

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

In Re Charge of Rosita Martinez

United States of America, Complainant v. Marcel Watch Corporation, a Corporation, Respondent, 8 U.S.C. § 1324b Proceeding; Case No. 89200085.

**ORDER AMENDING FINAL DECISION AND ORDER ISSUED MARCH 22, 1990**  
(May 10, 1990)

Upon consideration of Respondent's April 27, 1990 Motion to Correct Clerical Error in Final Decision and Order of March 22, 1990, which Special Counsel, by its letter-pleading dated May 3, 1990, states it does not oppose, that decision and order is amended as follows:

1. Page 30, on the line captioned ``Total Backpay Award'' in the column for ``4th Quarter 1988,'' delete the figure ``\$5,202.27,'' and substitute on that line in the column for ``1st Quarter 1989'' the figure ``\$3,690.52.

2. Page 31, at the entry for ``Total Back Pay Award,'' delete the figure ``\$5,202.27,'' and substitute the figure ``\$3,690.52.

3. Page 31, at the entry for ``Total Pay Award,'' delete the figure ``\$8,658.27,`` and substitute the figure ``\$7,146.52.

4. Page 33, at paragraph 16.(a) delete ``a total sum of \$8,658.27, of which \$5,202.27 is denominated back pay,'' and substitute ``a total sum of \$7,146.52, of which \$3,690.52 is denominated back pay.``

The changes above described are reflected also in substitute pages 30A, 31A and 33A of the final Decision and Order, attached to and incorporated in this Order. Because the computation error by which the sum of \$1,511.75 was counted twice on page 30 did not enter into the interest calculation, no further adjustment is required.

Respondent's Motion precipitated additional pleadings by which Special Counsel in a filing dated May 4, 1990 and Respondent in a filing dated May 8, 1990 each seek additional and controversial alterations in the Final Decision and Order. Respondent's May 8 letter-pleading takes exception to OSC's May 4 proposal; OSC by letter-pleading dated May 9, 1990 characterizes Respondent's May 8

proposal as a ``blatant attempt, in the absence of any newly discovered and previously unavailable evidence, to reopen the decision.''

The mischief inherent in reopening a case after final decision and order for other than clerical error is best avoided by adherence to the rule that fact finding turns on an evidentiary record which once closed and the subject of final decision generally ends the litigation before the trial judge. See e.g., Rule 60, Federal Rules of Civil Procedure.

Respondent's Motion to Correct is granted to the extent of the revised figures recited above and as reflected in substitute paged 30A, 31A and 33A. The Motion is otherwise denied as are all requests in pending pleadings filed by any party.

**SO ORDERED.**

Dated this 10th day of May, 1990.

MARVIN H. MORSE  
Administrative Law Judge

While back pay is normally tolled during those periods in which employees are not available for employment, ``a backpay remedy must be tailored to expunge only the actual, not merely speculative, consequences of the unfair labor practices.''. Sure-Tan, Inc., v. National Labor Relations Board, 467 U.S. 883, 900, (1984); See also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (``Only actual losses should be made good. . . .').

OSC, on brief (at 48), attaches a useful ``backpay analysis'' which Respondent has failed to refute or rebut, I accept the OSC analysis for the period October 5, 1988 through March 31, 1989, but I disallow a back pay award for the balance of the period claimed. Having accepted the OSC calculations, the award to Ms. Martinez for the period October 5, 1988 through December 31, 1988 and for the period January 1, 1989 through March 31, 1989 is derived as follows:

4th Quarter 1988	10/5-12/31	1st Quarter 1989 ----- 1/1-3/31
1. # days of work.....	61	65
2. compensation @ \$4.00/hr.....	\$1,952.00	\$2,080.00
3. less interim earnings.....	\$480.71	0
4. amount forwarded.....	0	\$1,511.75
Subtotal.....	\$1,471.29	\$3,591.75
Interest on subtotal (derived from Internal Revenue Service short-term under-payment rate)	\$40.46	\$98.77
Total.....	\$1,511.75	\$3,690.52

4th Quarter	10/5-12/31	1st Quarter 1989
Total Backpay Award..... .....		\$3,690.52

E. Front Pay Awarded

Future pay, viz, front pay, is the form of make-whole relief recognized by the courts where reinstatement is impractical, e.g., where the court finds it likely that the resulting friction between the parties would make future cooperation impossible. Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980); Francoeur v. Corron & Black Co., 552 F.Supp. 403, 413 (S.D.N.Y. 1982). Front pay is the equitable monetary relief for any future loss of earnings resulting from discriminatory conduct by a Respondent. Johnson v. Ryder Truck Lines, Inc., 10 Empl. Prac. Dec. ¶10535, (W.D. N.C. 1975). In the case at bar such a remedy is appropriate where Complainant ``would not like to'' work at Marcel Watch ``because since I took them to the Commission, they would be after me all the time, but I would have to do it if the judge orders me to.'' Tr. at 41. See E.E.O.C. v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919, 926 (S.D. N.Y. 1976), aff'd. 559 F. 2d 1203 (2d Cir. 1977), cert. den. 434 U.S. 920 (1977).

Ms. Martinez returned to the job market in June 1989; it is speculative whether after a two month break in service she would have had a job to return to at Marcel Watch had she been hired in the first instance. However, as the employer found to have unlawfully discriminated, Marcel Watch should not benefit from that uncertainty. Having already held as to back pay that Ms. Martinez had the option not to demand employment by Marcel Watch because he was reasonably apprehensive of interpersonal conflicts, I determine that make whole relief may be awarded in the form of front pay. Cf. Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 233 (S.D.N.Y. 1986) (where front pay was denied because discharge was not a result of discriminatory act of employer.)

The amount of front pay compensation for Ms. Martinez is determined by the amount of future earnings that would have been realized had there been no discrimination, following the period when he was clearly entitled to less speculative back pay, viz., from the time she was able to return to work until the end of the full twelve month period which began the month following the events of October 5, 1988, i.e., November 1, 1988 through October 31, 1989.

Hyland v. Kenner Products, (D.C. Ohio 1976) 13 Empl. Prac. Guide ¶11,427.

Ms. Martinez is entitled to front pay for the period beginning June 1, 1989, when she would have been able to resume her job search after her husband's illness, until November 1, 1989, calculated as follows:

<u>Total Front Pay Award</u>	
# days of work.....	
6/1-8/31.....	
9/1-10/31 .....	108
compensation @ \$4.00/hr.....	\$3,456.00
Recapitulation.....	
Total Front Pay Award .....	\$3,456.00
Total Back Pay award .....	\$3,690.52
Total pay award.....	\$7,146.52

9. That a citizenship status-based claim of discrimination in hiring, i.e., an unfair immigration-related employment practice, in violation of 8 U.S.C. § 1324b may properly be prosecuted on behalf of Rosita Martinez, as a Puerto Rican-born citizen of the United States.

10. That a citizen of the United States is entitled by virtue of the prohibition of 8 U.S.C. § 1324b against unfair immigration-related employment practices to protection against citizenship status-based discrimination in hiring.

11. That a prima facie case of an unfair immigration-related employment practice, i.e., discrimination in hiring, is shown on the record of this case by a preponderance of the evidence where it is established that Marcel Watch, through Dan Bob, its employee authorized to hire watch packers, rejected Ms. Martinez while continuing to hire for the position for which she applied.

12. That Marcel Watch has failed, in turn, to provide by a preponderance of the evidence or at all that it was lawfully entitled to discriminate against Ms. Martinez in its hiring practice by insisting on a green card and rejecting tender of her birth certificate and social security card at the time of her employment interview.

13. That Marcel Watch failed to provide by a preponderance of the evidence or at all that it would not have hired Ms. Martinez even in the absence of citizenship status discrimination.

14. That Marcel Watch failed to provide by a preponderance of the evidence or at all that it failed to hire Ms. Martinez for a legitimate, nondiscriminatory reason.

15. That, based upon the preponderance of the evidence, I determine that Marcel Watch engaged knowingly and intentionally in an unfair immigration-related employment practice, within the meaning of and in violation of 8 U.S.C. § 1324b, when it failed to hire Ms. Martinez, a Puerto Rican-born United States citizen, as a watch packer.

16. That Marcel Watch shall pay:

(a) To and on behalf of Ms. Martinez a total sum of \$7,146.52, of which \$3,690.52 is denominated back pay for the period October 5, 1988 through March 31, 1989 and \$3,456.00 is denominated front pay for the period June 1, 1989 through October 31, 1989, net of offset for interim earnings.

(b) To the United States a civil money penalty in the sum of \$1,000.00.

17. That Marcel Watch shall:

(a) Cease and desist from the unfair immigration-related employment practice found in this case, including, without limiting the generality of the foregoing, failure to accord reasonable weight to documents tendered as birth certificates by prospective employees, and requesting alien registration cards [green cards], from such applicants who identify themselves as citizens of the United States of Puerto Rico birth;

(b) Comply with requirements of 8 U.S.C. § 1324a(b) during a period of one year from the date of this final decision and order, during which it shall retain the name and address of each individual who applies, in person or in writing, for hiring for an existing position for employment by Marcel Watch in the United States.

18. That, pursuant to 8 U.S.C. § 1324b(g)(1), this final decision and order is the final administrative order in this case and ". . . shall be final unless appealed" to a United states court of appeals in accordance with 8 U.S.C. § 1324b(i).

**SO ORDERED:** Dated this 22nd day of March, 1990.

Marvin H. Morse,  
Administrative Law Judge.