U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

WILLIAM BURT,	**ARB CASE NO. 2020-0042**
COMPLAINANT,	**ALJ CASE NO. 2018-FRS-00015**
v.	**DATE: April 29, 2021**

NATIONAL RAILROAD PASSENGER CORPORATION ("AMTRAK"),

RESPONDENT.

Appearances:

For the Complainant:
William L. Myers, Jr., Esq.; ***The Myers Firm, Attorneys at Law, P.C.*****; Philadelphia, Pennsylvania**

For the Respondent:
Gina E. Nicotera, Esq. and William G. Ballaine, Esq.; ***Landman Corsi Ballaine & Ford, P.C.*****; New York, New York**

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, ***Administrative Appeals Judges***

DECISION AND ORDER AFFIRMING IN PART, VACATING AND REVERSING IN PART

PER CURIAM. William Burt (Complainant) filed a complaint under the Federal Railroad Safety Act[1] (FRSA), alleging that his employer, National Railroad Passenger Corporation (Respondent), had violated the FRSA's whistleblower protection provisions. After a hearing, an Administrative Law Judge (ALJ) found that Respondent had violated the FRSA and awarded him damages. Respondent appealed the ALJ's decision. We affirm in part, vacate and reverse in part.

BACKGROUND

Respondent employed Complainant as an electrical technician at its Bear, Delaware facility.[2] Complainant has worked for Respondent since 1983 and is a member of the International Brotherhood of Electrical Workers (Union).[3] In 2017, Complainant performed inspections on cars at the facility.[4] Complainant reported to Foreman Phil Daly, who reported to General Foreman Kevin Mitchell.[5] Mitchell reported to Manager of Mechanical Operations Louis Ortiz.[6]

On March 26, 2013, Complainant reported to his supervisors that battery chargers were being installed improperly and filed a complaint about the issue with the Occupational Safety and Health Administration (OSHA) on April 4.[7] OSHA

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1 49 U.S.C. § 20109, as implemented at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A.

2 Decision and Order (D. & O.) at 2.

3 *Id.*

4 *Id.* at 20.

5 *Id.* at 18.

6 *Id.* at 11.

7 *Id.* at 13.

subsequently came to the facility and walked the line with Complainant and the Union president.[8]

On April 2, 2013, Burt made a confidential complaint to Respondent's Ethics and Compliance Hotline (EEOC), stating that Foreman Maurice Ward had harassed Complainant and Todd Porter, his colleague, because of his safety complaint.[9] Complainant claimed that Ward told Porter on March 28 that he had heard "they were f---ing up 30 track."[10] Complainant interpreted the comment to be an insinuation that they were causing the safety issue.[11]

Superintendent Lou Woods met with Ward to inform him of the EEOC complaint and confirmed that Complainant had made it, even though the hotline was supposed to be anonymous.[12] Ward testified as to how knowledge of complaints is disseminated around the workplace, stating "it's the railroad. [The employee will] make a call, he'll in discretion tell his buddies, who in discretion tells one of his buddies, and then it gets around the shop."[13]

In 2016, Complainant became a shop steward for the Union, which obligated him to interact with Ward on matters involving overtime.[14] Electrician Charles Messina was assigned to work on cars on the 29 track, where Ward was the foreman.[15] On July 17, 2017, Messina noticed that two other electricians started to work overtime, knowing that he was ahead of them on the "overtime list."[16] Messina

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8 *Id.* at 17.
9 *Id.* at 17; Complainant's Exhibit 1A.
10 D. & O. at 17.
11 *Id.* at 14, 17.
12 *Id.* at 15.
13 *Id.* at 15; Hearing Transcript (Tr.) at 198.
14 D. & O. at 18.
15 *Id.*
16 *Id.*

asked Ward why he had been skipped.[17] Messina then called the Union president to report the issue, who instructed him to call Complainant.[18]

Complainant testified that he and Messina approached Ward's office and encountered Ward on the 27 track.[19] Ward told Messina "I don't appreciate you bringing this over here with you" and "calling your union man," referring to Complainant.[20] After Messina answered that Complainant was his union representative, Ward acknowledged that he had "made a mistake."[21] Complainant testified that he told Ward that Union rules required following the overtime list, to which Ward retorted "I do whatever the f--- I want here."[22] The two men were ultimately separated by another foreman.[23] Ward added, "Next time you call the EEOC, leave your name with it."[24] Immediately after the exchange, Ward announced to the men on his line that he was cancelling overtime.[25]

Complainant testified that the altercation made him "feel terrible" and that Ward "tried to make it look like it was my fault that all the overtime was stopping and my men were losing money."[26] Later that day, Complainant spoke with the Union president because he "was a little stressed about" the incident.[27] Complainant also told his wife that he was stressed about the incident.[28] After his shift ended, the facility's managers called Ward into a conference room to explain the incident.[29]

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17 *Id.* at 5, 18 (citing Tr. at 11).
18 *Id.* at 18.
19 *Id.* at 7 (citing Tr. at 35).
20 *Id.* at 7 n.10.
21 Tr. at 12.
22 D. & O. at 7 (citing Tr. at 36).
23 *Id.* at 18.
24 *Id.*
25 *Id.* (citing Tr. 13-14).
26 Tr. at 37.
27 *Id.* at 184.
28 *Id.* at 40, 89.
29 *Id.* at 184.

When Complainant arrived for work the following morning, a security officer and policer officer for Respondent "escorted" him to the conference room to meet with Mitchell and Ortiz.[30] Complainant explained his side of the story and then returned to his shift.[31] Complainant said he was "scared to death" and "humiliated" by the experience and thought the officers "were going to take [him] out of there in handcuffs."[32] On the same day, Complainant's foreman presented him with a time-adjustment slip to record his clock-in and clock-out times for the day because he was unable to record it when the officers escorted him to the meeting.[33]

On July 28, 2017, Mitchell issued Complainant a written counseling letter for failure to perform timely train inspections.[34] The letter referenced Respondent's "Standards of Excellence," which state that an employee can be dismissed for violating the standards.[35] Complainant, who had never received such a letter before, believed the letter was "serious" discipline and part of a plan to fire him because it is a step in Respondent's disciplinary process.[36]

After these incidents, Complainant testified that he "was just stressed out" and "scared [he] was going to lose [his] job."[37] Complainant also reported experiencing a variety of physical ailments, including headaches, diarrhea, and high blood pressure.[38] On September 25, 2017, Complainant sought medical treatment with his primary care physician, Dr. Robert Wilson, who diagnosed him with debilitating anxiety and prescribed Xanax to treat the stress.[39] Dr. Wilson advised

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30 D. & O. at 18-19.

31 *Id.* at 7.

32 Tr. at 41.

33 D. & O. at 29-30.

34 *Id.* at 19.

35 *Id.* The letter stated that Complainant had not explained why it was taking more than eight hours to perform an inspection, but Complainant testified that he had never been told before that inspections should take no more than eight hours and that he does not know anyone who could fully perform an inspection within eight hours. *Id.* at 21-22.

36 *Id.* at 19.

37 Tr. at 69.

38 D. & O. at 8 (citing Tr. at 69-70).

39 *Id.* at 38-39.

Complainant to refrain from working pending further evaluation.[40] Complainant went on sick leave the following day and did not return to work until December 2018, at a different facility for Respondent, where he obtained a lower-paying position after searching for similar jobs.[41]

On September 20, 2017, Complainant filed a complaint with OSHA, alleging that Respondent had unlawfully retaliated against him under the FRSA for reporting the denial of overtime.[42] On November 28, OSHA completed its investigation and determined Complainant had failed to establish that he had engaged in protected activity.[43] On November 30, Complainant objected to the determination and requested a hearing with the OALJ, which took place on June 24-25, 2019.[44]

On May 11, 2020, the ALJ issued a Decision and Order. The ALJ began the decision by recounting the testimonial evidence and making witness credibility determinations.[45] The ALJ found that Messina's and Complainant's testimony was credible.[46] In contrast, the ALJ found that Ward's testimony was only "moderately credible" because he sometimes contradicted his own testimony at the hearing and gave answers that "appeared deceptive, given the testimony of the record as a whole."[47] We have no basis for disturbing the ALJ's credibility findings of these witnesses.

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40 *Id.* at 39.

41 *Id.* at 23, 36, 39. On March 27, 2018, Respondent declared Complainant medically disqualified based on submissions from Dr. Wilson. *Id.* at 22.

42 *Id.* at 1.

43 *Id.*

44 *Id.* at 1-2.

45 *Id.* at 5-12.

46 *Id*. at 6, 8.

47 *Id*. at 9. Regarding the credibility of Ward's testimony, the ALJ found that he had "a potential for bias, as he both is an individual Respondent and a current employee of Respondent." *Id*. The ALJ also found that Ward's "testimony further demonstrates a potential bias against Complainant due to their history of a strained relationship as co-workers, including the incidents in 2013 and 2017." *Id*.

The ALJ turned to Complainant's protected activity. The ALJ concluded that Complainant engaged in a protected activity by making the safety reports to his superiors and to OSHA regarding the hanging wires.[48] The ALJ found unpersuasive Ward's assertion that his statement to Porter on March 28, 2013, was a joke, considering Complainant made an EEOC complaint about it.[49] The ALJ also found Ward was aware that Complainant had made these complaints as Respondent's management culture does not protect the confidentiality of complainants.[50]

The ALJ next considered whether Respondent undertook adverse actions against Complainant. The ALJ found that Ward, in his decision to publicly cancel overtime after his altercation with Complainant, had the intent to harass and humiliate Complainant and undermine his authority as a union representative.[51] The ALJ also determined that Ward's actions were more than trivial and therefore constituted an adverse action against Complainant.[52] The ALJ further determined that the written counseling letter given by Mitchell was an adverse action because the letter impliedly referenced further discipline if Complainant failed to abide by the letter.[53] The ALJ, however, concluded that the Respondent's police escort and time-adjustment slip were not adverse actions under FRSA.[54]

The ALJ subsequently discussed whether Complainant's protected activity had contributed to Respondent's adverse actions. The ALJ found that Complainant's 2013 safety complaints contributed to Ward's cancelling of overtime, citing Ward's comment to Complainant about calling the EEOC.[55] The ALJ, however, found Complainant failed to establish that either Mitchell or Ortiz (Ortiz had advised

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48 *Id.* at 24.

49 *Id.* at 14.

50 *Id.* at 25; *see also id.* at 14-15. Respondent does not dispute that Complainant engaged in protected activity and that Ward knew about the complaints on appeal.

51 *Id.* at 27.

52 *Id.*

53 *Id.* at 28-29.

54 The ALJ found that Complainant had not proven Respondent had instructed the police to escort him and that the time-adjustment slip was not a disciplinary action. *Id.* at 27, 29-30.

55 *Id.* at 30-31.

Mitchell on issuing the counseling letter) knew of the safety complaint, and, therefore the complaint did not contribute to the Respondent's issuance of the letter.[56]

The ALJ also concluded Respondent failed to prove its affirmative defense that Ward would have still engaged in his discriminatory conduct of cancelling overtime even if Complainant had not engaged in protected activity. The ALJ noted that Respondent offered no alternative explanation why Ward made the comment about Complainant calling the EEOC or cancelling the overtime.[57]

Because Complainant successfully proved his retaliation claim and Respondent did not prove its affirmative defense, the ALJ discussed Complainant's claim for damages. For economic damages, Complainant sought loss of wages, medical expenses, and reimbursement for lien advances. The ALJ awarded $83,739.00 in lost "straight time wages," $15,699.60 in overtime wages, and $2,381 in differential wages. The differential wage award accounted for the lesser pay Complainant received in the position he obtained when returning to work, as well as $1,027.56 in out-of-pocket medical expenses Complainant had paid to treat his stress.[58] The ALJ further awarded $42,743.56 to reimburse Complainant for two liens he had taken out with the Railroad Retirement Board and AETNA to pay for his expenses while he was out of work and had no income.[59]

The ALJ then discussed Complainant's claim for emotional distress damages. Relying on Dr. Wilson's testimony about his treatment of Complainant's anxiety and Complainant's testimony regarding his emotional state and physical symptoms that developed after the altercation, the ALJ awarded Complainant $20,000.[60]

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[56] *Id.* at 33-34. Complainant does not dispute the ALJ's finding that his protected activity did not contribute to the written counseling letter on appeal.

[57] *Id.* at 34-35.

[58] *Id.* at 35-37.

[59] *Id.* at 37, 39.

[60] *Id.* at 37-40. Respondent seemingly does not contest the ALJ's emotional distress damages award.

The ALJ addressed Complainant's claim for punitive damages. The ALJ found that Respondent's culture recklessly disregards a complainant's anonymity when he or she engages in protected activity or other confidential reporting, citing the disclosure of Complainant's EEOC complaint to Ward and Ward's testimony stating that complaints get around the shop.[61] The ALJ further noted Complainant's escort by Respondent's police officer as evidence of Respondent's problematic culture relating to protected activity. Someone had called the police and managers allowed the police to publicly escort a union representative to discussions about an incident with a manager involving a union issue.[62] The ALJ found these actions may have a chilling effect on the complaint process and awarded $35,000 in punitive damages.[63]

Last, the ALJ addressed Complainant's request to expunge the counseling letter from Respondent's records. The ALJ cited *Leiva*, in which the Administrative Review Board (ARB or Board) held that expungement is not a realistic remedy because employers are charged with maintaining records but held that placing the file in a restricted folder not to be used in future personnel files is acceptable.[64] The ALJ therefore ordered Respondent to restrict access to the file and prohibited it from using the file in future personnel actions.[65] Respondent petitioned the ARB to review the ALJ's decision.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review appeals of ALJ's decisions pursuant to the FRSA.[66] The ARB will affirm the ALJ's factual

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61 *Id.* at 41.

62 *Id.* at 41-42.

63 *Id.* at 42.

64 *Id.*; *Leiva v. Union Pacific R.R. Co.*, ARB No. 2018-0051, ALJ No. 2017-FRS-00036, slip op. at 6 n.11 (ARB May 17, 2019).

65 D. & O. at 42.

66 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

findings if supported by substantial evidence but reviews all conclusions of law de novo.[67]

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from retaliating against an employee because the employee engaged in a protected activity.[68] The FRSA protects, among other acts, individuals providing information regarding a violation of railroad safety regulations to a federal regulator or a person with supervisory authority over the employee.[69] To prevail on an FRSA retaliation complaint, complainants must prove by preponderance of the evidence that (1) they engaged in protected activity, (2) that their employer took an adverse employment action against them, and (3) that the protected activity was a contributing factor in the unfavorable personnel action.[70] If the complainant successfully proves their claim, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[71]

Respondent appeals several aspects of the ALJ's decision. First, Respondent contests the ALJ's conclusion that it was liable under the FRSA. Second, Respondent claims that the ALJ's economic damages award was excessive. Third, Respondent argues that the ALJ erroneously awarded Complainant punitive damages. We shall address each argument in turn.

1. Respondent's Liability

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[67] *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019).

[68] 49 U.S.C. § 20109(a).

[69] *Id.*

[70] *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 5 (ARB Nov. 24, 2015).

[71] *Id.*

Respondent contests the ALJ's decision that it is liable under the FRSA for retaliation. Respondent claims that the ALJ erred in finding that the altercation between Complainant and Ward was an adverse action and that Complainant's protected activity contributed to the adverse action. We will affirm these findings if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[72]

Respondent argues that the verbal altercation between Ward and Complainant cannot be considered an adverse action under the FRSA. Under that statute, adverse actions are "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged."[73] The ALJ, however, found that the subsequent cancellation of the entire shift's overtime, not the verbal altercation, was the adverse action. Such an action is likely more than trivial. As the ALJ discussed, the decision undermined Complainant's position as a union representative and was made to harass and humiliate him, which is more than a *de minimus* harm.[74] Therefore, we conclude the ALJ correctly found that Ward had committed an adverse action.

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[72] *McCarty v. Union Pacific R.R. Co.*, ARB No. 2018-0016, ALJ No. 2016-FRS-00066, slip op. at 3 (ARB Sept. 23, 2020).

[73] *Fricka*, ARB No. 2014-0047, slip op. at 6 (quoting *Williams v. Am. Airlines, Inc.*, ARB No. 2009-0018, ALJ No. 2007-AIR-00004, slip op. at 7 (ARB Dec. 29, 2010)). Respondent argues that the Board should not employ the "more than trivial test" and instead apply the "materiality test" used in Title VII discrimination cases under *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Under such test, an adverse action is one that would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68. Respondent does not persuade us that Ward's actions would not be an adverse action under either test. *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 2015-0080, ALJ No. 2015-AIR-00016, slip op. at 8-10 (ARB May 8, 2017) (declining to reject *Burlington Northern*'s applicability and reasoning that the "more than trivial" and "materially adverse" test yield the same outcome).

[74] *See Williams*, ARB No. 2009-0018, slip op. at 14-15 ("Trivial employment actions" are actions "that ordinarily cause de minimus harm or none at all to reasonable employees," including "petty slights," "minor annoyances," "personality conflicts," or "snubbing by supervisors and coworkers.").

Respondent further argues the ALJ erroneously found that the safety complaint was a contributing factor in Ward's cancellation of overtime. Respondent claims that the roughly four-year gap between Complainant's safety complaint and the incident with Ward is too large to find contribution and that there were other motivations for Ward's behavior, including his frustration with Messina involving a union representative in the overtime dispute.

A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."[75] The ALJ found by preponderance of the evidence that the 2013 safety complaint contributed to the 2017 altercation. The ALJ noted that Ward referenced the EEOC complaint during the altercation, which Complainant had made after Ward said he heard that Complainant was "f---cking up 30 track." We hold that this finding is supported by substantial evidence. The ALJ noted that: 1) Ward had known about the safety complaint; 2) Ward's comment in July 2017 to Complainant and Porter related to the safety complaint; 3) Complainant had made an EEOC complaint about Ward's 2013 conduct relating to the safety complaint; and 4) the EEOC complaint was clearly on Ward's mind during the altercation in 2017.[76] While Respondent argues that there could have been other motivations for Ward's behavior, Complainant needs only to prove that the protected activity contributed to the adverse action as a factor, not that it was the only or main motivation for the adverse action. Thus, we shall not disturb the ALJ's finding.

Respondent further argues that it successfully demonstrated by clear and convincing evidence that Ward would have cancelled the overtime regardless of whether Complainant had ever engaged in protected activity. Clear and convincing evidence is that which is "highly probable or reasonably certain."[77] Respondent cites evidence that Ward did not demonstrate any motivation to retaliate against Complainant for several years after the EEOC complaint and that the 2017

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[75] *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013).

[76] D. & O. at 30.

[77] *DeFrancesco v. Union R.R. Co.*, ARB No. 2013-0057, ALJ No. 2009-FRS-00009, slip op. at 8 (ARB Sept. 30, 2015).

altercation was entirely consistent with his reputation for aggressive behavior and dislike of being questioned.[78] Although this evidence is relevant to whether Ward would have cancelled the overtime regardless of protected activity, it does not persuade us to reverse the ALJ's finding that Respondent failed to meet its heightened burden for the affirmative defense. Ward's comment to Complainant about leaving his name on his next EEOC complaint demonstrated that Complainant's protected activity was on Ward's mind during the incident. We therefore affirm the ALJ's finding that Respondent is liable under the FRSA.

2. Damages Award

Respondent contests the ALJ's economic damages award, which included lost wages and overtime, a pay differential for the lesser-paying job he obtained, and medical expenses resulting from his stress condition. A complainant who prevails on an FRSA discrimination claim "shall be entitled to all relief necessary to make the employee whole," including reinstatement to their position, back pay with interest, and compensatory damages.[79] Damages make a complainant whole if they are "placed in the same position he or she would have been in if no unlawful retaliation [had] occurred."[80] The Board reviews damages awards for substantial evidence.[81]

Respondent contends that the record does not demonstrate that the altercation caused the stress disorder, citing Complainant's testimony that he was only "a little stressed" after the incident and evidence that he did not seek medical help until after the police escort and counseling letter, which were not found to be retaliatory acts. Respondent also references Dr. Wilson's testimony, which failed to state whether the incident had any lasting impact on Complainant's mental health or when the symptoms of the stress disorder began.

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[78] Respondent's Br. at 20.

[79] 49 U.S.C. § 20109(e)(1).

[80] *Laidler v. Grand Trunk W. R.R. Co.*, ARB No. 2015-0087, ALJ No. 2014-FRS-00099, slip op. at 13 (ARB Aug. 3, 2017) (quoting 80 Fed. Reg. 69,124 (Nov. 9, 2015)); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-20 (1975).

[81] *See Brough v. BNSF Ry. Co.*, ARB No. 2016-0089, ALJ No. 2014-FRS-00103, slip op. at 15 (ARB June 12, 2019).

As discussed by the ALJ, however, Complainant's and Dr. Wilson's testimony demonstrated that Complainant began suffering from a diagnosed anxiety disorder that was not present prior to the altercation with Ward.[82] Though the record suggests that subsequent incidents at work, including the written counseling letter, further contributed to Complainant's stress, the evidence in the record as a whole demonstrates that the incident with Ward initiated Complainant's anxiety, which worsened and eventually caused him to stop working. In other words, if the discrimination from Ward had never occurred, Complainant would not have needed to seek medical treatment and been out of work for a year. Substantial evidence supports this finding. Thus, we affirm the ALJ's damages award for loss of wages and medical expenses made Complainant whole.

Respondent further contests two specific aspects of the damages award. First, Respondent disputes the award reimbursing Complainant for the liens he took out. Second, Respondent challenges the ALJ's order for Respondent to seal the record of the counseling letter. Respondent argues that neither of those remedies made Complainant whole.

For the two liens Complainant had taken out to support himself while he was not receiving income, the ALJ awarded reimbursement of the liens in addition to the award for lost wages. The lost wages award enabled Complainant to pay back the liens he took out. By awarding both the lost wages and reimbursement of the liens, Complainant received a windfall by effectively being able to keep the loans without having to pay them back himself, which placed him in a better spot than he would have been if the retaliation had never occurred. The FRSA does not allow complainants to receive double recoveries.[83] The lien award is therefore vacated and reversed.[84]

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[82] D. & O. at 38-39.

[83] *Mercier v. Union Pacific R.R. Co.*, ARB Nos. 2009-0101, -0121, ALJ Nos. 2008-FRS-00001, -00004, slip op. at 8 (ARB Sept. 29, 2011); *Fresquez v. BNSF Ry. Co.*, 421 F.Supp.3d 1099, 1105 (D. Colo. 2019).

[84] Complainant did not address any fees or interest associated with the liens in his briefings, nor did the ALJ address them in the decision. Thus, we do not consider them in reviewing the damages award.

For the written counseling letter, the Board has previously held that an ALJ may require the employer to seal information regarding discipline an employee received out of retaliation and prohibit the employer from referencing it in future personnel actions.[85] However, the ALJ did not find that the letter violated FRSA's whistleblower statute. The order to seal the letter does not put Complainant in the position he would have been in if Ward had not retaliated against him. We therefore reverse this order as well.[86]

3. Punitive Damages Award

Respondent appeals the ALJ's decision to award punitive damages and the amount awarded. In addition to damages to make a complainant whole, the FRSA permits an ALJ to award up to $250,000 in punitive damages.[87] Under the "reckless disregard standard," an ALJ may award punitive damages if the employer acted "[w]ith malice or ill will or with knowledge that its actions violated federal law or with reckless disregard or callous indifference to the risk that its actions violated federal law."[88] We have previously held that punitive damages are awarded to punish defendants for their conduct and deter them and others from subsequent similar conduct.[89] The ALJ's finding regarding whether the employer acted with the requisite intent is reviewed for substantial evidence.[90]

Respondent argues that the disclosure of Complainant's identity as a whistleblower and the altercation with Ward were "one-off" occurrences and were

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[85] *Brough*, ARB No. 2016-0089, slip op. at 18-19.

[86] We note that Complainant's defense of the order is limited to one sentence in his brief and void of any substantive argument: "Although she found the written counseling letter not to have been causally related to [Complainant]'s protected reporting in 2013, ALJ Timlin concluded that sealing it was required to make [Complainant] whole, and her decision should be respected." Complainant's Brief at 25.

[87] 49 U.S.C. § 20109(e)(3).

[88] *Pan Am Rys., Inc. v. U.S. Dep't of Labor*, 855 F.3d 29, 38 (1st Cir. 2017).

[89] *Jackson v. Union Pacific R.R. Co.*, ARB No. 2013-0042, ALJ No. 2012-FRS-00017, slip op. at 6 (ARB Mar. 20, 2015).

[90] *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 22 (ARB May 19, 2020).

not condoned by management. Respondent also adds that Complainant was never discouraged enough not to file complaints with EEOC and OSHA and that the police escort, which the ALJ cited in support of its award, was not found to be connected to any protected activity.

First, the argument that punitive damages were not warranted because Complainant was still able to file complaints is unavailing, as punitive damages are not awarded based on whether or not the employee yields to the employer's wrongful conduct. Second, substantial evidence supports the ALJ's finding that "it is part of Amtrak's culture to recklessly disregard a complainant's privacy when he or she engages in protected activity or other confidential reporting."[91] The record demonstrates that Ward was apprised of Complainant's safety and EEOC complaints as a result of a workplace culture that disregards complainant anonymity, which led to the altercation and Ward's retaliation against Complainant. Testimony from managers for Respondent demonstrated lack of care or ambivalence toward complainant confidentiality at the workplace.[92] The ALJ did not find that Amtrak's police escort was an adverse action, in large part because the record does not establish who called the police. However, the ALJ observed that obviously "someone from Amtrak called the police, and Amtrak managers allowed the police to publicly escort a union representative to and from discussions about an incident with an Amtrak manager; in effect, publicly harassing [and humiliating] Complainant for doing his job as a union representative."[93] As the ALJ found, "[n]othing in the record established a legitimate reason for police presence at the meeting."[94] The ALJ also found that the police escort demonstrated a problematic part of Respondent's culture relating to protected activity, as the incident could have had a chilling effect on other workers.[95]

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91 D. & O. at 41.

92 In response to a question as to how he knew that Complainant made several anonymous complaints, Ward answered: "I'm going to put this so I don't–it's the railroad." Tr. 198. In response to a question of whether a manager was supposed to disclose a complainant's identity, Mitchell only responded: "I guess not." Tr. at 221-22.

93 D. & O. at 41.

94 *Id*. at 27 n.43 (citing Tr. at 30).

95 *Id*. at 41-42.

We conclude substantial evidence in the record supports the ALJ's conclusion that the "culture of Amtrak, when taken in its totality, amounts to a reckless disregard for the rights of both Complainant and any other potential would-be complainants."[96] The ALJ's decision to award punitive damages, therefore, is affirmed.

Respondent further contests the amount awarded to Complainant because the ALJ failed to provide the method used to arrive at the $35,000 award and that the ALJ's reference to several cases awarding various punitive damages amounts failed to discuss which cases applied to the current matter.[97] We conclude the ALJ did not abuse her discretion in determining the amount.[98]

CONCLUSION

Accordingly, we **VACATE** and **REVERSE** the ALJ's award of compensation for the liens and sealing of the counseling letter but **AFFIRM** all other aspects of the ALJ's decision.

SO ORDERED.

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[96] *Id*. at 42.

[97] The ALJ cited several previous cases in which the Board affirmed punitive damages awards ranging from $1,000 to $250,000, including brief parentheticals describing the employer's conduct, to demonstrate how punitive damages awards were determined on a factual basis. *Id*. at 40.

[98] *Raye v. Pan Am Rys., Inc*., ARB No. 2014-0074, ALJ No. 2013-FRS-00084, slip op. at 10 (ARB Sept. 8, 2016).