

**SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT**

**WILLIAM C. FULLER, M.D.,  
Grievant,**

**HF No. 7 G, 2003/04**

**v.**

**DECISION ON REMAND**

**UNIVERSITY OF SOUTH DAKOTA and  
SOUTH DAKOTA BOARD OF  
REGENTS,  
Respondents.**

This matter comes before the Department of Labor based on Grievant William C. Fuller's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Thomas K. Wilka represented Grievant William C. Fuller (Grievant). Tom Frieberg represented Respondents University of South Dakota and South Dakota Board of Regents (hereafter Respondent). The Department of Labor conducted a hearing on remand on January 11, 2007, in Sioux Falls, South Dakota.

**Issue:**

What is the appropriate amount of damages for Dr. Fuller's wrongful discharge?

**Findings of Fact:**

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Prior to July 1, 2002, Grievant, a psychiatrist, was employed as a Professor with the University of South Dakota School of Medicine (USD).
2. Dr. Fuller was a full-time faculty member who received a salary and benefits from the State of South Dakota. In addition, Dr. Fuller, and many other faculty members of the School of Medicine, received compensation from University Physicians (UP). UP is the practice group for the physicians employed as Medical School Professors by USD.
3. Only USD faculty were allowed to participate in the practice plan at UP.
4. USD and UP were separate entities, but closely intertwined.
5. Depending upon when a faculty member was hired, he or she might have received no "state monies" from USD and would receive compensation only from UP for services to USD.
6. Dr. Fuller was hired before UP was formed and therefore, remained on USD's payroll. Dr. Fuller was considered a full-time employee of USD.
7. In 2002, USD was reorganized for financial reasons. A "mission based management" (MBM) approach to the education of medical students was adopted.

8. The MBM approach required that many professors be displaced due to the need to tie faculty earnings directly with time spent teaching medical students.
9. The Dean of USD, Dr. Talley, began negotiations with the two major healthcare systems in Sioux Falls, Avera and Sanford, to hire professors who would be displaced when the MBM was implemented. Avera and Sanford were asked to hire the faculty.
10. Dr. Fuller and several others in the Psychiatry Department accepted substitute employment with Avera. Dr. Fuller and his fellow psychiatrists felt it important that they "remain an academic teaching group and not become simply a clinical provision services group." Dr. Talley cooperated with Avera in sharing the overall compensation of displaced professors from USD and UP to ensure that the displaced professors would receive adequate compensation for the loss of USD and UP income.
11. Fuller's employment agreement with Avera (Avera Agreement) is unambiguous on the topic of the expectations of physicians regarding other employment.
12. Fuller's duties with Avera include teaching residents and medical students. He receives a salary and a teaching stipend from Avera in addition to independent contractor payments from the USD MBM program.
13. Fuller's projected loss, based upon Dr. Ralph Brown's calculations, is:

Projected Loss from 7/1/02 to 12/31/06								
Before					After			Loss
Year	UP	USD	Expenses	Total	Avera	MBM	Total	
2002	\$83,545	\$58,554	-\$6,818	\$135,281	\$102,148	\$13,263	\$115,410	\$19,871
2003	\$172,102	\$118,865	-\$14,045	\$276,922	\$275,520	\$32,730	\$308,251	-\$31,329
2004	\$177,265	\$122,430	-\$14,466	\$285,229	\$239,507	\$24,683	\$264,191	\$21,039
2005	\$182,583	\$126,103	-\$14,900	\$293,786	\$230,996	\$29,384	\$260,380	\$33,406
2006	\$188,061	\$129,886	-\$15,347	\$302,600	\$292,850	\$25,127	\$317,976	-\$15,377
<b>Total</b>	<b>\$803,556</b>	<b>\$555,839</b>	<b>-\$65,577</b>	<b>\$1,293,817</b>	<b>\$1,141,020</b>	<b>\$125,187</b>	<b>\$1,266,207</b>	<b>\$27,610</b>

14. Prior Findings of Fact of the Circuit Court are incorporated by this reference as if set forth in detail.
15. The Department has jurisdiction over the subject matter and parties to this proceeding.
16. To the extent that any of the above Findings of Fact are determined to be Conclusions of Law or mixed Findings of Fact and Conclusions of Law, the same are incorporated herein by this reference as if set forth in full.

**Analysis:**

The department is charged with assessing damages in this wrongful termination case. In its order for remand, the Circuit Court indicated that the Department was to compute damages in accordance with General Drivers and Helpers Union v. Brown County, 269 NW2d 795 (SD 1978). That case stated that the terminated employees were to be:

Compensated for any losses of pay they have suffered by reason of their discriminatory discharge, by paying them sums of money equal to that which they

would normally have earned as wages in the Sheriff's office during the period from the date of discharge, September 9, 1975, less their net earnings from other employment during the back pay period.

Id. In assessing damages, the injured party is entitled to damages that will make him whole. Boxa v. Vaughn, 674 NW2d 306, 2003 SD 154. In other words, the plaintiff should not receive a windfall. In employment cases, once the grievant has proven that a wrongful discharge has occurred, a prima facie case for damages has been proven, and the damages are calculated by beginning with the contracted salary subject to mitigation. Soules v. Independent School District, NO. 518, 258 NW2d 103, 106 (Mn. Sup. Ct. 1977). Any income that is or could have been derived from replacement employment should be subtracted from the contract salary. Id.

Fuller found substitute employment, negotiated in part by USD, to make up for the change to MBM and subsequent loss of employment. Fuller's substitute employment included teaching duties at USD. Respondent argues that Fuller's income through Avera and as an independent contractor with USD should be applied to mitigate Fuller's damages. Grievant argues that it should not and he should receive the income he would have received had USD never adopted MBM, plus what he is able to earn through Avera and as an independent contractor with USD.

There are few cases in South Dakota that deal with mitigation of damages in wrongful discharge cases. Grievant asks Department to adopt a new standard in South Dakota for determining damages in wrongful termination cases, the "compatibility rule." In essence, the compatibility rule provides that compensation from other employment cannot be used to offset or mitigate damages if the other employment is not compatible with the employee's obligations to the duties the employee would have had to perform had they not been terminated. Soules at 106.

The Department declines to adopt the compatibility rule set forth in the Soules case. Fuller is a professional psychiatrist and professor. The realities of full-time professional occupations are not in keeping with the compatibility rule as it is typically associated with part-time and weekend work in occupations that are not professional and which have completely separate and clearly identifiable differences in terms of hours and/or duties.

Furthermore, Grievant's argument that he could have continued his wrongfully terminated position in addition to his current employment is rejected. The clause relied upon by Grievant is located on page 12 of the Avera Agreement Ex 7 and states:

G. University of South Dakota School of Medicine Teaching Income

1. In addition to any and all compensation earned, Physician shall receive any monies paid to Physician from University of South Dakota Medical School for the teaching of medical students on psychiatric rotations. These payments are exempt from the compensation formula and shall be paid directly

to the Physician. These payments will be summarized and reported annually by USD and reported to the CEO of Avera McKennan.

2. The Physician may only maintain dual employment relationship with the University of South Dakota School of Medicine.

The section allows Grievant to collect the MBM payments from USD in addition to the \$70,000.00 Avera teaching stipend for taking medical students on rotation and that is the extent of it. The statement that he may keep the dual employment relationship refers to the dual payment for taking medical students on rotation and serves to limit any other dual employment relationships. This section cannot be realistically and rationally interpreted to extend an invitation to Grievant to take a second and full time job with USD. The requirement that any payments from USD be reported to Avera serves to insure that Avera was getting the full-time physician they hired and not one who dedicated substantial time to another employer.

Other sections of the Avera Agreement are also contrary to Grievant's argument. Page 2 of the Avera Agreement provides:

- b. Physician agrees to devote substantially Physician's entire working time, skill and energy to the practice of psychiatric medicine in the community of Sioux Falls;
- c. Physician will not engage in the practice of medicine except as an employee of the Hospital unless authorized to do so by Hospital;
- d. Physician specifically understands that Physician does not have authority, [sic] to enter into medical contracts with other parties;...

Page 3 of the Avera Agreement provides:

- j. Daily Employment Work Requirements. Physician agrees to devote on a full-time basis, Physician's skill, labor, and attention to Physician's professional medical practice. It is understood that Physician's full-time practice of medicine shall be construed to mean serving the Behavioral Health Clinic, along with all satellite locations, and its patients five (5) days per week, and providing to or on behalf of Hospital's physician's proportionate share of call coverage.

Further page 11 of the Avera Agreement provides:

- E. Avera Teaching Stipends
  - 1. Physician shall receive Avera teaching stipends in the amount of 70,000. Such compensation shall be in payment for Physician duties relating to the psychiatry residency programs at Avera McKennan.
  - 2. Duties shall include but are not limited to the following: . . .
    - 1. Teach residents
    - 2. Teach medical students . . .

Finally, page 12 of the Avera Agreement provides:

- I. Compensation Parameters
  1. Maintain current work schedule and practice site unless a change in work schedule and site are approved by CEO of Avera McKennan
  2. The CEO of Avera McKennan shall approve all contractual obligations and agreements to the physicians and providers.

Grievant's evidence does not support a finding that Avera would consent to Fuller working additional time for USD. The language of the Avera Agreement cannot fairly be read to imply that such an arrangement would be acceptable. Grievant is required by the Avera Agreement to devote his entire working time, skill, energy, labor, and attention to psychiatry for the Behavioral Health Clinic and a second contract for full-time employment with USD would be incompatible with his current Avera Agreement. Therefore, Grievant's Avera income should be applied in mitigation.

### **Damages**

Both parties presented expert testimony regarding Fuller's damages. Fuller's expert, John Wenande, is a certified public accountant accredited in business valuation and financial planning. Wenande was asked only to compare the compensation from USD before and after Fuller's termination. Wenande opined that Fuller's total income from USD, through 2006, had he not been terminated would amount to, including interest, \$514,889.00. Wenande took into account only Fuller's current payments from USD, which are considered independent contractor payments under the Avera Agreement, and did not consider his salary or teaching stipend under the Avera Agreement.

Respondent's expert, Dr. Ralph Brown, is a retired professor at USD and holds a Ph.D. in Economics. Dr. Brown completed a thorough analysis of Dr. Fuller's income and determined that his overall loss of compensation resulting from the termination was \$27,610.00. Dr. Brown calculated these damages by subtracting Fuller's total earnings from Avera and USD MBM payments (from 2002-2006) from what he estimated Fuller would have earned based upon USD and UP payments (from 2002-2006). Dr. Brown's experience in these types of cases has been to compare income before and income after termination.

Wenande did not consider Grievant's post-termination income from Avera. To adopt his calculation of benefits would be contrary to South Dakota law. Dr. Brown's analysis is accepted and his figures are adopted. Wenande is rejected as unpersuasive and contrary to law. Grievant's damages amount to \$27,610.00, plus interest at 10% per annum<sup>1</sup>.

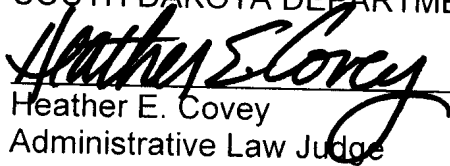
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<sup>1</sup> The parties did not argue or present expert evidence regarding any damages for lost benefits except Dr. Brown's opinion that the Avera Agreement included extensive benefits totaling \$47,857.00 in just the first

Respondents may submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant may have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto or to submit proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Respondents shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 22<sup>nd</sup> day of October, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

  
Heather E. Covey  
Administrative Law Judge

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year. These benefits included family medical and dental insurance coverage as well as life and disability insurance.