claim of discrimination in violation of the ADA and O.R.C. §4112 (Counts Three and Four); and intentional infliction of emotional distress (Count Five). Doc. #1. On March 31, 2003, summary judgment was granted the Defendant on Plaintiff's claims of failure to accommodate a disability and intentional infliction of emotional

distress, and was overruled on Plaintiff's claims of retaliation, thus leaving only Counts Three and Four, alleging retaliation, as viable to this litigation. Doc. #37. From March 7 to March 9, 2005, a trial was held before this Court on Plaintiff's remaining claims. Pursuant to Fed. R. Civ. P. 52, the Court sets forth its findings of fact, opinion and conclusions of law.

## I. FINDINGS OF FACT (Proven by the Preponderance of the Evidence)

1. Plaintiff was hired by the Defendant on February 18, 1985. Transcript of February 7, 2005, Doc. #94 at 33.
2. At all relevant times, Plaintiff's employment was governed by collective bargaining agreements. Id. at 13-14; Def. Ex. B.
3. On June 2, 1986, Plaintiff suffered work related injuries. Pl. Ex. #46.
4. As a result of the injuries suffered in 1986, Plaintiff took numerous Worker's Compensation leaves of absence through 1999. Transcript of February 8, 2005, Doc. #91 at 60-63.
5. As a result of her injuries, Plaintiff's physicians recommended work restrictions that limited the types of jobs she could perform. Id. at 57-60.
6. The Defendant's medical department wrote its own restrictions for Plaintiff that conflicted with those recommended by her physicians. Id. at 60-63.

7. As a result of this conflict, Plaintiff was often required to work at jobs outside of the restrictions recommended by her physicians. Id.

8. Plaintiff's experience of having the Defendant set conflicting restrictions and being placed in positions outside those recommended by her physicians was not unique to her. Doc. #94 at 111-12.

9. Section 28(q) of the National Collective Bargaining Agreement ("National Agreement") sets forth a means for the Union and the Defendant to resolve conflicts between work restrictions recommended by an employee's physician and those recommended by the Defendant's. Doc. #94 at 93; Def. Ex. B.

10. Under §28(q), the Union and the Defendant would agree on a neutral physician to evaluate an aggrieved employee and render an impartial medical opinion ("IMO"). Once an IMO was rendered, it controlled as to an employee's medical restrictions. Id.

11. The Defendant had three means for assigning jobs to employees on sick leave, who were able to return to work with doctor recommended restrictions.

    a. The seniority bidding system assigned employees to vacant positions they requested based on the seniority of all those who requested said position. Transcript of February 9, 2005, Doc. #93 at 4-7.

    b. Section 39(a) of the National Collective Bargaining Agreement

allowed the Defendant to place any employee with a work related injury into a position that matched his or her work restrictions, regardless of seniority. Def. Ex. B.

c. "Department 1051" was an accounting designation that the Defendant used to assign injured employees into positions that were not covered by the collective bargaining agreement. Doc. #94 at 94-95.

12. At all relevant times, Daniel Krey was responsible for making placements pursuant to §39(a) and had complete discretion to assign employees to Department 1051 positions. Doc. #94 at 95.

13. Krey preferred to have an employee working for the Defendant rather than out on sick leave. Doc. #94 at 31-32.

14. Krey assigned injured employees to Department 1051 positions, regardless of whether their injuries were work related or not. Id.

15. On May 30, 1996, Plaintiff's physician, Dr. David Mitchell, recommended work restrictions limiting her to ten repetitions of wrist flexion or extension per hour. Pl. Ex. 8.

16. In 1997, pursuant to §39(a), Plaintiff was placed in a position that complied with the work restrictions recommended by Dr. Mitchell. Doc. #94 at 38-40; Pl. Ex. 2.

17. That position ended at the end of 1998. Doc. #91 at 96-97.

18. Following the termination of her §39(a) position, Plaintiff returned to

her previous department and worked a number of different positions, some of which complied with Dr. Mitchell's recommended restrictions and some of which did not. Doc. #91 at 18-20, 96-98 and 105-109.

19. On January 6, 1999, Plaintiff saw another physician, Dr. Terez Metry, who recommended that Plaintiff not be placed in a position that required more than ten repetitive wrist movements per hour. Pl. Ex. 7a.

20. On January 20, 1999, Plaintiff was evaluated by the Defendant's physician, Dr. Moshos, who recommended work restrictions that limited her to no over the shoulder work and no lifting of twenty pounds or more. Doc. #91 at 183-84, 197-98; Def. Ex. U.

21. It was Krey's practice to follow the recommendation of GM's physician when assigning an employee to a position, even where they conflicted with the recommendations of the employee's physician. Doc. #93 at 24-28.

22. When Plaintiff informed Krey that she could not work on jobs outside the recommendations of her physicians, he sent her home on sick leave. Doc. #94 at 45; Doc. #93 at 31.

23. Plaintiff contacted shop chairman Daniel Poffenberger, who contacted personnel director Bill Murray to arrange a §28(q) IMO. Doc. #91 at 26.

24. On March 12, 1999, Plaintiff and Poffenberger filed a 28(q) grievance,

seeking an IMO. Doc. #94 at 96.

25. Sometime after meeting with Murray, Plaintiff was contacted by his secretary and told to report to work in the Safety Department on March 15, 1999. Doc. #91 at 27-28.

26. After Plaintiff returned to work as directed, Murray denied the §28(q) grievance because she was working. Id. at 28.

27. Plaintiff's job in the Safety Department ended approximately two weeks after she started. Doc. #93 at 48; Doc. #91 at 111.

28. While working in the Safety Department, Plaintiff bid on a number of positions within her restrictions. Def. Ex. P.

29. For one of the positions, Plaintiff was one of three bidders with seniority, but was not assigned the position because she lost a tiebreaker. Doc. #93 at 15.

30. On March 17, 1999, Plaintiff filed a grievance alleging disability discrimination. Pl. Ex. 11.

31. That grievance was never processed, and Krey did not see it until sometime in 2000. Doc. #93 at 54.

32. On March 29, 1999, Plaintiff was reevaluated by Dr. Moshos, the company physician, who removed all medical restrictions. Doc. #91 at 206-07.

33. Later that day, Plaintiff met with Krey who informed her that he would assign her to a position consistent with Dr. Mosho's recommendation

and not the recommendations of her doctors. Doc. #93 at 87-88.

34. On that same day, Plaintiff went on sick leave. Doc. #93 at 86.

35. On April 23, 1999, Plaintiff filed a charge with the EEOC, alleging that Krey's failure to place her in a job that fit her physician recommended work restrictions was due to discrimination. Pl. Ex. 13.

36. On June 14, 1999, Plaintiff filed a charge with the NLRB, alleging that the Union had failed to properly process her grievances. Pl. Ex. 14.

37. Krey was aware of both the EEOC charge and the NLRB charge, though he could not recall when he became aware of them. Doc. #94 at 54.

38. While Plaintiff was out on sick leave, the Union and the Defendant arranged for an independent medical exam to be given by Dr. Koppenhoefer, pursuant to §28(q). Doc. #94 at 124-25.

39. Plaintiff met with Dr. Koppenhoefer on September 29, 1999. He issued his report on September 30, 1999, adopting the restrictions recommended by Dr. Metry, and expressing the opinion that Plaintiff's problems were not caused by a work related injury. Pl. Ex. #17.

40. Sometime in October or November of the same year, Poffenberger and Krey discussed Dr. Koppenhoefer's report. In that discussion, in reference to the doctor's opinion that the Plaintiff's injuries were not work related, Krey said, "I have her now." Doc. #94 at 100-02.

41. Based on Dr. Koppenhoefer's opinion, Krey believed that he was not

obligated to place Plaintiff in a position pursuant to §39(a) of the National Agreement. Doc. #94 at 59-60.

42. In the same conversation, Poffenberger asked that Krey assign Plaintiff to work with the Union, using his discretion under the Defendant's Department 1051 policy. Krey refused to do so. Doc. #94 at 102-03.

43. A short time after that conversation, another employee was assigned to work with the Union. Id. at 103.

44. On January 19, 2000, Poffenberger filed a "policy grievance" on behalf of Plaintiff, alleging that the Defendant had violated the Collective Bargaining Agreement and federal law, by not assigning the Plaintiff a position consistent with her physicians' recommended work restrictions. Pl. Ex. 24.

45. Following the filing of the policy grievance, Krey became upset and asked Poffenberger why he continued to fight so hard for an employee who had filed charges against both the company and the Union. In the same conversation, Krey indicated that he would let Plaintiff stay out on sick leave long enough to break her seniority. Doc. #94 at 106-07.

46. Jeff Willis, another GM employee, filed two EEOC charges of discrimination against the Defendant. Doc. #91 at 159-60.

47. Molly Jacques worked in the Labor Relations Office with Krey, starting in March of 1999. While there, she overheard Krey, in conversation with someone else, say, regarding Willis, "[w]ell, what he fails to

realize is if he just quit suing me, I might have work for him." Doc. #94 at 143.

48. Early in May of 2000, the Defendant and the Union negotiated a new contract. As part of that new contract, thousands of pending grievances were settled, among them the Plaintiff's. Doc. #94 at 114-16.

49. On June 8, 2000, Plaintiff returned to work in a position consistent with the restrictions recommended in the IMO. Doc. #93 at 72-73.

50. In 1998, Plaintiff earned approximately $1081.60 per week. Pl. Ex. #35.

51. From October 4, 1999, to June 8, 2000, Plaintiff was on sick leave for 35 weeks and 3 days. Between those two dates, Plaintiff was paid $15,053.83 in sick leave pay and disability benefits. Pl. Exs. #36 and #37.

52. GM employees were paid $3,000 in signing bonuses if they were at work on June 6, 2000. Doc. #91 at 50.

## II. OPINION

At issue before this Court are Plaintiff's claims that the Defendant retaliated against her for having filed a charge of discrimination, in violation of the Americans with Disability Act ("ADA"), 42 U.S.C. §12101 et seq., and Chapter 4112 of the Ohio Revised Code. The Americans with Disabilities Act provides that: "[n]o person

shall discriminate against any individual because such individual . . . made a charge . . . , under this chapter." 42 U.S.C. §12203.[1] To establish a claim of retaliation, Benge must demonstrate that: 1) she engaged in protected activity; 2) the exercise of the plaintiff's rights was known by the defendant; 3) the plaintiff suffered an adverse employment action;[2] and 4) there was a causal connection between the protected activity and the adverse employment action. Williams v. General Motors Corp., 187 F.3d 553, 568 (6th Cir. 1999). The Defendant does not dispute that the evidence adduced at trial indicates that the Plaintiff demonstrated the first two

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[1]Claims of retaliation made pursuant to Ohio state law are analyzed in the same manner as claims made pursuant to the ADA. Chandler v. Empire Chemical, Inc., 99 Ohio App.3d. 396, 402, 650 N.E.2d 950 (Summit Cty. Ct. App. 1994).

[2]In Burlington Northern and Santa Fe Ry. Co. v. White, — U.S. —, 2006 WL 1698953, *7 (June 22, 2006), a decision rendered after the Court's final draft of this Opinion, the Supreme Court substantially broadened the definition of adverse employment action beyond one encompassing only the terms and conditions of employment to one where the adverse employment action in question need only be materially adverse to a reasonable employee or, to put the matter in another fashion, the employer's action must be harmful to the point that said actions could reasonably dissuade a reasonable worker from making or supporting a charge of discrimination. Indeed, depending on the context, retaliation might be found in an unfavorable evaluation, an unwelcome schedule change, or any other action well short of losing a job. Again, depending upon the context, an employer can effectively retaliate against an employee by taking actions not directly related to the terms and conditions of employment or by causing the employee harm outside the workplace, as long as the employer's action in question would have been materially adverse to a reasonable employee. Obviously, this standard is significantly broader than that applied herein, pursuant to the pre-Burlington Northern standard. However, as this Court has determined that Plaintiff suffered an adverse employment action, under the narrow standard applicable prior to this recent Supreme Court decision (defining an adverse employment action as a materially adverse change in the terms and conditions of employment), the Burlington Northern decision has no impact upon the decision rendered herein.

elements of her claim. Rather, the Defendant argues that she has failed to demonstrate that it took an adverse employment action against her, or that there is a causal connection between the alleged adverse action and the exercise of her rights.

An adverse employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Industries v. Ellerth, 524 U.S. 742, 761 (1998). The evidence adduced at trial indicates that it was completely within Krey's discretion to place Benge in a position that complied with her physicians' recommended work restrictions, but that he refused to do so. The evidence indicates that the Plaintiff and her Union repeatedly sought to have the difference between the restrictions recommended by her physicians and the Defendant's medical department resolved according to the terms of the contract, but that the Defendant avoided such a resolution. The Defendant's failure to place the Plaintiff in such a position caused a significant change in her benefits, as she was forced to continue on sick leave. It is true that it was the Plaintiff's decision to take sick leave instead of working in a position without medical restrictions. However, either choice would represent an adverse employment action as the one would cause her to work at a job with an unacceptable risk of re-injury, while the other resulted in a reduction in her benefits. See Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania, 162 F.3d 235 (3rd Cir. 1998) (holding that a transfer to a job that an employer knows an employee

cannot do may constitute an adverse employment action); see also Bernheim v. Litt, 79 F.3d 318, 325 (2nd Cir. 1996) (reassignment to a job requiring a five-story climb could be retaliatory if the employer knew of the employee's difficulty climbing stairs); Ross v. Douglas County, Nebraska, 234 F.3d 391, 84 (8th Cir. 2000) (permanent assignment to stressful position retaliatory where practice was to rotate employees through said position because of the stress associated with it).

The Defendant also argues that the Plaintiff cannot show a causal connection between the retaliatory act and the adverse employment action, as she decided to go on sick leave prior to filing her EEOC complaint. What the Defendant ignores is that Krey had opportunities to place her in positions following the filing of her charge, but refused to do so. While Krey's decision not to place Benge in a position consistent with her physicians' recommendations prior to her filing of the EEOC complaint could not have been retaliatory, when he made the same decision later, it was clearly influenced by retaliatory animus. Krey's general preference was to have injured employees working instead of on sick leave. Prior to the filing of the EEOC complaint, the Plaintiff had been called in from sick leave to work, temporarily, in a position that complied with her physicians' recommended restrictions. However, following the filing of the EEOC complaint, he refused to place the Plaintiff in an available position with the Union that would have complied with her physicians' recommended work restrictions, he questioned Poffenberger's willingness to help someone who had filed a claim against both the company and the Union and expressed his own unwillingness to place another employee who had

filed EEOC claims against the company in any position. He further expressed his willingness to allow the Plaintiff to stay out on sick leave long enough to break her seniority.

The Plaintiff has offered sufficient evidence to demonstrate her prima facie case by a preponderance of the evidence. It is therefore up to the Defendant to proffer a legitimate, non-discriminatory reason for the adverse employment action. The Defendant offers two reasons for failing to place the Plaintiff in a position that fit the restrictions recommended by her physicians. First, it contends that the Plaintiff's claim must fail, because, prior to September 30, 1999, when the IMO report was filed, the recommendation of its medical department controlled. Second, it contends that, after that date, Benge was out on sick leave and she did not request an assignment. In order for Benge to prevail on her claim, she must show, by a preponderance of the evidence, that GM's reasons for failing to place her in a position that met her physicians' recommended work restrictions were a pretext for retaliation. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). She may do this by showing, "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons [even if true] did not actually motivate [the Defendant's action], or (3) that they were insufficient to motivate [same]." See Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994) (quoting McNabola v. Chicago Transit Authority, 10 F.3d 501, 513 (7th Cir. 1993) (emphasis in Manzer). The Plaintiff has successfully shown that the Defendant's reasons were a pretext for retaliation, by utilizing the first and second methods.

As to the first reason offered by the Defendant, the Plaintiff has shown by a preponderance of evidence that it is not true. The evidence clearly indicates that the decision to place an employee into a Department 1051 position was entirely within Krey's discretion and that he had done so in the past for employees when there was a dispute about which restrictions ought to apply. In fact, Benge had, prior to filing her EEOC complaint and while her 28(q) dispute was pending, been placed in a Department 1051 position that complied with her physicians' recommended restrictions. While the fact that the Plaintiff's injuries were considered in the IMO to be unrelated to work might have limited the Defendant's ability to assign her to a position using §39(a), it was always within its discretion to assign her to a Department 1051 position, regardless of the source of her injuries.

As to the second of the Defendant's reasons, the Plaintiff has shown, by a preponderance of the evidence, that it is not true. Further, even were it true, it did not actually motivate the Defendant's actions. The evidence clearly indicates that Krey was aware that the Plaintiff wanted to and was ready to work, and there is further evidence indicating that GM had in the past taken the initiative to call employees at home to tell them they had been placed in a Department 1051 position. In addition, Krey bore retaliatory animus towards those who filed EEOC charges against the company. For example, he asked Poffenberger, during negotiations regarding the Plaintiff's 28(q) grievance, how he could work so hard for someone who had filed charges against the company and the Union. On another

occasion he wondered whether Willis, another employee who had filed two EEOC charges of discrimination against the company, knew that he was more likely to get put into a job, if he (Willis) stopped filing charges.

The Plaintiff has successfully shown, by a preponderance of the evidence, that the Defendant's reasons for taking the adverse employment action were a pretext for retaliation. While Krey's decision not to place Benge in a position that complied with her physicians' work restrictions may have been legitimate before she filed her EEOC complaint, his failure to do so afterwards was in retaliation for the filing of same.

The Plaintiff suggests two alternate dates the court should use in calculating her back pay award, neither of which is appropriate. She first argues that she is entitled to damages, in the form of back pay and benefits, pursuant to §28(q) of the CBA; those damages to be calculated from the date she first filed her grievance to the date she returned to work. In the alternative, she argues that the Court should calculate her damages from the date she first filed her EEOC claim until the date she returned to work. The Defendant makes no argument regarding the Plaintiff's damages. The Plaintiff's claim here is one alleging retaliation in violation of the ADA, not a violation of the collective bargaining agreement; therefore, an award of back pay made pursuant to §28(q) would be inappropriate. Further, as the Plaintiff's claim is one of retaliation, she is entitled to back pay, not from the date of the filing of her EEOC complaint, but from the date the Defendant retaliated against her for that filing. The appropriate measure of damages herein is that

suggested by Congress for retaliation claims filed pursuant to the ADA.

The ADA borrows remedies from Title VII for retaliation claims in the employment context. See 42 U.S.C. §§12203, 12117, 2000e-5. Remedies available to a party making a retaliation claim against an employer under the ADA are first determined by reference to 42 U.S.C. §12117. Section 12117, in turn, provides that the available remedies are those provided by the 1964 Civil Rights Act, 42 U.S.C. §§2000e-4 through e-9, 42 U.S.C. §12117(a). Section 2000e-5(g)(1) provides that a court may order certain equitable relief including, but not limited to, back pay, but it does not provide for compensatory and punitive damages.[3] Back pay awards must "completely redress the economic injury the claimant has suffered as a result of the discrimination." Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 626 (6th Cir.1983). A victim of discrimination "is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975). Consequently, to determine what is the appropriate beginning point to measure the Plaintiff's damages the

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[3]There is some disagreement among the courts regarding whether 42 U.S.C. §1981(a), which amended Title VII to allow a plaintiff to recover compensatory and punitive damages, applies to the ADA. Compare Cantrell v. Nissan North America, Inc., Copy, 2006 WL 724549, *1-*2 (M.D. Tenn. 2006) (finding that 42 U.S.C. §1981(a), which amended Title VII to provide compensatory and punitive damages under certain circumstances, did not provide for compensatory and punitive damages for claims of retaliation under the ADA) with Edwards v. Brookhaven Science Associates LLC, 390 F.Supp.2d 225 (E.D. N.Y. 2005). However, as the Plaintiff seeks only equitable relief (Doc. #79), the Court need not address that issue here.

Court must ascertain when the retaliation began.

Neither of the dates suggested by the Plaintiff for use in calculating her back pay award is appropriate. The appropriate date for use in calculating a back pay award in this case is the first day the Defendant could have placed the Plaintiff in a position that was consistent with her physicians' recommended work restrictions, but refused to do so in retaliation for the Plaintiff's filing of her EEOC complaint. The Plaintiff has offered no clear evidence suggesting the date on which that occurred. However, back pay should be awarded, even where the precise amount of the award cannot be determined. Rasimas, 714 F.2d at 628. Any ambiguity should be resolved against the employer. Id.

On September 30, 1999, the IMO was issued, resolving the dispute about what work restrictions should apply to the Plaintiff. At some point in the two months after the report was issued, Poffenberger discussed same with Krey. In that conversation, Poffenberger asked Krey to place the Plaintiff in a position with the Union, and Krey refused. The Defendant suggests that Krey refused because the IMO indicated that the Plaintiff's injuries were not work related. However, the evidence indicates that Krey placed employees in Department 1051 positions, regardless of whether their injuries were so related. Moreover, Krey's preference was to have employees at work rather than at home, drawing sick leave. It is the opinion of the Court that Krey's refusal to assign the Plaintiff to work with the Union was in retaliation for her having filed an EEOC complaint.

During his testimony, Poffenberger could not recall the exact date of their

conversation, but estimated that it was sometime in September, October or November of 1999. As the conversation took place in the context of discussing the IMO, it could not have occurred before September 30, 1999, a Thursday. Resolving the ambiguity against the Defendant (see Rasimas, 714 F.2d at 628), the Court will calculate the Plaintiff's damages beginning from October 4, 1999, the first Monday following the IMO. From October 4, 1999, until she returned to work on June 8, 2000, the Plaintiff received sick pay and disability benefits in the amount of $15,053.83. Plaintiff suggests, and the Defendant does not dispute, that her average salary from 1998 is the appropriate baseline for calculating her back pay. Had she been employed at the wages she suggests, she would have earned $35,260.16 during the relevant time period. By simple arithmetic, her lost earnings are therefore $20,206.33. Additionally, had she been at work on or before June 6, 2000, she would have earned $3,000 in bonus money. The total back pay due her as a result of the Defendant's retaliation is, therefore, $23,206.33.

The Plaintiff, in addition to back pay, seeks pre-judgment interest, a matter that remains essentially one for the discretion of the trial judge. EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 579 (6th Cir. 1984). "The basis for allowing interest lies of course in Title VII's remedial provisions which are intended to give courts wide discretion in exercising their equitable powers to restore aggrieved persons to where they would have been were it not for the unlawful discrimination." Id. Pre-judgment interest helps to make victims of discrimination whole and compensates them for the true cost of money damages

they incurred. West Virginia v. United States, 479 U.S. 305, 310 (1987). An award of pre-judgment interest is an element of complete compensation in a back pay award. EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 841 (6th Cir. 1994). In order to make the Plaintiff whole, equity demands that the judgment include pre-judgment interest. However, the amount of pre-judgment interest and the method for calculating same is within the Court's discretion. See Ford v. Uniroyal Pension Plan, 154 F.3d 613, 619 (6th Cir. 1998).

Congress has provided a means of calculating post-judgment interest in 28 U.S.C. §1961(a), and district courts may be guided by that in setting pre-judgment interest. Wooster Brush Co., 727 F.2d at 579. It is the opinion of this Court, therefore, that the Plaintiff is entitled to pre-judgment interest to be calculated in a manner and amount consistent with 28 U.S.C. §1961(a). Given the Court's opinion on the appropriate amount of back pay to be awarded the Plaintiff, an amount different from that suggested by the Plaintiff, the amount of pre-judgment interest suggested by her is inappropriate.

28 U.S.C. §1961 requires that interest be calculated "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System. . . to be compounded annually." The average rate over the relevant period (June 8, 2000, to date) is 2.95%. Based on the back pay award of $23,206.33, and an interest rate of 2.95%, compounded annually from June 8, 2000 to date, the Plaintiff is entitled to pre-judgment interest

in the amount of $4,705.03.[4]

The Plaintiff also seeks attorney's fees but has offered nothing to support an award of such. A "prevailing party" is entitled to recover "reasonable" attorney fees. 42 U.S.C. §2000e-5(k). It is entirely proper for a court to reduce fees in cases of limited success, and to exclude fees deemed unreasonable. Wooldridge v. Marlene Industries Corp., 898 F.2d 1169, 1173-77 (6th Cir. 1990). The Court will consider an appropriate award of attorney's fees, post-judgment, should the Plaintiff wish to file a properly supported motion seeking such.[5]

## III. CONCLUSIONS OF LAW

1. This Court has original jurisdiction over the Plaintiff's claim made pursuant to 42 U.S.C. §12111, *et seq.*, the Americans with Disabilities Act (Count Three).

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[4]The Court here uses what has been called a simple interest model to calculate the appropriate pre-judgment interest. See Caffey v. UNUM Life Ins. Co., 302 F.3d 576, 585 (6th Cir. 2002). There are other acceptable methods of calculating pre-judgment interest. Id. (holding that trial court did not abuse its discretion when it adopted a "stream-of-benefits" method of calculating pre-judgment interest rather than "simple interest model"). The Court has adopted this method to avoid the difficulty of calculating, under the alternative model, what would effectively be a negligible difference. See Ford v. Uniroyal Pension Plan, 154 F.3d 613, 619 (6th Cir. 1998) (holding that trial court did not abuse its discretion by rounding interest rate to simplify the calculation of pre-judgment interest).

[5]It is axiomatic that requests for attorney's fees can be raised by post-judgment motion. See White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982).

2. This Court exercises supplemental jurisdiction over the Plaintiff's claim made pursuant to Ohio Revised Code §4112.99 (Count Four).

3. The Defendant retaliated against the Plaintiff by refusing to place her in a position that complied with her physicians' work restrictions, because she filed an EEOC complaint.

4. The Plaintiff is entitled to back pay in the amount of $23,206.33.

5. The Plaintiff is entitled to pre-judgment interest in the amount of $4,705.83.

Judgment is to be entered on behalf of the Plaintiff and against the Defendant on Counts Three and Four of her Complaint, in the amount of $23,206.33, plus pre-judgment interest in the amount of $4,705.83 and post-judgment interest at the prevailing rate.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

September 25, 2006

/s/ Walter Herbert Rice

WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:
Counsel of record