U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 21 October 2010

CASE NO. 2009-FRS-00003

In the Matter of

NICOLE ANDERSON,

Complainant,

v.

AMTRAK,

Respondent.

ORDER DENYING RECONSIDERATION

Respondent Amtrak moves for reconsideration of the Decision and Order, issued on August 26, 2010.[1] It seeks admission into the record and consideration of twelve exhibits (JJ through UU) as well as the declaration testimony of two of its in-house counsel.[2] All of this is newly offered:

[1] Simultaneously with this motion, Amtrak filed a petition for review of the Decision and Order with the Administrative Review Board. On September 29, 2010, the Board ordered that the petition be held in abeyance until I decide the present motion.

This motion was timely filed. Although service on other parties is complete at the time of mailing, absent a specific exception in the regulations, a motion is not deemed filed until received at this Office. 29 C.F.R. §18.4(c)(1). This Office received Amtrak's motion on September 13, 2010. The motion therefore was filed on that date, eighteen days after the Decision and Order issued.

For any given filing deadline, five additional days are allowed if the filing is by mail. *Id.* An additional five days also are allowed when the trigger that starts the filing time is the service on a party of a document that is served on it by mail. 29 C.F.R. §18.4(c)(3). Thus, if a motion for reconsideration must be filed within 10 days of a Decision and Order, the motion is timely if received in this Office by mail within 20 days after the Decision and Order issued (5 days added because the due date depends on a mailed document and 5 days added because the motion was filed by mail). That was the case here.

This Office has jurisdiction to reconsider an order so long as it retains jurisdiction of the case. An adjudicative body generally has inherent jurisdiction to reconsider its decisions, and the Administrative Review Board has found that such jurisdiction exists so long as the statute at issue and its implementing regulations do not limit it, and so long as reconsideration would not "'interfere with, delay or otherwise adversely affect accomplishment of the Act's . . . purposes and goals.'" *Henrich v Ecolabs*, ARB Case No. 05-030 (5/30/2007) (Sarbanes-Oxley Act), *quoting Macktal v. Brown & Root, Inc.*, ARB Case Nos. 98-112 and 122A (11/20/1998). I find nothing in the statute or its implementing regulations that would preclude reconsideration. To the extent that jurisdiction had passed in this case to the Board, the Board's order holding the petition for review in abeyance returned jurisdiction to this forum.

[2] The attorneys, Keren Rabin and Robert Corl, previously appeared when the case was at the Occupational Health & Safety Administration.

Amtrak offered none of it at trial or while the matter was under submission awaiting decision following trial.

Amtrak directs its arguments narrowly at one issue: the award of punitive damages. It argues (1) that a trial court should admit evidence of a defendant's remedial actions relevant to punitive damages, even when those actions occurred after the plaintiff filed the action; and (2) that, to the extent the purpose of punitive damages is to correct the defendant's conduct and deter future violations, that purpose is addressed when a defendant voluntarily takes remedial action prior to being ordered to do so, thus obviating or reducing the need for punitive damages.

Complainant opposes and objects to the admission of the post-hearing evidence. She argues that: (1) the evidence was untimely offered after the evidentiary record was closed *and* the decision had issued; (2) she was afforded no opportunity to take discovery related to any of the newly offered evidence, and (3) inconsistent with the pre-trial order, she was given no notice of this evidence prior to the hearing and thus was given no meaningful opportunity to rebut it.[3]

I find Amtrak's motion without merit. Amtrak offers no evidence that was unavailable to it prior to the decision. Having received an adverse decision, Amtrak now chooses to offer evidence that it previously withheld. Amtrak would shift its litigation strategy for a new bite at the apple on punitive damages. As Judge Posner observed, were courts to allow litigants to present successive iterations of evidence until they found one that worked, the litigation process would become endless. That is not the purpose of a motion for reconsideration.

Even were I to allow reconsideration, the evidence Amtrak offers would be inadmissible largely for the same reasons that reconsideration is unavailable: the evidence is not new, Amtrak offers no excuse for not offering it before decision, and allowing it at this time would significantly delay the process and thus prejudice Complainant.

Finally, while Amtrak's proffered evidence shows that in the three years since the Federal Rail Safety Act went into effect Amtrak has taken some commendable steps to come into compliance, Amtrak's evidence fails to prove remedial action sufficiently prompt and effective to refute the propriety of punitive damages.

---

[3] Complainant submitted no new evidence with her opposition. This is unsurprising, given that she had no opportunity for discovery related to Respondent's new evidence, and that evidence is of a kind that would be uniquely in Respondent's possession, not Complainant's.

The pre-trial order, served on December 1, 2008, required each party to provide all other parties fourteen days before the hearing with a witness list (including a precise statement of what that witness' testimony would prove) and an exhibit list (with a precise statement of what each document would prove). It also required each party no later than seven days before the hearing to provide the other parties with a copy of each exhibit that it would offer at trial. Respondent did not list as witnesses either of the in-house counsel whose declarations it now offers, nor did it list as exhibits either the two declarations or any of the other exhibits submitted with this motion.

Discussion

I. Amtrak Has Failed To Establish an Entitlement to Reconsideration.

Legal standard. Our procedural rules are silent about motions for reconsideration. *See* 29 C.F.R. part 18.[4] When our procedural rules are silent, the Federal Rules of Civil Procedure for the U.S. District Courts apply. *See* 29 C.F.R. §18.1. Once a decision on the merits has been reached and an order issued, a motion for relief from the order or to alter or amend it generally is addressed in Rules 59(e) and 60(b), Fed.R.Civ.P. It generally is a party's obligation to specify the Federal Rule on which it relies,[5] and here Respondent doesn't do that. Nonetheless, I will consider the general law applying to motions to reconsider under an adjudicative body's inherent power and under each of the two Federal Rules that afford possible relief.

Inherent power to reconsider. Generally, motions for reconsideration are not aimed at providing a "second bite at the apple." *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3rd Cir. 1995) (forum *non conveniens*). "Whatever other circumstances may justify reconsideration, mere presentation of arguments or evidence *seriatim* does not." *Id.* "Reargument 'should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided.'" *Id.* (citation omitted). "It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless." *Frietsch v. Refco. Inc.,* 56 F.3d 825, 828 (7th Cir. 1995) (Posner, C.J.).

What Amtrak presents here is a classic example of what the courts have consistently rejected as a basis for reconsideration: a second bite at the apple through the *seriatim* offer of evidence that could have been offered prior to the decision on the merits. Amtrak transparently made a strategic litigation choice prior to trial. That strategy having failed, it now wants an opportunity to adopt a different strategy and retry the matter.

Much of the evidence that Amtrak offers was available to it before trial. In-house attorney Rabin states that she has been training Company managers about the Act for three years, at least half of which would have been before the trial of this case. Decl. of Rabin, ¶2. In-house attorney Corl has done the same for two years, which also would include nearly a year's time before the trial. Decl. of Corl, ¶2-3. Both state that, for the past two years, Amtrak has "advised" its managers to consult with counsel prior to initiating discipline against workers where an injury was involved; again that would have begun well before the June 16 and 17, 2009 trial. Decl. of Rabin, ¶¶3, 4;

[4] The Secretary has yet to adopt final procedural rules for the Federal Rail Safety Act. Interim final rules are available for comment until November 1, 2010. *See http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=21731.* The interim rules apply this Office's general procedures in part 18, 29 C.F.R. to cases arising under the Act. Until the regulations become final, I reach the same result by looking to the implementing regulations under the Wendell H. Ford Aviation and Investment and Reform Act for the 21st Century ("AIR 21"), after which the Federal Rail Safety Act was patterned. The regulatory procedures for that statute also incorporate (unless otherwise specified) this Office's general practices and procedures in subpart A, 29 C.F.R. part 18. *See* 29 C.F.R. §1797.107(a).

[5] *See Hinton v. Pacific Enterprises,* 5 F.3d 391, 395 (9th Cir. 1993).

Decl. of Corl, ¶4. Ms. Rabin refers to Amtrak's publication of two articles about the Act, both of which are offered into evidence; the first of these dates from March 2008 and existed long prior to trial. Exhs. NN, OO; Decl. of Rabin, ¶5. Both she and Mr. Corl state that they have observed during the past two years instances in which Amtrak disciplined managers for violation of its policies about accurate reporting of injuries and illnesses; that would again include instances that happened prior to trial. Decl. of Rabin, ¶9; Decl. of Corl, ¶8. Yet Amtrak chose to offer none of this at the time of trial.

As to the remaining evidence, all of it was available to Amtrak prior to the decision on the merits. Amtrak could have moved at any time to reopen the record prior to decision to include this additional evidence if it had a basis to do so. It filed no such motion.

A review of Amtrak's proffered evidence shows why Amtrak would choose not to offer it before a decision on the merits: the evidence includes admissions that imply liability. For example, it shows that Amtrak found that it had to start imposing discipline on managers if it wanted to avoid violations of the Act. Decl. of Rabin, ¶9. On December 14, 2009, more than a year after the Act went into effect, Amtrak's president and chief executive officer acknowledged that "many employees" "sometimes feel pressure not to report an injury because they believe management tends to focus on blame rather than improvement." As he wrote: "We understand . . . that there can be reluctance to report injuries based on past experiences – situations where it has seemed like blame and punishment were the main response when an injury was reported." Exh. QQ. Although it wasn't until some two years after the Act went into effect, the Company president acknowledged in January 2010 that the Company had to change its policy of evaluating managers' performance based on the number of injuries reported by their subordinates regardless of the circumstances. This change was needed, as the president wrote, "in order to eliminate any possible incentive for a manager to fail to comply with the FRSA . . . and to encourage employees to report all injuries, without fear of retaliation . . . ." Decl. of Rabin, ¶10. This was Amtrak's acknowledgement (however belatedly) that by diminishing managers' performance reviews (and salary raises) if too many employees reported injuries, it was foreseeable that at least some managers would discourage their subordinates from reporting injuries, a likely violation of the Act. As the president and CEO wrote:

> The Executive Committee and I have made this decision because it's vital that employees feel comfortable reporting injuries without fear of being reprimanded . . . . We want managers to be more concerned with the welfare of their employees and creating safe working environments, not statistics.

Exh. RR. This also points to an ongoing compliance problem as recently as January of this year.

These admissions and observations, many from the corporation's highest ranking officer, are consistent with Complainant's allegations. All of them involve steps that Amtrak had not taken when it fired Complainant or moderated the termination to a suspension. All of it implies liability.

By not disclosing any of this before the decision, Amtrak took the opportunity to portray itself differently. For example, when Complainant offered testimony at trial from employees who said

that they were reluctant to report injuries for the very reasons that the president later acknowledged as a problem, Amtrak tried to discredit that testimony. Amtrak couldn't have done that had they put on the record documents that revealed the president and CEO's candid admissions.

The evidence Amtrak proffers on the current motion presented it with a strategic choice at the time of trial. It could put on the evidence, which might strengthen its defense on the punitive damages claim but would likely weaken its liability case, or it could withhold the evidence with the opposite likely result. Assisted by able and experienced trial counsel, Amtrak chose not to offer the evidence – at least until the decision issued, finding it liable.

At that point, the calculus changed. Now, there was little to be lost and much to be gained by revealing the evidence: the Company already had been found liable, and perhaps the evidence might help on punitive damages. Amtrak filed this motion, seeking to assert now the strategy that it rejected for the litigation through the trial, the post-trial period while the matter was under submission, and until it had been found liable. That is exactly the kind of strategic maneuver that the courts have consistently and uniformly held to be an improper use for reconsideration. *See supra*. Amtrak has failed to establish a basis for reconsideration under this Office's inherent power as an adjudicative body.

Rules 59(d) and 60(b). An analysis under these two Federal Rules of Civil Procedure leads to the same result, largely for the same reasons. To some extent the difference between Rules 59(e) and 60(b) is more apparent than real, for "A denial of a motion for reconsideration under Rule 59(e) is construed as one denying relief under Rule 60(b) and neither will be reversed absent an abuse of discretion." *Duarte v. Bardales,* 526 F.3d 563, 567 (9th Cir. 2008) (citations omitted).[6]

But the analysis under the two Rules has some differences.

> Under Rule 59(e), it is appropriate to alter or amend a judgment if "(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law."

United National Ins. Co. v. Spectrum Worldwide, Inc., 555 F.3d 772 (9th Cir. 2009), *quoting Zimmerman v. City of Oakland,* 255 F.3d 734, 740 (9th Cir. 2001).[7] Rule 59(e) offers an

---

[6] If filed within 10 days of judgment (as here), the motion generally will be taken as under Rule 59; otherwise, it will be taken as under Rule 60. *See Zamani v. Carnes*, 491 F.3d 990 (9th Cir. 2007), *citing Circuit City Stores, Inc. v. Mantor,* 417 F.3d 1060, 1064 (9th Cir. 2005). "A motion filed within the ten-day period set by Federal Rule 59 may be construed as a Rule 59 motion though labeled according to another federal rule . . . ." *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir. 1989). Given the adjustments for mailing time discussed above, the current motion was filed within 10 days and therefore technically is under Rule 59. Nonetheless, I will address both rules.

[7] The Administrative Review Board has adopted a similar standard:

> In the absence of our own rule, we have adopted principles federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under similar limited circumstances, which include: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence; (ii) new material

"'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (*quoting* 12 James Wm. Moore, *et al.*, MOORE'S FEDERAL PRACTICE § 59.30[4] (3d ed. 2000)).

Somewhat different, relief under Rule 60(b) is appropriate on a showing of "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b) . . .; or (6) any other reason that justifies relief."[8] Fed.R.Civ.P. 60(b) (in pertinent part); *see United National Ins., supra*.

Although Amtrak raises no argument under either Rule, its theory is largely that it should be allowed to offer new evidence as that evidence, although arising after Complainant filed her complaint, is relevant to punitive damages.[9] Fed.R.Civ.P. 59(e)(1), 60(b)(2). But just as with

---

> facts that occurred after the court's decision; (iii) a change in the law after the court's decision; and (iv) failure to consider material facts presented to the court before its decision.

Knox v. U.S. Department of the Interior, ARB Case No. 07-105 at n. 58 (8/30/2007).

This standard, however, is inapplicable here. As the Board has acknowledged, the relevant rules for this Office (OALJ) differ because they are controlled by 29 C.F.R. Part 18, including its incorporation by reference of the Federal Rules of Civil Procedure, as well as by the Administrative Procedures Act, none of which applies to the Board. *Id.*

[8] Rule 60(b) also allows relief under other circumstances not relevant here.

[9] Amtrak offers no colorable argument under the other theories of relief that Rules 59 and 60 provide:

Mistake, inadvertence, surprise, or excusable neglect (Rule 60(b)(1)).

> Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge that corrects the erroneous legal advice of counsel. For purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel.

Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1101 (9th Cir. 2006) (plaintiff accepting offer of judgment under attorney's advice, which advice was grounded on a mistake of law, not entitled to relief under Rule 60(b)(1)). A mistake of law, a "lawyer blunder," or a mistake based on advice of counsel is not a mistake within Rule 60(b)(1). *Id.* at 1101, *citing* cases. What Amtrak presents here is the result of a litigation strategy that failed; it does not argue or offer any facts to support mistake, inadvertence, surprise, or neglect.

No clear error or manifest injustice in the initial decision (Rule 59(e)(2)). Respondent points to no evidence on the record in the initial decision that I failed to consider, no error in my factual findings, no authority that I failed to consider, and no authority that I misapplied. It offers nothing to suggest clear error or manifest injustice in the initial decision.

No change in controlling law (Rule 59(e)(3)). Amtrak offers no law or argument on this theory, and I am aware of no changes in controlling law.

No other grounds (Rule 60(b)(6)). The catchall provision in Rule 60(b)(6), Fed.R.Civ.P., which allows relief for "any other reason" that justifies it is not routinely available; rather, it "requires a finding of 'extraordinary circumstances.'" *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985), *citing McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985); *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981). Here, Respondent does no more than demonstrate that another trial strategy might potentially have produced different results. There is nothing extraordinary in that.

The other grounds for relief under Rules 59(e) and 60(b), Fed.R.Civ.P., are not even arguably applicable, and Respondent offers nothing to the contrary.

the general law of reconsideration, Rules 59(e)(1) and 60(b)(2) cannot be used to offer evidence that was reasonably available to the litigant prior to decision.

For, "A Rule 59(e) motion may not be used to raise arguments or present evidence that could reasonably have been presented earlier in the litigation." *Carroll v. Nakatani,* 342 F.3d 934, 945 (9th Cir. 2003) (rejecting appeal of denial of Rule 59(e) relief because party could have raised argument prior to the entry of summary judgment); *accord Exxon Shipping Co. v. Baker*, 544 U.S.__, 128 S.Ct. 2605, 2617 n. 5 (2008), *citing* 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §2810.1, pp. 127-28 (2d ed. 1995). "A defeated litigant cannot set aside a judgment because he failed to present . . . all the facts known to him that might have been useful to the court." *Hopkins v. Andaya,* 958 F.2d 881, 887 (9th Cir. 1992) (Rule 60 motion following summary judgment). A party's "failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence.'" *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Even evidence that reasonably *could have been discovered* is insufficient. *Hopkins v. Andaya,* 958 F.2d 881, 887 n. 5 (9th Cir. 1992). Amtrak has failed to establish an entitlement to relief under these Rules.

Amtrak has failed to demonstrate a basis for reconsideration. Standing alone, that forecloses relief under the present motion. Yet I will deny relief for additional reasons, to which I now turn.

II. Respondent's Newly Proffered Evidence Is Inadmissible Post-Decision.

Were I to reach the substance of Amtrak's motion, I would sustain Complainant's objection to the proffered evidence. Although the result might differ had Amtrak offered this evidence before the decision, it did not. Admitting it at this late date would be unduly prejudicial to Complainant.

I find no authority (and the parties point to none) that addresses the admission of evidence of post-complaint remedial action to mitigate punitive damages specifically under the Federal Rail Safety Act. Where the caselaw does not provide controlling authority, federal employment discrimination and retaliation decisions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.,* can supply guidance in "whistleblower" retaliation cases.[10] The application of this precedent to the Federal Rail Safety Act's punitive damages provision, however, is complicated.

The complication arises because the punitive damages language in Title VII, 42 U.S.C. §1981a(b), differs considerably from that in the Federal Rail Safety Act. Punitive damages under Title VII are limited to those cases where the "complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with

[10] *See Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 at 9 (ARB Jan. 31, 2007) ("In deciding whistleblower cases . . . , the Secretary and this Board often have relied upon cases arising under Title VII of The Civil Rights Act of 1964."); *see also Van Asdale v. Int'l Game Technology*, 577 F.3d 989, 995 (9th Cir. 2009) (looking to Title VII and the Age Discrimination in Employment Act in a Sarbanes-Oxley case); *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513 (1989) (ERA case citing to Title VII decision in discussing the standard for showing that an employer terminated an employee for non-retaliatory reasons).

reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. §1981a(b)(1). The Federal Rail Safety Act's language is far less specific. It states only: "Relief in any action under subsection (d) [*i.e.*, any enforcement action] may include punitive damages in an amount not to exceed $250,000." 49 U.S.C. §20109(e)(3).[11]

But a look at the historic development of the language in Title VII demonstrates that the difference is inconsequential, and that the Title VII precedent can be applied usefully to the Federal Rail Safety Act. As the Supreme Court explained, the statutory language in Title VII adopts the standard for punitive damages that the Court adapted from the common law to apply to cases under the nineteenth century civil rights act, 42 U.S.C. §1983. *Kolstad v. American Dental Assoc.,* 527 U.S. 526, 536 (1999), *citing Smith v. Wade,* 461 U.S. 30, 56 (1983) (punitive damages available under 42 U.S.C. §1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.") The punitive damages language in the Federal Rail Safety Act does not define any parameters for its application; common law notions therefore apply to that statute. Given the common law roots of the statutory language in Title VII, an interpretation of the much more general language in the Federal Rail Safety Act should be consistent with the Title VII decision law.

Respondent contends that the evidence it offers of the remedial action it undertook after Complainant filed the present claim is admissible to show good faith efforts at compliance. The Ninth Circuit confronted this question squarely in a Title VII case, *Swinton v. Potomac Corp.,* 270 F.3d 794, 810-11 (9th Cir. 2001). Reviewing *BMW v. Gore,* 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001), the Court found that,

> The Supreme Court's references to post-litigation remedial action are glancing and ambiguous. The Court did not, to be sure, face head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim.

Swinton, at 812. Yet, as the Ninth Circuit observed, "The [Supreme] Court's passing references are not without some persuasive value in the context of evaluating punitive damages on appeal." *Id.*

The *Swinton* court analyzed the case law across several jurisdictions (and academic commentary); it found that some courts admitted evidence of post-filing remedial action, and other courts rejected it.[12] *Id.* at 814. It resolved the question by deferring to the trial court's discretion, holding:

---

[11] Title VII also limits the amount of punitive damages, but the limit varies with number of persons whom the employer employs.

[12] The Court found the existing cases, not only inconsistent, but especially unhelpful because they arise mostly in product liability litigation, which the Court found distinguishable because, "In the employment discrimination context . . . post-occurrence remediation is part and parcel of the legal framework." *Swinton,* 270 F.3d at 814.

> A district court may, in its discretion, allow a defendant/employer to introduce evidence of remedial conduct undertaken in response to its discovery of discrimination as a means to mitigate punitive damages. Likewise, where the plaintiff, in arguing for punitive damages, contends that they are necessary to "teach the defendant a lesson," post-charge remediation may be relevant to defendant's posture. The plaintiff can, of course, make arguments about prejudice, too little too late, and relevance of remedial conduct. Adoption of this approach has the advantage of encouraging employers to implement remedial measures, while leaving to the trial court, which has a front-row seat in evaluating the evidence, the discretion to determine the limitations on such evidence. In framing this discussion, we do not attempt to prejudge in all cases whether remedial conduct is admissible, even if it occurs after the plaintiff has filed a charge with an administrative agency such as the EEOC, or has in fact filed a lawsuit. Rather, the determination as to whether the evidence is too far afield, temporally or by subject matter, is left, in the first instance, to the discretion of the trial court.

Id. at 814-15.

In my view, the exhibits and declarations that Amtrak offers post-decision cannot be admitted without allowing a new trial on punitive damages. As the Ninth Circuit observed, evidence of post-filing remedial steps might be relevant, but only in the context of an opportunity for the opposing party to respond to it. *See Swinton, supra.* Due process would require a new trial on punitive damages; otherwise, Complainant would be deprived of an opportunity to respond meaningfully.[13] The delay inherent in a new trial would prejudice Complainant, who has yet to receive the remedy that Congress allowed.

Amtrak was fully on notice that punitive damages were at issue: It expressly listed punitive damages in its pre-hearing brief as an issue to be decided at trial. It offered evidence at trial that it later argued was relevant to punitive damages. It devoted considerable attention in its post-trial brief to the issue. It cited record evidence that it argued, much as on the current motion, showed its efforts to train managers about safety; its "specific rules and protocols" regarding the investigation and reporting of accidents; a requirement that management employees be trained on its rules and protocols; a policy that discipline "is but one of many options" when an employee engages in unsafe behavior and that discipline should not be arbitrary; and a purported "fundamental tenet" in a "strongly worded and strict policy" that managers may not retaliate against workers who report on-the-job injuries. *See* Amtrak's post-trial brief at 42-46. Amtrak had a full opportunity to present its case on punitive damages and in fact did present what it chose to present; it asserts nothing to the contrary.

[13] For example, Complainant might wish to take discovery into other examples of injured workers being disciplined to show that Amtrak's president came too slowly to his decision in January 2010 to end the policy of withholding raises from managers whose subordinates reported too many injuries.

Amtrak offers no excuse or other countervailing interest to overcome the prejudice that late admission of this evidence would cause Complainant. The newly proffered evidence therefore is inadmissible.

III. Respondent's Newly Offered Evidence, Even If Considered, Would Not Change the Result.

I discussed the law of punitive damages under the Federal Rail Safety Act in the initial decision and will not repeat that discussion here. Rather, I focus on the arguments that Amtrak raises on its motion for reconsideration.

Amtrak argues that its post-decision evidence shows that it does not need an inducement to comply with the Act because it took steps voluntarily to comply prior to the decision in this case. At the outset, this argument has limited impact because it neglects the other purpose of punitive damages, which, as the Supreme Court has established, is to punish. *See BMW v. Gore*, 517 U.S. 559, 568 (1996). That is consistent with the Supreme Court's teaching that the degree of the defendant's reprehensibility or culpability and the harm done the victim are relevant. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 432, 434-35 (2001) (punitive damages operate as "private fines" to punish and deter). As the Court stated:

> A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Haslip*, 499 U.S., at 54, 111 S.Ct. 1032 (O'CONNOR, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible").

Cooper Industries, 523 U.S. at 432 (footnote omitted).

Amtrak's evidence also is unpersuasive on the theory that it needs no further inducement to come into compliance with the Act. In the employment context, a determination whether to impose punitive damages must "focus on the actor's state of mind." *Kolstad, supra,* 527 U.S. at 535 (Title VII). It "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind." *Id.* at 536. A showing of egregious acts is *evidence* of a state of mind (or "evil motive") that would support the imposition of punitive damages, but Title VII does not include for punitive damages an "independent, 'egregiousness' requirement." *Id.* at 538-39.

Good faith efforts by an employer to address or prevent violations of the Act may be relevant to show state of mind, and thus the appropriateness of punitive damages. "Where an employer has undertaken . . . good faith efforts at Title VII compliance, it 'demonstrates that it never acted in reckless disregard of federally protected rights.'" *Kolstad v. American Dental Ass'n,* 527 U.S. 526, 544 (1999). The existence of such good faith efforts is an affirmative defense, not an

element of a plaintiff's case. *See Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1197-98 (9th Cir. 2002). It is therefore Amtrak's burden to demonstrate sufficient steps to show good faith.

What, then, in this context does Amtrak's new evidence show?

A. The Proposed New Evidence Does Not Show Discipline of the Managers Involved in the Violation of Complainant's Rights.

"In the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" *Kolstad,* 527 U.S. at 545 (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting)). But "it is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them." *Swinton,* 270 F.3d at 810-11 (citing cases). "While an employer's institution of a written policy against race discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind with respect to racial minorities, such a policy is not automatically a bar to the imposition of punitive damages." *Lowery v. Circuit City Stores,* 206 F.3d 431, 446 (4th Cir. 2000) (cited with approval in *Swinton* at 811).

Thus, when the person whom an employer entrusts with enforcement of federal statutory rights fails to follow policy, and fails with malice or reckless disregard of the employee's federally protected rights, that failure is imputed to the employer and is a basis for punitive damages. *Swinton*, 270 F.3d at 810, *citing, Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262, 1271 (10th Cir. 2000); *see also, Cooke v. Stefani Management Services, Inc.,* 250 F.3d 564, 569 (7th Cir. 2001) "(Where the 'claim [is] that the supervisor failed adequately to remedy the harassment[,] . . . the supervisor acts on behalf of the company in enforcing (or failing to enforce) its [ ] harassment policy, and it is therefore fair to attribute his knowledge and acts to the company')." As I stated in the initial decision, the Supreme Court looked to the Restatement of Agency and Restatement (Second) of Torts to include in sources of imputed liability an agent employed in a managerial capacity and acting in the scope of employment, or occasions when the principal or a managerial agent of the principal ratified or approved the act. *Kolstad,* 527 U.S. at 539-44.

In my initial decision, I observed the many ways in which Mr. Duncan consciously disregarded Complainant's federal statutory right to report an injury without retaliation. I showed how Mr. Duncan repeatedly ignored Company policy, including the policy against such retaliation. I concluded that when Complainant was reporting the injury, Mr. Duncan, contrary to Company policy, repeatedly questioned her in a manner designed to deter her from reporting. When she insisted on making the report, the acts of retaliation began. Despite the Company's carefully articulated policies that require a non-disciplinary safety investigation following any injury, Mr. Duncan told Complainant's co-workers *before there had been an investigation* that she was to blame for the injury. He delegated responsibility for the investigation (including a reenactment of the accident), did little to monitor it, and then allowed the safety review and the disciplinary process to go forward although no real or meaningful investigation (or reenactment) was done. He was inflexible in demanding that Complainant admit blame and accept a 30-day suspension,

and Amtrak offered nothing to show that the proposed suspension was consistent with Company practice, whether lawful or unlawful. Although a Company "hearing officer" rejected two of Mr. Duncan's allegations against Complainant under Company policy and the collective bargaining agreement, and accepted only that Complainant should have used more common sense, Mr. Duncan imposed the ultimate discipline – discharge – without reading or being briefed on the substance of the hearing officer's findings. The hearing officer's findings were tainted because Amtrak presented him with testimony from a witness whom the Company believed to be so dishonest that it disciplined her for dishonesty in the very context of this testimony. The Company was unable to offer any evidence to show that a termination was consistent with Company policy or practice. It didn't offer a single case where it lawfully (or even otherwise) terminated employment under similar circumstances.

Because Complainant and her union took it upon themselves to grieve the termination, Amtrak had an opportunity to disavow fully and squarely what Mr. Duncan had done. Instead, a higher ranking official ratified the imposition of discipline with a reduction to the 30-day suspension. As before, Amtrak was unable to show the suspension was consistent with Company policy or practice. The failure to correct at that time the many legally deficient actions that had occurred when Mr. Duncan managed the discipline served only to exacerbate the violation. The Company further compounded matters when it later imposed an additional 4-day suspension merely because Complainant was late for a meeting, discipline that could only be justified in reliance on the previously imposed unjustifiable 30-day suspension related to the Complainant's injury report.

Although Complainant's federal statutory rights were at stake, Amtrak did not require that a Company lawyer or human resources manager review Mr. Duncan's discharge decision. Had a human resources or legal department official reviewed the decision, she might have corrected it, but Amtrak's respect for the federal rights at stake weren't enough to require this level of internal review. Rather, Amtrak chose to place full authority in Mr. Duncan and the second manager. The result is that the acts of these managers may be imputed to Amtrak for purposes of punitive damages.

The twelve exhibits and two declarations that Amtrak submits with this motion include nothing to show that either of the managers involved in disciplining Complainant weighed in the balance the fact that she had federally protected rights and that disciplining her might discourage others from reporting injuries despite their similar rights. Nothing shows that either manager considered that, if he discouraged workers from reporting injuries that resulted from unsafe working conditions, those conditions would likely remain unsafe and pose a hazard to other workers.

Amtrak still doesn't require that an objective, trained professional, such as someone in the human resources or legal department, review managers' decisions to discipline employees protected under the Act (although it has "advised" managers that they may consult with a Company lawyer).

And nothing in the proposed new evidence shows that Amtrak took any action directly and personally with either of the two managers to tell them that their actions were contrary to

Company policy and unacceptable. The only fact related specifically to either manager is that Mr. Duncan attended a Company conference call in May 2008 along with other managers and was given the Company's standard training on the Federal Rail Safety Act. That falls short of a clear message to Mr. Duncan that his conduct when Complainant was injured was unlawful and inconsistent with Company policy. If anything, Amtrak's lack of direct communication with the two managers ratifies what they did.

B. The Proposed New Evidence Does Not Show an Effective Correction of Amtrak's Institutional Culture that Has Discouraged Employees from Reporting Injuries.

Amtrak has acknowledged that "some employees" believed at least as late as 2009 that Amtrak's main focus when it receives injury reports was to place blame, but it offers nothing to prove that it has achieved a correction of this element of its culture. It has taken some potentially useful steps: Amtrak's president reiterated Company policy forbidding retaliation for reporting injuries. But Amtrak contended at trial that it had a "strongly worded" policy to that effect in place at the time Mr. Duncan fired Complainant. Mr. Duncan and the other manager disregarded that policy. With a history of managers disregarding Company policy crucial to compliance with the Act, Amtrak needs more to show that it has *corrected* its culture than further policy pronouncements, even if they come from its chief executive (as commendable and *potentially* useful as that is).

The Company also took the important step of disciplining managers who violate the policy. But the record shows only that this has happened Company-wide at least twice in the three years since the Act became effective.[14] It doesn't show the extent to which other managers know of the discipline or what impact it's made on other managers' behavior. Again, it is movement in the right direction. But Amtrak has not established the extent of the movement or how effective it has been in altering the behavior of its managers.

C. Amtrak Misplaces Its Reliance on Steps It Took Too Late To Mitigate Punitive Damages.

Although Amtrak recognized that its policy of evaluating managers based on injury ratios is inconsistent with the demands of the Act and rescinded the policy, it did not do so until January 2010. That is very late in coming. Amtrak offers no explanation why it took considerably over two years after the Act's effective date for it to notice that withholding pay raises from managers based simply on the statistics of how many injuries their subordinates reported, irrespective of the circumstances, would induce managers to discourage injury reports. Yes, it is far better that Amtrak's president addressed this failure than not, but the long delay detracts from any reason for a different analysis on punitive damages.

[14] The declarations submitted with Amtrak's motion refer to the discipline of Company "managers," plural. There is no indication of how many managers were included other than that it must have been more than one.

D. Conclusion on Impact of Newly Proffered Evidence.

Amtrak's new evidence shows additional efforts to adopt appropriate policies and disseminate information within the Company about the Act's requirements and Amtrak's policies.[15] The Company has shown some late-arriving but nonetheless real commitment by its chief executive officer and legal department to adopt appropriate policies, rescind countervailing policies and practices, and inform managers and workers about the statute and its requirements. As I've said, though, this is insufficient to change the analysis about punitive damages, given Amtrak's admitted corporate cultural history and the actions of the managers involved in the present case. For that, Amtrak would need to show that its efforts have changed the culture so that employees are not deterred from reporting and especially so that those with the Company's authority do not disregard workers' federally protected rights when they respond to injury reports. That is what the new evidence lacks.

The statute allows the imposition of punitive damages up to $250,000. Given my finding that Complainant incurred economic and emotional damages exceeding $60,000, the imposition of the full extent of punitive damages allowed would not be disproportionate. *See BMW v. Gore*, 517 U.S. 559.

But I have kept in mind that the events underlying this action happened relatively soon after Congress created the statutory scheme involved. Amtrak should have been following the legislation from its introduction in January 2007 and as it moved through Congress; it should not have been surprised. And Amtrak did have, even at the time it fired Complainant, some appropriate policies in place. I have assessed damages well-under the statutory maximum after considering these facts in mitigation of the otherwise clear record of Amtrak's disregard for Complainant's federal rights. I conclude that, even were I to consider Amtrak's additional evidence, I would nonetheless award punitive damages in the amount of $100,000.

[15] On March 1, 2008, seven months after Congress enacted the relevant provision, Amtrak's legal department published in its labor and employment law newsletter an article in which it described the legislation in considerable detail, and in which the intended readers were advised about how to distinguish discipline for unsafe behavior causing injury from discipline for reporting an injury. Exh. NN. A second newsletter, published more than a year later refers to the relevant statutory provision but focuses mainly on the October 2008 amendments, which concern delays in providing medical care to injured workers. Exh. OO.

Nothing on the record shows who received the newsletter or whether they were required to read it. It was certainly a useful step, but it should have been distributed within weeks after the statute passed, and the record doesn't show its impact on the managers who make the disciplinary decisions.

Amtrak adopted a policy as of June 24, 2009 (apparently announced the month before in a "Safety Bulletin") that employees must timely report all work-related injuries, that the Company won't tolerate conduct "calculated to discourage or prevent" such reporting, and that employees who engage in such conduct will be subject to discipline, up to and including termination. Exh. OO at 2, PP at 3. This was more than ten months after the statute took effect. As I state in the text above, Amtrak had a similar policy when its managers fired Complainant. That's why the Company must do more to avoid punitive damages than show a reiteration or even an expansion of the policy; it must show a change in managers' behavior, *i.e.*, that is policy initiatives have been effective.

Conclusion and Order

Respondent's motion for reconsideration is DENIED.

Complainant's objection to Respondent's newly offered evidence is SUSTAINED.

Were I to reach the merits on Respondent's motion, I would deny it. Amtrak neglects that part of the reason for punitive damages is to punish those who act in conscious disregard of an employee's federally protected rights. As to the deterrent effect of punitive damages, Amtrak has offered evidence of commendable steps at the policy level (albeit slow in coming), but it has offered nothing to show that its culture has changed, that employees no longer feel deterred from reporting injuries, and that managers responding to employees' injury reports now respect those employees' federally protected rights.

Accordingly, Amtrak's motion for reconsideration is DENIED in its entirety.

Complainant's counsel may within 30 days file a fee petition for this motion and the earlier litigation.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge