U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**In the Matter of:**

**CHRISTOPHER J. CAIN,**

**COMPLAINANT,**

**v.**

**BNSF RAILWAY COMPANY,**

**RESPONDENT.**

**ARB CASE NO. 13-006**

**ALJ CASE NO. 2012-FRS-019**

**DATE:** SEP 18 2014

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*
**Robert J. Friedman, Esq.;** ***Law Offices of C. Marshall Friedman*****, St. Louis, Missouri**

*For the Respondent:*
**Andrea Hyatt, Esq.;** ***BNSF Railway Company*****, Fort Worth, Texas and Bryan Neal, Esq. and Micah R. Prude, Esq.;** ***Thompson & Knight LLP*****, Dallas, Texas**

**Before: Joanne Royce,** ***Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge*****; Lisa Wilson Edwards,** ***Administrative Appeals Judge***

## DECISION AND ORDER

This case arises under the Federal Rail Safety Act of 1982 (FRSA), 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2013), as implemented by 29 C.F.R. Part 1982 (2013) and 29 C.F.R. Part 18, Subpart A (2013). Christopher Cain filed a complaint alleging that his employer, BNSF Railway Company (BNSF), violated the FRSA by imposing a suspension and then terminating his employment after he reported a work-related accident and injuries. On October 9, 2012, following an evidentiary hearing, an Administrative Law Judge (ALJ) determined that the

employer's action violated the Act, and he granted relief.[1] BNSF petitions the Administrative Review Board (ARB) for review. We affirm with modifications as to the damages awarded.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the FRSA.[2] The ARB reviews the ALJ's factual findings for substantial evidence and conclusions of law de novo.[3]

## BACKGROUND

BNSF hired Cain on February 2, 2006, and when BNSF suspended and ultimately dismissed him in June 2010, he was working as a sheet-metal worker. During the course of his employment, Cain reported to work at employer's Argentine Yard in Kansas City, Kansas. However, he was frequently assigned to work at both the Argentine Yard and the Murray Yard in North Kansas City, Missouri. To travel between the two yards, Cain drove a BNSF work truck. On January 27, 2010, Cain was driving the truck from the Murray Yard back to the Argentine Yard, when he was involved in a traffic accident. Cain's truck collided with the back of a produce truck that was stopped at a traffic light. The responding city police officer did not issue him a citation, and Cain's truck was towed from the scene. A BNSF officer drove Cain from the scene to the Argentine Yard, where Cain filled out a standard Employee Personal Injury/Occupational Illness Report. Reporting his injuries, he stated only that he had a skinned knuckle on the index finger of his left and a bruise below his left knee cap.

Subsequently, Cain began to experience increasing symptoms in his chest and sought medical treatment. On February 17, 2010, he was diagnosed with a fracture of the 5th or 6th rib on the left side and a very large left pleural effusion. The physician proposed a thoracentesis to drain the fluid from his lungs, which was performed on February 23. At a follow-up appointment on April 8, Dr. Shantikumar informed Cain that the seatbelt caused his injuries in the accident on January 27. Later that day, despite being discouraged from filing an amended report, Cain filed a personal injury report with BNSF noting the additional injuries related to the accident on January 27.

On February 23, 2010, Cain received notice that he must attend an investigation meeting on March 10, to ascertain the facts of the January 27 accident, and to determine his

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1 *Cain v. BNSF Railroad Co.*, ALJ No. 2012-FRSA-019 (Oct. 9, 2012)(D. & O.).

2 Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

3 *Youngermann v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 2 (ARB Feb. 27, 2013)(citations omitted).

responsibility, if any, for the accident.[4] The notice informed him of possible violations of "MSRP Rule S-28.1.1 Maintaining a Safe Course, MSRP Rule S-28.6 Conduct, Section 1. Careless of the safety of themselves or others," and "MSRP Rule S-28.1.2 Alert and Attentive." This investigation was mutually postponed two times and was held on May 18. On June 2, 2010, the investigating manager, Darrin Suttles, issued a decision by letter finding that Cain had violated the safety rules and assessed a "Level S 30 Day Record Suspension and a Three Years Probation," which was deemed retroactive to the date of the accident. Previously, on April 30, 2010, Cain received a notice of an investigation into a possible violation of "MSRP Rule S-28.2.5 Reporting, Section A," relating to his injury report filed on April 8. The investigation meeting was held on May 13. By letter dated June 8, 2010, Suttles reported his conclusion that Cain had violated the reporting rule by failing to report the extent of his injuries in a prompt manner. Suttles informed Cain that he was dismissed from employment effective immediately. Cain filed a claim under the FRSA on November 24, 2010.[5]

## DISCUSSION

### I. The FRSA's whistleblower protection provisions

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[6] The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b)(West 2007). To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. If a complainant meets his burden of proof, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.[7]

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4 Complainant's Exhibit (Cl. Ex.) 11.

5 Respondent's Exhibit (Resp. Ex.) 44.

6 *See* 49 U.S.C.A. § 20109(a), (b).

7 *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012). *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii).

## II. The ALJ's Decision and Order

*The ALJ's findings on protected activity*

The ALJ accepted the parties' stipulation that Cain engaged in protected activity when he reported on January 27, 2010, that he sustained two injuries from a work-related vehicle collision. D. & O. at 6. In addition, the ALJ found that Cain engaged in protected activity on April 8, 2010, when he reported that he had discovered that he had suffered from more extensive injuries in the accident in January. The ALJ rejected BNSF's contention that the report on April 8 was not made in good faith, and thus cannot be considered protected activity. The ALJ appears to have found that the two reports are inextricably intertwined and thus are both protected activity. *Id.*

*The ALJ's findings on contributing factor*

In his determination of whether the protected activities contributed to the adverse employment actions, the ALJ considered the commonality of the facts as well as the temporal proximity between the filing of the reports and the suspension and dismissal from employment. He also considered the intermixing of the investigation processes and concluded that the preponderance of the evidence established that the filing of the reports contributed to the suspension and dismissal. *Id.* at 7.

*The ALJ's findings regarding "clear and convincing" evidence*

Initially, the ALJ found that BNSF failed to establish by clear and convincing evidence that it would have assessed a 30-day suspension against Cain absent his protected activity. The ALJ found that although the internal investigation properly concluded that Cain had been involved in a rear-end collision with a stopped vehicle, there was no evidence that the discipline applied followed company policy. The ALJ found that the BNSF managers responsible for assessing the discipline offered shifting reasons for choosing the 30-day suspension. He noted that BNSF did not submit any evidence regarding the company policy on discipline for violating a company rule. Moreover, he rejected BNSF's contention that it exercised a "zero tolerance" policy for violations given the list of similar employees who were given shorter suspensions.

In finding that BNSF failed to establish by clear and convincing evidence that it would have terminated Cain's employment in the absence of his filing the report of additional injuries on April 8, the ALJ noted that the termination was for violation of probation, which had been decided June 2, but was deemed effective retroactively to the January 27, 2010 accident. The ALJ found that BNSF managers offered conflicting accounts as to who decided to terminate Cain's employment and whether it was for the offense of misrepresentation of an on duty injury or a violation occurring during a probationary period. The ALJ credited Cain's testimony that his managers discouraged him from filing an amended report and noted that BNSF did not present any evidence of similar employees whose employment was terminated. Thus, he concluded that these inconsistencies preclude a finding that clear and convincing evidence supports a finding that BNSF would have imposed dismissal absent the protected activity.

*The ALJ's assessment of remedies*

The ALJ found that Cain is unable to perform railroad work and thus did not order reinstatement. With regard to lost wages, the ALJ accepted the parties' stipulation that Cain had lost wages of $20,405.18, but made interim earnings of $9,894.14, by working for Washburn University. The ALJ found that the amount Cain received in unemployment benefits are from a collateral source, and should not be deducted from the total lost wages. Thus, the ALJ concluded that Cain is entitled to a total of $10,511.05 for lost wages, plus interest.

The ALJ found that although Cain did not offer evidence to support a claim for compensatory damages, he ordered BNSF to pay $1 to Cain in nominal damages "for pain and suffering." D. & O. at 17.

Lastly, the ALJ considered Cain's request for the imposition of punitive damages. The ALJ found that BNSF managers "conspired to defeat the Complainant's right to submit a medical claim and deprive him of his job." *Id.* at 18. The ALJ also noted that the amount of damages awarded as back wages and compensatory damages was not sufficient to deter BNSF from similar actions in the future. After reviewing cases in which punitive damages were awarded, the ALJ imposed a punitive damages award of $250,000 against BNSF.

**III. Analysis of the ALJ's Decision and Order**

BNSF does not contest that it took unfavorable personnel actions against Cain, namely a 30-day suspension with probation of three years and termination of employment. However, BNSF contends on appeal that the ALJ erred in finding that Cain established by a preponderance of the evidence that his protected activity was a contributing factor to the unfavorable personnel actions.

*Protected activity*

The ALJ accepted the parties' stipulation that Cain engaged in protected activity by reporting the vehicle accident on January 27, 2010. We accept this finding as final because it is unchallenged by the parties on appeal. However, BNSF contends that the ALJ erred in finding that Cain also engaged in protected activity by filing the report on April 8, 2010.

Initially, the ALJ found that the facts underlying the two reports were intertwined, as were the investigations BNSF conducted. This finding is supported by substantial evidence. Cain's report on April 8 amended the extent of the injuries incurred on January 27, and thus can properly be treated as a separate protected activity.[8] Moreover, the ALJ considered and rejected Respondent's contention that Cain did not file the report on April 8 in "good faith." Specifically, he found that Cain was probably in shock when he filled out the initial report on January 27 and was not advised until April 8 by a physician that the nature of his injuries indicated they were

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[8] We interpret the ALJ's finding that "Complainant remains in status as long as subsequent events reasonably relate to the initial protected activity" to mean that the two reports are inextricably intertwined.

caused by the seatbelt in the January 27 accident. He acknowledged that a nurse practitioner informed Cain in February that there was a "high probability" that the injuries he suffered were a result of the January vehicle collision, but found that Cain was reluctant to amend his initial report without a greater degree of certainty, given the discouragement by Reppond, BNSF's General Foreman.

*Contributing Factor*

BNSF also contends that the ALJ erred by failing to require Cain to establish by a preponderance of the evidence that the alleged protected activities were contributing factors to his unfavorable personnel actions. Proof of causation or "contributing factor" is not a demanding standard. To establish that his protected activity was a "contributing factor" to the adverse action at issue, the complainant need not prove that his or her protected activity was the only or the most significant reason for the unfavorable personnel action. The complainant need only establish by a preponderance of the evidence that the protected activity, "alone or in combination with other factors," tends to affect in any way the employer's decision or the adverse action taken.[9] The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.[10]

BNSF does not dispute that it initiated the investigation into the vehicle collision because of Cain's January 27th report, and that the investigation resulted in the imposition of a suspension and probation period. Therefore, we affirm the ALJ's finding that the protected activity on January 27 contributed to the unfavorable personnel action. In addition, the charge against Cain of failing to file a timely report, which he received notice of on April 30, was directly linked to the amended injury report filed on April 8. Thus, we also affirm the ALJ's finding that the protected action of filing an injury report contributed to the subsequent decision to terminate Cain's employment as it is supported by the credited evidence of record.[11]

*Clear and Convincing Evidence*

A respondent's burden to prove the affirmative defense under FRSA is purposely a high one. As noted above, FRSA whistleblower cases are governed by the legal burdens set out in

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9 *Henderson*, ARB No. 11-013, slip op. at 11.

10 *Benjamin v. Citationshares Mgmt., L.L.C.*, ARB No. 14-039, ALJ No. 2010-AIR-001 (ARB July 28, 2014).

11 *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

AIR 21, 49 U.S.C.A. § 42121(b). The AIR 21 burdens of proof are similar to the burdens of proof provisions of the 1992 amendments to the Energy Reorganization Act, 42 U.S.C.A. §5851. Congress intentionally drafted the burdens of proof contained in the 1992 ERA amendments – the same as those now contained in FRSA – to provide complainants a lower hurdle to clear than the bar set by other employment statutes: "Congress desired to make it easier for whistleblowers to prevail in their discrimination suits . . . ."[12] In addition to *lowering* a complainant's burden, Congress also *raised* the respondent's burden of proof – once an employee demonstrates that protected activity was a contributing factor, the burden is on the employer to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity.[13] In addition to the high burden of proof, the express language of the statute requires that the "clear and convincing" evidence prove what the employer "would have done" not simply what it "could have" done.[14]

Because we affirm the ALJ's finding that Cain established that his protected activities contributed to the adverse employment actions, we will consider BNSF's contention that it established that it would have taken the same adverse actions in the absence of the protected activities. Initially, BNSF contends that the ALJ erred in finding that it failed to establish by clear and convincing evidence that it would have suspended Cain in the absence of the protected activity. It is undisputed that Cain was involved in a work-related vehicle collision while driving one of Respondent's trucks. The ALJ did not address whether Cain would have been disciplined for this collision, but rather, he focused his analysis on whether BNSF would have imposed a 30-day suspension absent the protected activity.[15] As we do not superimpose our opinion on the conclusions of a company's personnel office, our role is not to question whether the employer's decision to suspend Cain was wise or based on sufficient "cause" under BNSF personnel policies, but only whether all the evidence taken as a whole makes it "highly probable" that BNSF "would have" suspended Cain for 30 days absent the protected activity.

The ALJ found that the investigation of the January accident occurred at the same time as the investigation of the April report, and was conducted by the same investigating manager, Suttles.[16] The ALJ found that the timing of the investigations creates an appearance that Suttles

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12 *Araujo v. New Jersey Transit Rail Operations*, 708 F.3d 152, 159 (3d Cir. 2013).

13 *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

14 49 U.S.C.A. § 20109(d)(2)(A)(i); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006 (ARB Apr. 25, 2014).

15 In fact, the ALJ found that "Respondent has proven that it was within its rights to consider the fact that an accident did occur and that there was, under company policy, a basis for discipline." D. & O. at 8.

considered both reports in his decision to suspend Cain for 30 days. The ALJ found that Suttles admitted that he had the power to consider whether to waive any investigation or penalties, seek alternative handling, or not pursue the matter. Hearing Transcript (H. Tr.) at 176, 180. BNSF entered into evidence a list of other employees who violated safety rules and were similarly situated, but the ALJ found that this evidence establishes that a number of lesser suspensions had been issued, as well as a "waiver." The ALJ rejected BNSF's contention that the list describes discipline that is "the same or similar" to the discipline imposed on Cain, noting that the employees listed were given 10 and 20-day suspensions or "waivers."[17]

We do not agree with the ALJ's characterization of employer's evidence. The table BNSF submitted includes the discipline of 24 employees. BNSF had charged three employees with non-serious violations and thus they are not the same or similar to Cain. Ten employees chose to pursue alternate handling, which Cain declined. Of the nine employees charged with a serious violation, BNSF suspended eight for 30 days and imposed either a one or three-year probation period. BNSF only gave one employee charged with a serious violation a waiver, which appears to be the exception rather than the rule. As we noted in *Speegle*, the "clear and convincing" defense focuses on what would have happened in the "absence of" the protected activity.[18] The evidence Respondent submitted shows that in cases where the employee chooses not to pursue "alternate handling" of an allegation of a safety violation, the employees charged with a "Level S serious" violation received the same discipline as Complainant. It is not disputed that BNSF knew about the motor-vehicle accident prior to Cain's report as a BNSF officer drove Cain from the scene to employer's Argentine yard and the company truck was towed from the scene and ultimately totaled. Thus, we reverse the ALJ's determination that Respondent did not establish by clear and convincing evidence that it would have imposed a 30-day suspension due to the January motor vehicle accident, absent the protected activity.

Regarding the termination of Cain's employment, BNSF contends that it terminated Cain's employment because Cain's failed to timely file the amended injury report and violated the probation that it had applied retroactively to the January 27 incident. The ALJ credited Cain's testimony that Reppond and Schakel, BNSF's facility manager and Cain's direct foreman, discouraged him from amending his original accident report, to report the more serious injuries, and thus waited until his physician unequivocally opined that his rib and lung injuries were related to the January accident. Moreover, the ALJ found that there was no evidence the April report was based on fraud, and BNSF's reasons for terminating Cain's employment shifted between explanations by Heenan, Suttles, and Cargill. As the Board noted in *Speegle*, the

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16 We agree with Employer's contention that the ALJ mischaracterized the time it took to initiate the investigation into the January accident. Employer sent notice on February 23, 2010, of an investigation to be held on March 10. The parties mutually postponed the investigation until May 18 due to Cain's extended leave of absence. However, it is undisputed that the investigation for the failure to file a timely report was held on May 13.

17 D. & O. at 10.

18 *Speegle*, ARB No. 13-074, slip op. at 7.

employer must prove what it "would have done" in the "absence of" the protected activity, which includes consideration of the facts that would have changed in the absence of the protected activity.[19] In this case, BNSF terminated Cain's employment, in part, for violating a probationary period. However, this "violation" would not have occurred in the absence of the April 8 report and BNSF does not offer an alternative reason that is not connected to the April 8 report for Cain's dismissal.[20] As there is no allegation that BNSF would have terminated Cain's employment absent his filing the report on April 8, 2010, we affirm the ALJ's determination that Respondent failed to establish by clear and convincing evidence that the decision to terminate Cain's employment was not related to the protected activity.

*Back Wages*

BNSF contends that the ALJ erred in failing to enforce the parties' stipulated lost wages in the amount of $5,780.52. The ALJ accepted the stipulated amount of lost wages of $10,511.05 ($20,405.18 less the amount received from interim earnings of $9,894.13), but declined to deduct an additional $4,730.35, the amount Cain received in unemployment benefits.[21] He found that these benefits are collateral sources and should not be factored out of lost wages.[22] The ALJ did not address the fact that the parties had stipulated to lost wages in the amount of $5,780.52.

The Board has held that absent a provision of a stipulation that is contrary to public policy, the parties should be held to their bargain where, as here, they have fairly entered into a stipulation of facts.[23] As there is no evidence that the stipulation to the amount of lost wages was so contrary to public policy as to warrant nonenforcement of the stipulation, we vacate the ALJ's finding that Cain is entitled to $10,511.05 in lost wages, and hold that the parties are bound to the stipulated lost wages of $5,780.52.

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19 *Id.* at 12.

20 Moreover, we note that the probationary period was not actually in place when Cain filed the April report as it was not issued until Suttles's June 2 decision following his investigation of the motor vehicle accident.

21 D. & O. at 17.

22 It is well established that unemployment compensation is not deductible from back pay awards in whistleblower cases. *See, e.g., Moyer v. Yellow Freight Sys., Inc.*, No. 1989-STA-007, slip op. at 11 (Sec'y Aug. 21, 1995).

23 *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022 (ARB May 17, 2000); *see also Christian Legal Soc. v. Martinez*, 561 U.S. 661; 130 S. Ct. 2971, 2983 (2010) (a party's admissions in a joint stipulation of facts are binding on the parties).

*Compensatory Damages*

The ALJ found that "Complainant did not testify as to any pain and suffering, did not produce medical testimony as to the relationship of employment to injury, relate the extent of injury, submit medical bills for payment or show that any expenses were medically necessary and reasonable."[24] However, in spite of the lack of evidence, the ALJ awarded compensatory damages in the amount of $1. We agree with BNSF that this award cannot be affirmed. Any award of compensatory damages, even a de minimus one, must be supported by the evidence and it is clear that Cain has not submitted any evidence.[25]

*Punitive Damages*

BNSF challenges the ALJ's punitive damages award, and argues that the award is unsupported, excessive, and unlawful. The FRSA entitles a prevailing complainant to be made whole. Possible relief under FRSA "may include punitive damages in an amount not to exceed $250,000."[26] Reviewing the ALJ's punitive award requires us first to review whether it was warranted at all and then the amount awarded.[27] An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[28] The size of the punitive award is fundamentally a fact-based determination, and "[w]e are bound by the ALJ's [factual] findings if they are supported by substantial evidence."[29] In analyzing the amount of damages awarded, the focus is on the employer's conduct and "whether it is of the sort that calls for deterrence and punishment."[30]

In considering the applicability of punitive damages in this case, the ALJ found that several of BNSF's management employees "conspired to defeat [Cain's] right to submit a medical claim and deprive him of his job."[31] As we discussed in *Henderson*, the FRSA and its amendments convey congressional intent to comprehensively address and prohibit harassment, in

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24 D. & O. at 17.

25 *See Young v. Park City Transp.*, ARB No. 11-048, ALJ No. 2010-STA-065 (ARB Aug. 29, 2012).

26 49 U.S.C.A. § 20109(e)(3).

27 *Youngermann*, ARB No. 11-056, slip op. at 5 (citation omitted).

28 *Id.* at 6. *See also Bailey v. Consolidated Rail Corp.*, ARB No. 13-030, -033; ALJ No. 2012-FRS-012 (ARB Apr. 22, 2013).

29 *Youngermann*, ARB No. 11-056, slip op. at 6.

30 *Id.* at 10 (internal citation omitted).

31 D. & O. at 18.

all its guises, of injured rail employees to help prevent "chronic under-reporting of rail injuries, widespread harassment of employees reporting work-related injuries, and interference with medical treatment of injured employees."[32]

There were a number of employees involved with the investigation of Cain's charges relating to his protected filing of the accident and injuries report and the subsequent adverse employment actions. In addition, the ALJ credited Cain's testimony that Reppond and Schakel warned him not to file a second report. BNSF does not point us to any evidence that contradicts this testimony. It is undisputed that BNSF meted out the most severe adverse action: termination of employment. Thus, we find that substantial evidence supports the ALJ's finding that punitive damages are warranted.

With regard to the amount of the punitive damages awarded, we reject BNSF's contention that the decision of the United States Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is controlling. In *Campbell*, the Court discussed the application of punitive damages in civil tort litigation.[33] The Court held that the punitive damages were excessive and were duplicative of amounts awarded for compensatory damages and had been applied to deter behavior that had occurred outside of the jurisdiction. Moreover, the Court held that the lower courts improperly awarded punitive damages to punish and deter conduct that bore no relation to the plaintiff's harm. Thus, the Court vacated the amount of punitive damages awarded and remanded for further consideration.

We hold that the decision in *Campbell* is not dispositive as the punitive damages under consideration in this case are provided for by statute and include a cap on the amount awarded to protect respondents' interests. Moreover, the Court in *Campbell* noted that the punitive damages awarded were duplicative of the compensatory damages awarded, and the damages in this case serve to deter Respondent from repeating retaliatory behavior rather than to compensate Complainant for damages.

However, we agree with BNSF's contention that the ALJ failed to provide sufficient justification for the amount of punitive damages. The ALJ found that the amount of lost wages would have no deterrent effect upon Respondent, recognizing that deterrence as well as punishment are two primary reasons to award punitive damages under the Act.[34] The ALJ also found that a number of employees were involved with the decision to retaliate against

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[32] *Henderson*, ARB No. 11-013, slip op. at 4.

[33] The plaintiff in *Campbell* was awarded $145,000,000 in punitive damages on a compensatory damages award of $1,000,000. 538 U.S. at 408.

[34] *Youngermann*, ARB No. 11-056, slip op. at 12. Although not discussing federal whistleblower laws, we are persuaded by the United States Supreme Court's explanation that the purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts §908(1)(1979). *Smith v. Wade*, 461 U.S. 30, 51 (1983).

Complainant. However, the other basis for the ALJ's award of $250,000 in punitive damages was that Cain's reassignment to the diesel service facility was "wanton and willful and an equivalent to an intentional tort."[35] Cain did not raise the issue of his reassignment to the diesel service facility as an adverse employment action and, thus, the facts of the reassignment were not adjudicated in this claim. As this issue was not before the ALJ and was not adjudicated, we hold that the ALJ erred in considering it when evaluating Employer's conduct to determine the amount of punitive damages. The ALJ devoted half of his summary analysis to his determination that BNSF must pay $250,000 in punitive damages. Therefore, we reduce his award by $125,000.

## CONCLUSION

The ALJ's liability determination is **AFFIRMED.** The relief awarded by the ALJ is amended as follows: the compensatory damages award in the amount of $1 is vacated, the backpay award is reduced to $5780.52 pursuant to the parties' stipulation, and the punitive damages award is reduced to $125,000.00.

**SO ORDERED.**

**LUIS A. CORCHADO**
**Administrative Appeals Judge**

**JOANNE ROYCE**
**Administrative Appeals Judge**

**LISA WILSON EDWARDS**
**Administrative Appeals Judge**

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35 D. & O. at 18.

**ADMINISTRATIVE REVIEW BOARD**
**CERTIFICATE OF SERVICE**

**CASE NAME : Christopher J. Cain v. BNSF Railway Company**

**ARB CASE NO.: 13-006**

**ALJ CASE NO. : 2012-FRS-019**

**DOCUMENT : ORDER**

**A copy of the above-referenced document was sent to the following persons on**

SEP 18 2014

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