U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 09 October 2012In the Matter of

CHRISTOPHER J. CAIN,
Complainant

v. Case No.: 2012-FRS-00019

BNSF RAILWAY COMPANY,
Respondent

APPEARANCES: Robert Friedman, Esquire and Kenneth Rudd, Esquire
For Complainant
Andrea Hyatt, Esquire and Micah Prude, Esquire
For Respondent

BEFORE: Daniel F. Solomon
Administrative Law Judge

DECISION AND ORDER

DAMAGE AWARD

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 ("FRSA").[1] Christopher J. Cain ("Complainant") complained that his employer, Respondent BNSF Railway Company, violated the FRSA when he was suspended for 30 days on June 2, 2010 for unsafe, inattentive, and careless driving and was fired on June 8, 2010 for failing to report injuries in a timely fashion.

The case came to hearing in Kansas City, Missouri, June 20, 2012. I admitted the following into evidence:

One set of stipulations, marked as "ALJ 1";
Complainant's exhibits, "CX" 1-CX 5, CX 7- CX 9, CX 11-21;
Respondent's exhibits, "RX" 1- RX 55.

The Complainant testified. Although Shaun Carr was presented as a similar employee by Complainant, after a review of the transcript, I find that he is not and do not consider his testimony.[2]

Respondent called Darrin Suttles, Albert T. Bossert, Derek Cargill and Dennis Bossolono at hearing, and the record includes the deposition testimony of John Reppond.

Post-hearing, the parties submitted proposed findings, briefs and reply briefs.

---

[1] 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act), Pub. L. No. 110-53 (Aug. 3, 2007), and as implemented by federal regulations at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A.

[2] Mr. Carr was discharged for dishonesty relating to time records. TR 47. Although there is a factual dispute, the charges are not similar to Complainant's case.

LAW AND REGULATIONS

The FRSA prohibits a rail carrier from retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness. Section 20109(a) of Title 49 of the United States Code states:

> A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—
>
> > (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

49 U.S.C.A. § 20109(a)(4). The FRSA's whistleblower provision incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[3]

Thus, the complaint will be governed by AIR 21's legal burdens of proof, which contain whistleblower protections for employees in the aviation industry.[4]

To prevail, a 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 the unfavorable personnel action. If a complainant meets his burden of proof, the employer may avoid liability only 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.[5]

STIPULATIONS

The parties agreed and I find:

COVERAGE

1. Respondent BNSF Railway Company is a "railroad carrier engaged in interstate commerce," and as such is a covered employer under the FRSA.
2. Complainant Christopher J. Cain was, for purposes of the events giving rise to his FRSA Complaint, a covered "employee" within the meaning of 42 U.S.C. § 20109.

TIMELINESS

3. Record suspension. Mr. Cain's FRSA claim regarding the record suspension he was issued on June 2, 2010 is timely because he filed a complaint with OSHA within 180 days of that record suspension.
4. Dismissal. Mr. Cain's FRSA claim regarding his dismissal from employment with BNSF, which occurred on June 8, 2010, is timely because he filed a complaint with OSHA within 180 days of his dismissal.

---

[3] 49 U.S.C.A. § 42121(b); see 49 U.S.C.A. § 20109(d)(2)(A).

[4] 49 U.S.C.A. § 42121(b)(2)(B)(iii); ***Luder v. Continental Airlines, Inc.***, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); see ***Brune v. Horizon Air Industr., Inc.***, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight).

[5] 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv); ***Menefee v. Tandem Transp. Corp.***, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010), citing ***Brune***, ARB No. 04-037, slip op. at 13.

5. Appeal. Mr. Cain timely filed his objections and request for a hearing before an Administrative Law Judge. He received OSHA's findings on January 9, 2012 and filed his objections and request for a hearing on February 7, 2012.

JURISDICTION

6. This Court has jurisdiction over Mr. Cain's FRSA complaint pursuant to 49 U.S.C. § 20109(d) and 29 C.F.R. § 1982.106.

ELEMENTS OF 2010 CLAIM

7. Protected activity. The parties agree that Mr. Cain engaged in protected activity on January 27, 2010 when he reported that, as a result of vehicle collision, he had two injuries: (1) a skinned knuckle on the index finger of his left hand, and (2) a bruise below his left knee cap. The parties disagree about whether Mr. Cain engaged in additional protected activity.

8. Adverse employment action. The parties agree that Mr. Cain's record suspension and dismissal from employment rise to the level of adverse employment actions under the FRSA.

UNDISPUTED FACTS

Dates, Positions, Union Affiliation

9. BNSF hired Mr. Cain on February 2, 2006.

10. BNSF dismissed Mr. Cain on June 8, 2010.

11. While employed as a sheet-metal worker for BNSF, Mr. Cain was a member of an employee union, the Sheet Metal Workers International Association.

12. At the time of his dismissal, Mr. Cain was working as a sheet-metal worker.

13. At the time of his dismissal, Mr. Cain's regular, scheduled workdays were Monday through Friday.

a. Mr. Cain was "on call" every Saturday. In addition, he would be on call whenever his name came up on a rotating list of certain sheet-metal workers who were subject to call outside normal business hours.

b. His regular, scheduled shift generally started between 7:00 and 7:30 am and ended around 3:30 pm, although it was not unusual for him to work beyond those set hours.

Chain-of-command

14. Paul Schakel, Facility Supervisor, was Mr. Cain's direct foreman.

15. Mr. Schakel reported to John Reppond, General Foreman III.

16. Mr. Reppond reported to Dennis Bossolono, Shop Superintendent of the Argentine/Murray Yards.

17. Earl Bunce was the General Foreman of the Murray Diesel Shop.

Work location & pickup

18. Normally, Mr. Cain reported to work at a particular BNSF railyard—the Argentine Yard in Kansas City, Kansas.

a. However, he frequently was assigned to work at both the Argentine Yard and another BNSF railyard—the Murray Yard in North Kansas City, Missouri.

19. To travel between the two yards, Mr. Cain drove a particular BNSF work truck (BNSF Vehicle No. 96191). Cain drove this same truck to the Murray Yard most of the time for over a year.

a. The truck was a white 1996 Chevrolet Cheyenne pickup.

b. The truck's VIN was 1GCFC29RXTE256989.

20. Mr. Cain was not the only BNSF employee to drive this particular BNSF work truck.

The Vehicle Collision

21. As usual on Wednesday, January 27, 2010, Mr. Cain reported for work at the BNSF Argentine Yard in Kansas City, Kansas.

22. Mr. Cain drove the work truck (BNSF No. 96191) to the Murray Yard where he performed his regular sheet metal worker duties.

23. Near the end of his shift, Mr. Cain got in the truck and began driving it from the Murray Yard back to the Argentine Yard.

24. Mr. Cain had been driving this route (between the Argentine Yard and the Murray Yard) approximately 4 days a week for many months.

25. It was a clear day and the streets were dry.

26. While driving from the Murray Yard back to the Argentine Yard, Mr. Cain was involved in a vehicle collision.

27. Immediately before the collision, he had turned left and was headed East on 12th Avenue in North Kansas City.

28. A produce truck had stopped in the eastbound lane, ahead of his truck at a red light at the intersection of 12th Avenue and Burlington Street.

29. Mr. Cain's truck collided with the rear end of the stopped produce truck.

30. The North Kansas City Police Department responded to the scene.

a. The police officer did not issue Mr. Cain a ticket.

b. According to the police report, Mr. Cain "stated at the scene his brakes failed."

31. Mr. Cain did not seek any immediate medical attention at the time of the collision.

32. The driver of the produce truck drove his truck away under its own power.

33. BNSF Truck No. 96191 was towed from the scene.

34. No ambulances were called to the scene.

35. The parties disagree about the cause of the collision.

Immediately after the collision

36. Following the collision, a BNSF officer transported Mr. Cain from the scene to the Argentine Yard.

37. Back at the Argentine Yard, Mr. Cain filled out a standard Employee Personal Injury/Occupational Illness Report. According to Mr. Cain, he has no memory of filling out this injury report. He alleges that he was in shock while he was filling out the report, as demonstrated by what he contends are shaky handwriting and one-word answers on the report. He contends that his lack of memory and state of shock are consistent with his later discovery that he was bleeding internally into his pleural cavity.

38. Mr. Cain also took a standard, post-accident, drug-and-alcohol test, which he passed.

The days after the collision

39. The next two days after the vehicle collision (Thursday, January 28 and Friday, January 29, 2010) Mr. Cain did not work his scheduled workdays.

a. On January 28, 2010, he took a vacation day.

b. On January 29, 2010, he took either a vacation or a sick day.

40. Mr. Cain returned to work on Monday, February 2, 2010.

Investigations & discipline

41. On May 13, 2010, BNSF held a formal investigation to determine Mr. Cain's responsibility, if any, in connection with his alleged failure to report to the proper manager that he had received medical treatment related to the vehicle accident on January 27, 2010.

42. On May 18, 2010, BNSF held a formal investigation to determine Mr. Cain's responsibility, if any, for rear-ending the produce truck on January 27, 2010.

43. On June 2, 2010, Mr. Cain was issued a Level S 30 Day Record Suspension.

44. On June 8, 2010, Mr. Cain was issued a dismissal letter.

PROCEDURAL CONTEXT

45. Mr. Cain filed an FRSA complaint with OSHA on November 24, 2010.

46. On December 16, 2011, the Regional Administrator for OSHA Region VII issued findings that there was no reasonable cause to believe that Respondent violated 49 USC § 20109.

47. Mr. Cain timely filed objections and request for hearing.

LOST-WAGES DAMAGES

48. Mr. Cain is seeking an award of lost wages.

49. For purposes of this lawsuit only, the parties agree that, if the Court determines that Mr. Cain is entitled to an award of lost wages, the following facts are relevant for computing the amount of such an award:

a. The relevant time period for an award of lost wages would be the 17-week period from June 8, 2010 through September 30, 2010 because:

i. Mr. Cain was dismissed from employment with BNSF effective June 8, 2010; and

ii. After September 30, 2010, according to Mr. Cain, he was no longer physically able to work as a sheet-metal worker.

b. Had Mr. Cain remained employed with BNSF during the relevant 17-week period, he would have earned an average weekly wage of $ 1,200.30.

50. Based on the above stipulations, the parties agree that Mr. Cain's lost wages would amount to $20,405.18, less the offsets below.

a. Mr. Cain earned $9,894.13 in interim earnings during the relevant 17-week period by working for Washburn University.

b. Mr. Cain received $ 4,730.53 in unemployment benefits during the relevant 17-week period.

PROCEDURAL MATTERS

Although the Complainant argues that Respondent's implementation of its timely-reporting policy is on its face a violation of the FRSA, I do not need to address this issue, as the entire subject is part of a collective bargaining process among the parties. I am advised that the

parties are in negotiation and/or litigation over this issue, albeit in another forum. The parties have not provided evidence concerning the "law of the shop" at Respondent on this issue.

Likewise, although there is testimony and argument regarding allegations surrounding "alternative handling," (a process whereby an employee of Respondent accepts responsibility for a violation in return for a lesser disciplinary punishment), I find that this also relates to a violation of the collective bargaining agreement and is actually a discussion of terms of a proposed settlement.[6]

Although the personal injuries alleged in this case may also be at issue in other actions, such as pendant state claims, a Federal Employers Liability Act, "FELA," claim[7] or other activities, I do not rule on any of these.

Although Respondent provided additional evidence post hearing, there was no Motion to accept it, and I will not consider it.

PROTECTED ACTIVITY

The parties stipulated and I accept that the Complainant was engaged in a protected activity. See Stipulation 7.[8]

Although Respondent alleges that Complainant subsequently fabricated the April 8, 2010 injury report, I find that once in protected activity, Complainant remains in status as long as subsequent events reasonably relate to the initial protected activity.

Moreover, the sequence shows:

> 41. On May 13, 2010, BNSF held a formal investigation to determine Mr. Cain's responsibility, if any, in connection with his alleged failure to report to the proper manager that he had received medical treatment related to the vehicle accident on January 27, 2010.
>
> 42. On May 18, 2010, BNSF held a formal investigation to determine Mr. Cain's responsibility, if any, for rear-ending the produce truck on January 27, 2010.

As the investigation of the April incident preceded the investigation of the January incident, and as the investigation was performed by the same person, Mr. Suttles, the facts of the latter incident are, to a reasonable degree of probability, intertwined with those of the former.

UNFAVORABLE PERSONNEL ACTION

The parties stipulate, and I agree that the Complainant suffered an unfavorable personnel action. See Stipulation 8.

Two actions are involved:

1. Suspension for unsafe driving,
2. Termination for reporting an injury in an untimely manner.

CONTRIBUTING FACTOR

A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." ***Williams v. Domino's Pizza***, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). Complainant must prove

[6] See TR 85-87. Negotiations leading to settlement are generally not admissible. Generally the law encourages settlement. Therefore, although I admitted the testimony, I will not consider the argument further.

[7] The Federal Employers Liability Act (FELA), 45 U.S.C. § 51 et seq. (1908), is a United States federal law that protects and compensates railroaders injured on the job.

[8] Employer admits that the Complainant was engaged in protected activity when he initially reported the accident.

that the reporting of his injury was a contributing factor to the suspension. ***Marano v. Dept. of Justice***, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (explaining that proof of retaliatory intent is not necessary to a determination of whether protected activity was a contributing factor to an adverse action); see ***Henrich v. Ecolab, Inc.***, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 20-22 (ARB June 29, 2006).

Although the Complainant received the 30 day suspension before the notice that he had been fired, the investigation that led to the firing was initiated before the investigation of whether he was responsible for the accident. Stipulations 41 and 42.[9]

Based upon the common nexus of the accident in January and the sequences of events surrounding the internal investigation, I find that Complainant has established that the reporting of the accidents and the reporting of injury relating to accident were contributing factors as construed under the FRS. Temporal proximity is "evidence for the trier of fact to weigh in deciding the ultimate question of whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." ***Clemmons v. Ameristar Airways, Inc***., ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010).

Moreover, I find that issues such as whether Complainant could or should have amended his initial notice and the penalties imposed resulting in suspension and termination were affected by the two filings. These relate to an accident and injuries; protected activities and two adverse personnel actions.

CLEAR AND CONVINCING EVIDENCE

Once the issues set forth above have been proven, the burden shifts to Respondent. Respondent argues that (1) an April 8, 2010 injury report was not made in good faith, (2) the protected activity that he did engage in (the injury report he filed on January 27, 2010) was not a contributing factor to either his suspension or dismissal, (3) even if it had been, Respondent would have taken those actions in the absence of the protected activity, and (4) disciplining an employee for violating a rule which requires prompt reporting of work-related injuries does not violate the FRSA.

SUSPENSION

Respondent argues that even if his alleged protected activity were a contributing factor, it proved by clear and convincing evidence that it would have issued Complainant a suspension even in the absence of protected activity.

The accident occurred January 27. The suspension notice is dated June 2, 2010. RX 23.

Complainant argues that suspension was based on “unfounded, baseless, over-assuming [evidence], and a blatant pretext to retaliate against Mr. Cain in violation of the FRSA. There was no credible evidence proffered at the investigation, nor at the trial, nor anywhere in the record, that Mr. Cain drove the company vehicle that day in any way other than fully attentive and safe. TT at 170. Mr. Suttles, the presiding officer and fact-finder, testified that he had zero evidence of inattentiveness. TT at 170. Mr. Cain was not issued a citation. Id. In fact, the police officer who came to the scene moments after the collision, whose actual duty it is to conduct on-scene accident investigations through various methods in which he is trained, inspected the vehicles at the time and made his decision based on the evidence available to not issue Mr. Cain a ticket, citation or warning for inattentive or reckless driving. Id.; C-1, C-2, R-22.

A review of the evidence, including a review of the Collective Bargaining Agreement and related documents, does not substantiate this argument. The Complainant alleged that the brakes

[9] The 30 day suspension was issued June 2 and the dismissal letter was issued June 8. Stipulations 43 and 44.

failed and in order to protect the public, he ran the vehicle into the curb, to "scrub the truck's speed down and try to stop it." Although the police investigated, no charges were filed.

I find 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. When his foreman asked Complainant what had happened, he said that the brakes on the truck had failed. RX 22, at 12. There is no dispute that the impact of the rear-end collision damaged the produce truck's rear bumper and damaged a metal step that had been connected to the rear of the truck. The truck Complainant had driven was towed from the scene. Stipulation 33. It wasn't cost effective to repair the vehicle due to its age, the mileage of the vehicle and the damage, RX 53, at 12. Eventually, the truck was sold for salvage. At hearing, the Respondent produced Albert Bossert, who testified that the vehicle brake system was thoroughly checked after the accident and several components were in "near new condition," which is consistent with the brake service being performed less than three months prior to the accident, contrary to the Complainant's version of the story. TR 183-198. Although Complainant argues that I should discount the testimony regarding the brakes because the vehicle was destroyed, I find that Mr. Bossert is credible. He is not a company employee and apparently does not have any economic interest to lie or embellish the record.

Both of the parties agree that under company policy two separate "formal" investigations were performed and that Darrin Suttles, assistant general foreman, was the official in charge. TR 160-173. He described the job as to determine the facts and decide the responsibility for incidents. I was directed to Rule 40 of the Collective Bargaining Agreement regarding discipline ("CBA"). TR 162. A transcript of the "formal" investigation is at RX 22.

However, in the penalty phase, as to whether a thirty day suspension penalty was reasonable, Mr. Suttles had the power to consider whether Respondent would waive any investigation or penalty, seek mediation,[10] or not pursue the matter. TR 176, 180. I note that the investigation by Mr. Suttles was contemporaneous to or simultaneous with the investigation about the reporting of the injury. The incident occurred in January; it took four months to initiate the investigation. It did not occur until after the investigation of the April episode was brought. I find that this time lag and the fact that the injury was being investigated at the same time are important and mitigate to Complainant's favor. See ***Clemmons***, *supra*; ***Luder***, *supra.*

During the hearing, I requested information about whether under the CBA the company or the Complainant had the burden of proof at the "formal" investigation. TR 174.[11] Respondent provided me with the following:

> ***SMWIA v. Burlington Northern***, PLB 4320, Award No. 6 (1992) (Lazar, Arb.) (finding that substantial evidence exists to support dismissal decision); ***BMWE v. BNSF***, NRAB 3d Div. Award No. 40280 (Jan. 15, 2010) (Vaughn, Arb.) ("It was the Carrier's burden to establish by substantial evidence considered in the record as a whole that the Claimant is guilty of the charges against him and that the penalty imposed was not harsh, unwarranted, inappropriate, arbitrary, or capricious."); ***BMWE v. BNSF***, PLB No. 7048, Award No. 54 (June 13, 2011) (Miller, Arb.) ("The record is clear that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged."); ***BMWE v. BNSF***, PLB No. 5850, Award No. 66 (April 6, 1996) (Hicks, Arb.) ("The burden of proof in disciplinary matters rests solely

[10] This might actually be "remediation" as I specifically remember addressing it, and may be due to a scrivener's error.

[11] The transcript does not appear to be completely accurate. However, the parties have answered my inquiry.

upon the shoulders of the Carrier. They must, by the furnishing of substantial evidence, establish Claimants' culpability for the charges assessed.").

Mr. Suttles did not find the Complainant's testimony credible. TR 166. Moreover, the transcript and a colloquy at hearing did not indicate which party had the burden of proof as to whether there was a company infraction.[12] Although Mr. Suttles misapplied the burden of proof, as he had no understanding of the concept, I find it is harmless error, as the physical facts show that there was, indeed, "rear ender," a collision with a stopped vehicle.

However, after a review of the evidence, I find that there is no evidence to show that the thirty day suspension follows company policy or that it is reasonable. Although the vehicle was "totaled," any replacement value was probably negligible. The vehicle involved was a 1996 Chevrolet Cheyenne pickup, 14 or 15 years old. Respondent overstates the value. There apparently was limited damage to the other vehicle, but no mention of personal injuries to a third person. The violation of company policy should, under the system of progressive discipline promoted by company policy and the CBA, reasonably relate to the penalty. Moreover, in reviewing the transcript, I find that the company policy was to educate and remediate employees rather than punish them for every infraction.

At this level of inquiry under the FRS, the Respondent has a duty to prove that the penalty was fair. The burden of proof under the clear-and-convincing standard under this phase is more rigorous than the preponderance-of-the-evidence standard.[13] Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.[14] Clear and convincing evidence that an employer would have disciplined the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.[15]

Mr. Suttles and Mr. Bossolono did not explain why 30 days suspension with three years' probation was selected as the penalty. A review of the testimony does not provide any insight into why Mr. Suttles, who purportedly made the decision, selected 30 days. See Transcript and RX 23. A review of the transcript of the proceeding shows that the penalty was not discussed. RX 22. Although the appendices to that transcript set forth the company policy about violations, it does not set forth anything about penalties.[16] A review of Rule 40, which the parties agree is controlling, provides no guidance. RX 37. Derek Cargill, Director of Labor Relations, was called to testify for Respondent, and although he testified that some cases warrant a 30 day suspension, he did not relate it to this case.

Respondent argues that it presented evidence of its uniform enforcement of its written rules regarding safe vehicle operations, called "Mechanical Seven Safety Absolutes." RX 42. "Vehicle Operations" is one of the Seven Safety Absolutes. "BNSF management has placed special emphasis on holding employees accountable for rule violations associated with one of the Seven Safety Absolutes, and has a 'zero tolerance policy for these violations.'" I am advised that at least seventeen other employees since 2005 who were found to have violated safety rules were

[12] I ordered the parties to brief this issue.

[13] See ***Clarke v. Navajo Express, Inc.***, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

[14] ***Williams***, ARB 09-092, slip op. at 5.

[15] ***Clemmons v. Ameristar Airways, Inc.***, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 11 (ARB Jan. 5, 2011).

[16] For example, EX 13 attached to RX 22 sets forth "General Responsibilities" but does not describe the penalty for infractions.

penalized, and that this demonstrates that Respondent would have taken the same action with respect to Claimant in the absence of his protected activity. RX 36.

To the contrary, given the facts, I find that the penalty was arbitrary. Of the purported similar employees, several were given suspensions that were less than 30 days. Id. Nine of them were given alternate handling. Three were given a 10 day suspension and a "waiver." Id. Another was given a 20 day suspension. Id. There is no evidence showing anyone of this group was terminated for violating probation. RX 36.

Therefore, I reject the "zero tolerance" argument.

In testimony, only Mr. Bossolono, and not Mr. Suttles, who imposed the penalties, related termination to a second Level S suspension during a probationary period. TR 248-249. The letter from Mr. Suttles applying the suspension is dated June 2, 2010, and although it is captioned "Level S 30 Day Record Suspension" there is no rationale for why 30 days was given. The Bossolono explanation is different than those proffered in testimony by Mr. Suttles and Mr. Cargill, and was not set forth in the charges for either of the investigation hearings. RX 21, RX 22.

I find that these are inconsistencies that preclude a finding by clear and convincing evidence why the penalty of suspension was selected. Such inconsistencies may be considered a false cover for the adverse action where the real basis is impermissible retaliation for protected activity. ***Walker v. American Airlines***, ARB No. 05-028, ALJ No. 2003- AIR-17, slip op. at 18 (ARB March 30, 2007). Where an employer offers shifting explanations for the adverse personnel action, this in itself may be sufficient to provide evidence of pretext. ***Vieques Air Link, Inc. v. U.S. Dept. of Labor***, 437 F.3d 102, 110 (1st Cir. 2006).

Therefore, I find that Respondent did not meet its burden to prove that but for the protected activity it would have suspended Complainant.

TERMINATION

Complainant knew that he was required to promptly notify his supervisors if he later received medical treatment for any injuries resulting from the vehicle collision. The issue regarding the termination differs from the suspension because Section 20109(a)(4) protects railroad employees from retaliation for notifying or attempting to notify the railroad or the Department of Transportation's Federal Railroad Administration ("FRA") of a work-related personal injury.[17]

Moreover, the termination was for violation of probation, which had been applied retroactively to the January 27, 2010 incident. RX 25.

Respondent argues that this notice requirement applies whenever any employee has reason to believe that his or her medical procedure may be connected with a workplace injury. TR 226-227. In the alternative, Respondent argues that the injury listed on the April 8, 2010 injury report was not work related, "...that his injuries were pre-existing and occurred off duty." See Brief.

The record does show that during a February 17 medical appointment a doctor indicated that there was a "high probability" that Complainant had suffered a lung injury as a result of the January 27, 2010 collision. RX 49, Page 2; see also TR 80:21-81:10. Complainant alleges that he did not know:

[17] See 49 U.S.C. § 103, section 3(e)(1). The purpose of FRA includes to promulgate and to enforce rail safety regulations, to administer railroad assistance programs, and to conduct research and development in support of improved railroad safety and national rail transportation policy.

A …they knew what was wrong with my lung, it a big push after the drainage, to get me into surgery. They would have put me in surgery that day had I not asked for a day to fill out the paperwork to stay within the rules.

TR 88.

Respondent also argues that Complainant actually knew that he had injured his chest and/or lungs when the accident occurred. I am directed to RX 52, 60:18-64:21 (testifying that his chest was throbbing after the collision and that it was more tender than before the collision), Id. 102:14-18 (Q: "Did your side seem more or less sore after the wreck?" A: "After I got home it seemed more sore. After -- I'm sure after the adrenaline and the shock wore off.").

I am also directed to February 17 medical notes that he had "ecchymosis underneath his abdominal apron, probably from his seatbelt [worn during the January 27, 2010 collision.]. . . . Dr. Teeter thought he did have a fracture of either the 5th or 6th rib on that left side, as well as a very large left pleural effusion." RX 11. Complainant acknowledged under oath that he was told during that visit that there was a "high probability" that his injuries were caused by his seatbelt during the January 27, 2010 collision. RX 49, Page 2; TR 80 -81. He disclosed to the nurse he met with during that consultation that he had been in a collision because "of [his] side that was aggravated, had gotten worse from – since the accident." RX 52, at 132.

I am advised by Respondent that by waiting until April 8, 2010 - more than 70 days after the collision that he claims caused a throbbing in his chest, and almost two months after he was told that there was a "high probability" that he had suffered a lung injury as a result of the collision - to report this information to BNSF, "Mr. Cain was not acting in good faith." RX Brief.

Complainant argues that when he informed John Reppond about his need to amend his prior injury report, Mr. Reppond discouraged him, as it would make the injury "FRA reportable", TR at 92-93, which would then "be announced in lineups and . . . hurt the managers and supervision." TR at 93.

I am also reminded that Complainant had chest pain before January 27 and that he felt the "same chest wall strain" when he filled out the first injury report on the day of the collision.[18] See Brief. I am also reminded that the Complainant had stated: "My chest was sore before the collision so I have no idea that the soreness was from the collision." Respondent argues that Complainant was explaining that the January 27 report did not say anything about pain in his chest because "I had been diagnosed with a muscular strain to my chest two weeks before, and I had chest x-rays and I was at St. Francis Emergency Room in Topeka, so the feeling in my chest was the seat belt just popped against my chest strain and that was just already there . . . .".
I am advised further that Complainant reported to his doctor more than two weeks before the collision that he had coughed and experienced a pop in his chest. TR 123:20-24; RX 1. He had been pinned against the side of a trailer while loading cattle. TR 130:6-8. Afterward he thought he might have a broken rib. RX 52, at 185:8-25-186:4; also RX 19. "In total, this evidence suggests that the injury that Mr. Cain reported on April 8, 2010 was actually a condition that pre-dated the January 27, 2010 collision." Respondent Brief.

Mr. Suttles said that Complainant had no excuse or explanation for the late notice. TR 167-168. Mr. Suttles stated that his conclusion in the second incident was not influenced by the fact that Complainant had reported the injury on January 27. Id.

Complainant argues that MSRP Rule S-28.2.5 attempts to bypass the FRS: "Respondent attempts to create a backdoor method to discipline an employee for reporting injuries, by

[18] Citing to TR 107:3-19, 115:1-4, 123:10-23; see also TR 139:9.

claiming they are disciplining the 'late-ness' of it." I am advised that timeliness grounds are not incorporated into FRS.

Respondent cites to ARB cases:

> "[R]ules requiring prompt reporting of work-related injuries under threat of discharge are common in the railroad industry." ***Henderson v. Wheeling & Lake Erie Railway Co.***, 2010 FRS 12 (ALJ Oct. 28, 2010). Such rules are a by-product of FELA and are legitimate reasons for discharging an employee that do not violate the FRSA. Id.; see also ***Alexander v. Kansas City So***. RR Co., 2011 FRS 9 (May 20, 2011).

In Henderson, an airbag deployed on January 26, 2009, when injury may not have been immediately apparent to him. He visited a doctor about his neck pain on February 6, 2006. He believed that he injured his back due to cumulative trauma at work, culminating on February 26, 2009. He visited a doctor about his back pain on March 2, 2009. When the Railway learned that he was claiming that he had work-related injuries, it initiated an investigation whether he had violated its rules, conducted a hearing, and fired him. He admitted that he did not file injury reports regarding either injury until March 16, 2009.

In ***Alexander***, the injury was not reported to the Carrier as required until more than three months after surgery was performed, or even a longer period of time given the fact that injury had to have occurred prior to October 1, 2009, the date of surgery.

In reviewing the evidence, I find that Complainant did report the injury on the date of accident. Stipulation 37. He also took and passed a drug and alcohol test. Stipulation 38. Neither ***Henderson*** nor ***Alexander*** are precedent, and moreover, unlike those cases, there is no question that the fact of injury was communicated. Respondent really objects to the extent of the injury.

However, the rule also states:

> If after the initial report of an injury, employees seek medical attention for a work-related injury, they must contact the appropriate supervisor and update their status.

RX 21.

The issue is whether Complainant did so.

On February 17, Dr. Teeter "thought" Complainant had a fracture of either the 5th or 6th rib on that left side, as well as a very large left pleural effusion. RX 11. He was told during that visit that there was a "high probability" that his injuries were caused by his seatbelt during the collision. RX 49, at 2; see also TR 80:21-81:10.

Respondent argues that Complainant "choose to not report this new information to the company at that time."

Complainant had a history of lung, chest and respiratory difficulties, predating the auto collision. He had emergency room treatment on January 9, 2010 for a cough and chest pain. TR 120, 126, 129; RX 1, CX 16. When he took a medical leave of absence on February 22, it was for non-work illness. CX 8, RX 12.

I do not rule whether MSRP Rule S-28.2.5 attempts to bypass the FRSA. The Complainant followed the rule. He provided notice of injury. The issue is moot.

As to whether the Complainant misled the Respondent, Claimant maintains that April 8, 2010 was the first day he learned that his chest injury was work related. Respondent points out that although Claimant undisputedly had chest problems before the collision, which were aggravated by it, I am advised that he violated BNSF Rule S-28.2.5 by not reporting that injury when he filed his first injury report on January 27, 2010. I do not accept this premise. The

parties stipulate that following the collision Complainant filled out a standard Employee Personal Injury/Occupational Illness Report: "According to Mr. Cain, he has no memory of filling out this injury report. He alleges that he was in shock while he was filling out the report, as demonstrated by what he contends are shaky handwriting and one-word answers on the report. He contends that his lack of memory and state of shock are consistent with his later discovery that he was bleeding internally into his pleural cavity." Stipulation 37. He also took a standard, post-accident, drug-and-alcohol test, which he passed.

A review of RX 7, the Respondent's form completed by Complainant on January 27, 2010, shows that while he did not indicate that he had pains in his chest or abdomen there is no place on the form to indicate the medical history.

I am further advised that he thereafter was told by a registered nurse practitioner that there was a "high probability" that the collision caused the injury for which he underwent a procedure in February, 2010. Respondent alleges that Complainant violated BNSF Rule S-28.2.5 for a second time by representing to BNSF that the procedure was not work related. "As such, the second injury report that he filed on April 8, 2010 was not made in good faith, and Claimant therefore has failed to show that the report constituted protected activity for purposes of the FRSA. Carriers such as BNSF are entitled to discipline employees who violate prompt-injury-reporting rules, and BNSF's decision to discharge Claimant for violating such a rule therefore does not violate the FRSA."

I agree that Respondents have the right to discipline Complainants who violate the rule. I accept that Complainant should have provided formal, record information about the chest earlier than April 8. Even if he was not sure to a reasonable degree of medical certainty that his chest/rib pain was related to the January 27 incident, he should have provided the Respondent with formal notice.

However, in mitigation of the failure, I note the dispute whether he was discouraged from amending the January 27 report by Mr. Reppond. Whether this is true or not, there is no doubt that there had been discussions about Complainant's medical condition soon after the January 27 filing. He sent emails to Mr. Reppond a day after the accident.

> Q And what did you tell them?
>
> A I apologized for causing everyone grief. I also updated him that my knuckle and my knee were fine and I was going to take a couple days vacation because I was sore and I believe, I don't have the paper in front of me, I believe I told him I was going to go follow up with a doctor.

TR 74, CX 7.

Therefore, I find that Respondent was placed on inquiry notice when Complainant took leave without pay for medical reasons. The next two days after the vehicle collision (Thursday, January 28 and Friday, January 29, 2010) Complainant did not work his scheduled workdays. On January 28, 2010, he took a vacation day. On January 29, 2010, he took either a vacation or a sick day. Stipulation 39. When he took a medical leave of absence on February 22, it was for non-work illness. CX 8, RX 12. He told the Respondent that he was to have a thoracotomy. TR. 77, CX 9.

I also accept that Complainant was probably in shock while he was filling out the January 27 report, as demonstrated by what he contends are shaky handwriting and one-word answers on the report. He contends that his lack of memory and state of shock are consistent with his later discovery that he was bleeding internally into his pleural cavity. He did not work the next two days. It turned out later that he had a fractured rib.

In April, Complainant visited his cardiologist, Dr. Shantikumar, who opined "for the first time" that because of the greenstick fracture and the way the rib had entered the lung, the injury was caused by the slap of the seatbelt. Dr. Teeter also agreed and at that time, Complainant, on the advice of the Sheet Metal Workers' Union, amended the injury report.

As to whether, as alleged by Respondent, the Complainant knew that his rib was injured on January 27 when he filed the report, I find that Respondent has failed to prove this allegation.[19]

Respondent did not provide expert medical testimony to show that Complainant knew or had reason to know that his pre-existing impairments had been aggravated. Respondent insinuated that ultimate responsibility for the surgery, including the thoracotomy, was generated by Complainant, when the record shows that the Cardiologist, Dr. Shantikumar, related it to the accident. Whether he did so to a reasonable degree of certainty or probability has not been proven. These are matters that normally relate to causation and to damages. The amended report is similar to a complaint and there is no basis in this record to find that it was based on fraud.

With respect to the penalty phase, the burden is on Respondent to prove that Complainant would have been terminated from his job absent the protected activity.

As set forth in the discussion of the penalty phase in the suspension, as to termination it is more egregious. I find that there is no showing that the penalty is appropriate.

Although Mr. Suttles stated that Complainant had no excuse or explanation for the late notice, TR 167-168, the record shows otherwise. The Complainant provided several arguments, as set forth above.

Likewise, although Mr. Suttles stated that his conclusion in the second incident was not influenced by the fact that Complainant had reported the injury on January 27, I find that it was actually dependent upon it. The record shows that the Respondent considered that the first placed Complainant in probation status, and the filing of the latter a violation of probation.

Moreover, although Mr. Suttles stated that he had the power to consider it, the Respondent did not consider mitigation for the charge, although there had been ample evidence produced to him that I now consider to have been inquiry notice to Respondent of medical problems. I find that they had been consistently communicated since the day after the accident. CX 7.

In addition, although he purportedly administered the penalty, Mr. Suttles testified that the penalty was really selected by "Labor Relations." TR 169, 175-177. An email shows he consulted with Joe Heenan, Director of Labor Relations, who in effect dictated the penalty. See RX 24.

Mr. Cargill, for Labor Relations, testified that "stand alone" dismissals are appropriate when a Complainant is charged with misrepresentation of an on duty injury and gross negligence. If Complainant was placed on probation as alleged, although the Respondent characterized it as retroactive to the date of accident, it really was only for six days. Respondent did not prove any policy to show that retroactive application may be maintained. A review of the CBA shows that suspensions pending an investigation violate the contract. RX 37 at Rule 40 a.

[19] In other *fora*, the party with the burden of proof would provide medical expert testimony as to medical causation and date of maximum medical improvement. Neither side provided me with any such evidence. Respondent tried to have Complainant provide such information through cross examination, but Complainant cannot be expected to able to testify as to the state of mind of his physicians on these issues. Apparently Dr. Shantikumar released Complainant to work. TR at 147, 148. Dr. Shantikumar was not deposed. Whether he or Dr. Teeter, the treating family physician, placed any restrictions is not in evidence.

A review of the charges filed by Mr. Suttles and read to Complainant during the investigation, RX 21 at 3, does not include misrepresentation of an on duty injury and/or gross negligence. Mr. Bossolono testified that, in effect, the penalty was really his decision as shop superintendent to fire Complainant. TR 235, 248-249. The email from Mr. Heenan shows that it might have been his decision. RX 24. This explanation is different than those proffered by Mr. Suttles and by Mr. Cargill, and was not set forth in the record charges or in either of the investigation hearings. RX 21, RX 22.

As stated above, I find that these are inconsistencies that preclude a finding that clear and convincing evidence for the penalty of termination was selected. Where an employer offers shifting explanations for the adverse personnel action, this in itself may be sufficient to provide evidence of pretext. ***Vieques Air Link, Inc v. U.S. Dept. of Labor***, *supra*.

I also find that public policy and legislative intent for FRS assume that disputes as to the nature and extent of injuries are commonplace and should not be used as a pretext to discriminate. Section 20109(a)(4) protects railroad employees from retaliation for notifying or attempting to notify the railroad or the FRA of a work-related personal injury. That the FRA injury reporting regulations require the railroad to report injuries including the number of lost work days, and may be violated by a railroad that does not accurately report workplace injuries or the number of lost work days, does not impede a railroad employee's right under 20109(a)(4) to report the injury to the railroad or Department of Transportation without fear of retaliation.[20]

Therefore, I find that Respondent failed to provide convincing proof that termination was not related to the protected activity. In fact, although the Respondent has a policy of progressive discipline, it did not apply it with respect to Complainant. It is more reasonable that Respondent took advantage of a technical violation in deriving the penalty. It did not provide any schedule for similar employees as to termination.

Alternatively, I find to a reasonable degree of probability that the decision to terminate was, in part, based on the suspension, the penalty for which I find was arbitrarily adduced.

ADDITIONAL EVIDENCE OF DISCRIMINATION

Complainant alleges that he was warned not to file an amended report:

> Complainant: John Reppond looked me right in the eye and told me this wasn't going to go very well for me and this was not what we talked about and I responded to him that we did not talk about anything. I was following the rules and I dropped it on his desk and I just left.
>
> Q What did you take that to mean when he told you, "This is not going to go well for you"?
>
> A Obviously he was threatening me.
>
> Q Did you feel he was threatening your job?
>
> A Yes.
>
> Q Did you feel he was telling you not to file a second injury report?
>
> A Yes, I do.

TR 84-85.

[20] By their nature medical claims often are disputed, as evidenced by the volume of litigation involving personal injuries, workers' compensation and other laws. The FELA provides the exclusive remedy for employees of interstate railroads to recover from a railroad for injuries incurred during the course of their employment. 45 U.S.C.A. § 51 et seq.

Complainant also was told by Mr. Schakel that filing the amended report was going to hurt "everybody's safety … and safety chances, this was going to be reportable, it was going to be announced in lineups and this was going to hurt the managers and supervision also because it was an FRA reportable injury because it was lost time." TR at 93. This testimony is not rebutted.

Complainant also alleges that after he returned to work following his leave of absence for lung surgery, he was assigned by Respondent to work in the diesel service facility, the "dirtiest, smokiest, hideous place on the yard." TR at 90. He alleged "breathing issues." He worked there for about three weeks before he was fired. TR at 92.

On Cross examination, although Claimant alleged he was released to return to work, he said that he did not know whether or not the physicians placed any restrictions on his work related activities. TR at 144.

Again, at this level of inquiry the burden is on the Respondent to make its case by clear and convincing evidence that it would have administered the discipline in the absence of the protected activity. I find that Respondent has not met this burden.

In fact, I find that Complainant is credible that both Mr. Reppond and Mr. Schakel exhibited animus to influence Complainant not to make a second filing.

Moreover, even if the Complainant was returned to work status by his Cardiologist, Respondent has not proved that Complainant was not placed in the "dirtiest, smokiest, hideous place on the yard" due to retaliation. A review of the evidence, to a reasonable degree of probability, shows that Respondent knew or had reason to know that the Complainant has a medical history that includes lung problems.

.

REMEDIES

Section 20109(e)(2) of the Act provides for reinstatement, back pay with interest, and compensatory damages. Complainant has a duty to mitigate damages. ***Douglas v. Skywest Airlines, Inc***., ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14 (ARB Sept. 30, 2009). Since his position was terminated, Complainant has been selling heating and air parts for trains.

Complainant also alleges that the railroad exhibited sufficient reckless disregard for the FRSA rights of its employees that "punitive damages in an amount to be determined by this Court are appropriate in order to punish such conduct and help ensure it is not repeated."

He also seeks payment of all his attorney fees and costs as provided by statute.

REINSTATEMENT

Victims of discrimination are presumptively entitled to instatement or reinstatement. However, Complainant alleges that after September 30, 2010 he has not been able to work as a sheet metal worker, which I accept as a stipulation that he can no longer perform railroad work.

Therefore, I do not order reinstatement.

WAGE LOSS

As to lost wages, as set forth above, the following stipulations apply:

48. Mr. Cain is seeking an award of lost wages.

49. For purposes of this lawsuit only, the parties agree that, if the Court determines that Mr. Cain is entitled to an award of lost wages, the following facts are relevant for computing the amount of such an award:

a. The relevant time period for an award of lost wages would be the 17-week period from June 8, 2010 through September 30, 2010 because:

i. Mr. Cain was dismissed from employment with BNSF effective June 8, 2010; and

ii. After September 30, 2010, according to Mr. Cain, he was no longer physically able to work as a sheet-metal worker.

b. Had Mr. Cain remained employed with BNSF during the relevant 17-week period, he would have earned an average weekly wage of $ 1,200.30.

50. Based on the above stipulations, the parties agree that Mr. Cain's lost wages would amount to $20,405.18, less the offsets below.

a. Mr. Cain earned $9,894.13 in interim earnings during the relevant 17-week period by working for Washburn University.

b. Mr. Cain received $ 4,730.53 in unemployment benefits during the relevant 17-week period.

I accept the stipulated amounts.

I find that the total owed is $10,511.05.

The unemployment benefits are collateral sources.

Interest is due on back pay awards from the date of termination to the date of reinstatement. Prejudgment interest is to be paid for the period following Complainant's suspension on June 8, 2010, until the instant order of reinstatement. Post-judgment interest is to be paid thereafter, until the date of payment of back pay is made.

COMPENSATORY DAMAGES

Although this case has an aspect of personal injury, 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.

As to emotional distress, there was no testimony and no expert testimony proffered. Under ***Burlington Northern v. White***, 548 U.S. 53 (2006), even when an employer makes an employee whole for lost wages, it does not make the employee whole emotionally. Id. at 72.

I was provided with no facts to base an award.

However, in an abundance of caution, I order that Respondent pay $1 to Complainant in nominal damages for pain and suffering.

PUNITIVE DAMAGES

Congress provided for possible punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e). Punitive damages are to punish unlawful conduct and to deter its repetition. ***BMW v. Gore***, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: 1) the degree of the defendant s reprehensibility or culpability, 2) the relationship between the penalty and the harm to the victim caused by the respondent s actions, 3) the sanctions imposed in other cases for comparable misconduct. ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc.***, 523 U.S. 424, 434-35 (2001).

Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. ***Johnson v. Old Dominion Security***, 86-CAA-3/4/5, (Sec y May 29, 1991).

I find that several of the Respondent's management employees conspired to defeat the Complainant's right to submit a medical claim and deprive him of his job.[21] I also find that the assignment to the worst place in the yard was wanton and willful and an equivalent to an intentional tort.

Because Complainant failed to provide evidence to establish damages, taking into account $10,511.05 wages lost plus $1 in compensatory damages constitute the total exposure to Respondent for individual Complainant. I find the amount due Complainant will have no deterrent effect upon Respondent.

In ***Nicole Anderson v. Amtrak***, 2009FRS00003 (August 26, 2010), a colleague assessed a railroad $100,000 in punitive damages for an offense which I find is less onerous than in this case. In ***Anderson***, Amtrak did not terminate the employee. Amtrak did not attempt to completely foreclose any potential monetary exposure for medical expenses, as in this case. In ***Anderson***, as to the penalty phase, a modicum of fairness and progressive discipline were applied. I also find that had Respondent prevailed, the repercussions may have placed a chilling effect on FELA claims.

In ***Erickson v. U.S. Environmental Protection Agency***, 1999-CAA-2, 2001-CAA-9 and 13, 2002-CAA-3 and 18 (ALJ Sept. 24, 2002), an award of $250,000 in exemplary damages based on a review of other exemplary damage awards was recommended. Respondent's conduct in failing to disclose the results of an OIG investigation of Complainant to Complainant (the OIG had found no grounds for criminal prosecution or administrative discipline), in permanently transferring Complainant out of her career field, in subjecting her to a hostile working environment, and in allowing her to suffer in a position that she was not fully qualified to perform while she attempted to manage personnel who refused to work with her was considered. I note that the Complainant in that case had also not been terminated.[22]

I have reviewed a number of others but find that they are not as relevant.[23]

---

[21] Some might call this a "railroad" job.

[22] Although the case was reversed, under former law the burden of proof was not on Respondent to provide clear and convincing proof that it would have treated Complainant the same absent protected activity.

[23] For examples, see:

- ***Hall v. U.S. Army, Dugway Proving Ground***, 1997-SDW-5 (ALJ Aug. 8, 2002) (awarding $400,000 in compensatory damages for mental anguish, adverse health consequence, and damage to professional reputation caused by "repeated and continuous discrimination and retaliation" that caused great mental suffering, compromised mental health, and destroyed professional reputation).
- ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003) (awarding no emotional trauma damages because the plaintiff failed to demonstrate both (1) objective manifestations of distress, e.g., sleeplessness, anxiety, embarrassment, depression, feelings of isolation, and (2) a causal connection between the violation and the distress).
- ***Creekmore v. ABB Power Systems Energy Services, Inc.***, Case No. 93-ERA-24, slip op. at 25 (Dep'y Sec'y Dec., Feb. 14, 1996) (awarding $40,000 for emotional pain and suffering caused by a discriminatory layoff after the complainant showed that his layoff caused emotional turmoil and disruption of his family because he had to accept temporary work away from home and suffered the humiliation of having to explain why he had been laid off after 27 years with one company).
- ***Michaud v. BSP Transport, Inc***., ARB Case No. 97-113, ALJ Case No. 95-STA-29, slip op. at 9 (ARB Dec. Oct. 9, 1997) (awarding $75,000 in compensatory damages where evidence of major depression caused by a discriminatory discharge was supported by reports by a licensed clinical social worker and a psychiatrist; evidence also showed foreclosure on Michaud's home and loss of savings).
- ***Blackburn v. Metric Constructors, Inc***., Case No.1986-ERA-4, slip op. at 5 (Sec'y Dec. after Remand, Aug. 16, 1993) (awarding $5,000 for mental pain and suffering caused by discriminatory discharge where complainant became moody and depressed and became short tempered with his wife and children).

I find that the conspiracy to deny Complainant his right to pursue his medical claim is as obnoxious as in ***Erickson.*** I note that ten years have passed since then and under the environmental whistleblower acts the amount in 2012 dollars would far exceed $250,000.

Therefore, I award $250,000 in punitive damages.

ATTORNEY'S FEES

Complainant's counsel is afforded thirty days to submit a petition for attorney's fees. Complainant's counsel shall submit a fully supported and fully itemized fee petition, sending a copy thereof to Respondent's counsel who shall then have fourteen (14) days to comment thereon.

ORDER

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, I find Complainant is entitled to relief. I hereby order that Complainant be awarded the following remedy:

1. Respondent shall remit to Complainant:
   A. Damages for lost wages: $10,511.05.
   B. $1 in compensatory damages.
   C. Interest on the entire back pay award, calculated in accordance with 26 U.S.C. § 6621.
   D. Punitive damages of $250,000.00.
2. I retain jurisdiction to entertain a petition for attorney's fees.

SO ORDERED

Digitally signed by Daniel Solomon
DN: CN=Daniel Solomon, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of

---

- ***Lederhaus v. Paschen***, Case No. 91-ERA-13, slip op. at 10 (Sec'y Dec., Oct. 26, 1992) (awarding $10,000 for mental distress caused by discriminatory discharge where the complainant showed he was unemployed for five and one half months, foreclosure proceedings were initiated on his house, bill collectors harassed him and called his wife at her job, and her employer threatened to lay her off; and his family life was disrupted).

issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed

notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).