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Issue Date: 23 September 2011

Case No.: 2010-FRS-00018

In the Matter of

LAURA VERNACE
Complainant

v.

PORT AUTHORITY
TRANS-HUDSON CORPORATION
Respondent

APPEARANCES: Charles Goetsch, Esquire
For Complainant

Donald F. Burke, Esquire
Stephen Powell, Esquire
For Respondent

BEFORE: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA" or "the Act"), 49 U.S.C. § 20109, as amended.[1] The employee protection provisions of the Act apply to railroad employees who feel they have been subjected to retaliatory discipline or discrimination by their employer for engaging in protected activities related to railway safety.

I. PROCEDURAL BACKGROUND

Complainant Laura Vernace ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") on April 30, 2009, alleging that her employer, the Port Authority Trans-Hudson Corporation ("Respondent" or "PATH") discriminated against her for engaging in protected activity. (CX 8).[2] Specifically, she asserted she had filed an injury report and was subsequently charged with a violation of PATH safety rules.

[1] Pub. L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, § 419, Oct 16, 2008, 122 Stat. 4892.
[2] Complainant's exhibits are hereby referred to as "CX"; Employer's exhibits are referred to as "EX"; and the transcript of the August 4 and 5, 2010 hearing is referenced as "Tr."

OSHA investigated the complaint and issued the Secretary's findings on March 2, 2010 (identified as CX 12, admitted as ALJX 1).[3] OSHA determined that Respondent's actions violated the Act. Respondent timely appealed, and the matter was assigned to me. I held a hearing on August 4 and 5, 2010 in New York, New York. The following decision is based on the Act and its implementing regulations, and the evidence and testimony presented by the parties.

II. CONTENTIONS OF THE PARTIES

It is Complainant's position that PATH is covered by the Act. She contends she filed an injury-on-duty report ("IOD") stemming from an accident on April 1, 2009 when she sat on a broken chair which collapsed. She claims PATH violated the Act by retaliating against her for filing the injury report. Complainant asserts she can make out a *prima facie* case of violation against PATH, and seeks backpay or restoration of lost vacation time, compensatory damages, punitive damages, and attorney's fees and litigation costs.

Respondent contends Complainant was charged with safety violations not because she filed an injury-on-duty report, but because their post-injury investigation provided them reason to believe a safety violation had occurred. Respondent also claims that, because the charges were ultimately withdrawn, no discipline or harm occurred in this matter. Thus, Respondent asserts Complainant cannot meet the elements of her *prima facie* case because there was no adverse action and the filing of an injury report was not a contributing factor to the charges filed against Complainant.

III. STIPULATIONS AND ISSUES PRESENTED

The parties stipulated that Complainant filed a report of a work-related injury on April 1, 2009. There were no other stipulations presented at the hearing. The issues presented for decision are:

- Whether Respondent is a covered entity under the Act;
- Whether Complainant engaged in protected activity;
- Whether Respondent was aware of the protected activity;
- Whether Respondent took unfavorable action against Complainant;
- Whether Complainant's protected activity was a contributing factor in Respondent's unfavorable action;
- Whether Respondent would have taken the same action absent the protected activity; and
- Appropriate damages, if any.

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[3] Although Complainant identified this exhibit at the hearing, it was not offered or received into evidence. The Secretary's findings are procedurally relevant to this claim, and I therefore admit this exhibit as ALJ Exhibit "ALJX" 1.

IV. SUMMARY OF EVIDENCE PRESENTED

A. Exhibits

Summarized below are the exhibits admitted into evidence at the hearing.

1. Complainant's Exhibits

- *CX 1: Federal Railway Safety Act*

This is a photocopy of selected provisions of the Act.

- *CX 2: PATH Book of Rules*

This exhibit is a photocopy; an original Book of Rules has been submitted as RX 28 and will be the exhibit referred to in this decision.

- *CX 3: Injury Report*

The time of injury is listed as 1:30 a.m. Complainant's shift hours were 11 p.m. to 7 a.m. Her injury occurred on PATH premises in the WTC Main Relay Room, was witnessed by Orlando Vason and was reported at 4:30 a.m. to P. Aviles, signal supervisor. Medical treatment was received at the Port Authority clinic on April 1, 2009. Complainant listed injuries to her left and right shoulders, neck, right elbow, and a headache. She described the accident as follows: "Got chair to sit on so I can write test cards and tags. When I leaned back the back of the chair fell back causing me to hit my head against the relay rack and do a somersault which hurt my neck and shoulders." She wrote that it was not applicable to questions regarding inspecting tools or equipment prior to use, reporting an alleged unsafe tool or equipment prior to injury, and inspecting the worksite prior to beginning work. When asked if what she could have done to prevent the injury, she wrote, "Nothing – person whom [sic] broke chair should have left a note on it or threw it out. 'I' put sign on chair now."

In his portion, Mr. Aviles wrote, "Employee reports getting a chair from the far end of the room. Pulled it to the work area (relay races) [sic]. She sat down on the chair wrote down the tags and when she finished she leaned against the back of the chair and then she tipped over with the chair." The site of the injury was inspected at 5:30 a.m. He wrote that Complainant notified him before the end of her work tour, and medical treatment would be received at 9 a.m. during a previously scheduled exam. Mr. Aviles checked that Complainant did not inspect a tool prior to use, did not report alleged unsafe or defective tools, and an unsafe act was committed. He wrote, "Maintainer omitted inspection of office chair prior to use. Rule N.4 was not followed. Maintainer used a piece of equipment without proper inspection." He wrote that he provided counseling on inspecting worksites, planning ahead, and being aware of the surroundings. A list of all Complainant's previous injury reports and lost time was attached.

- *CX 4 and 4A: Photographs*

Complainant's Exhibit 4 consists of twenty-one black and white photocopies of pictures of the chair Complainant sat on and the signal room where she was working. CX 4A consists of twelve color photocopies of pictures of the chair and signal room.

- *CX 6: April 24, 2009 Charge Letter*

This letter ordered Complainant to report to the eighth floor conference room at Journal Square Transportation Center for an investigation of the charge that she violated Rules N.2, N.3, and N.4. Specifically, the letter said she "failed to exercise constant care and utilize safe work practices to prevent injury to yourself when you did not inspect a chair prior to using it during your tour of duty on April 1, 2009. You subsequently reported an alleged injury-on-duty when you leaned back and fell from that chair, which you reported as being broken before you sat down on it. Your alleged injury has caused you to be absent from work from April 2, 2009 through at least the date of this letter. You may be represented in this matter as provided for in Article X-F, Discipline—Hearings, of the Agreement between the parties." The parties copied on the letter were C. Bacon, R. Bulayev, M.DePallo, C. Easterling, and the Employee File.

- *CX 7: Collective Bargaining Agreement Between BRS and PATH*

This exhibit is an excerpt; the entire agreement was submitted as RX 27 and will be referred to in this decision.

- *CX 8: Complaint*

Complainant filed her OSHA complaint with Michael Mabee, Supervisory Investigator, on April 30, 2009. She alleged Mr. Childs had sent her a certified letter "charging [her] with baseless rule violations and ordering [her] to report for a disciplinary investigation" because she filed an injury report stemming from the April 1, 2009 chair incident. She felt PATH was trying to intimidate her and fellow workers from filing injury reports. She alleged this was discriminatory and retaliatory conduct prohibited under the Act.

- *CX 8A: Letter from OSHA*

This letter, dated May 4, 2009, informed Mr. Childs that a complaint had been filed in this case.

- *CX 9: April 30, 2009 Letter Rescheduling Hearing*

This letter rescheduled the hearing for May 13, 2009. The same people were copied on this letter as on the original charge letter.

- *CX 10: May 12, 2009 Letter Postponing Hearing*

This letter said the hearing had been postponed at Mr. Easterling's request, and Complainant would be notified of the new time and date when the hearing was rescheduled.

- *CX 11: February 9, 2010 Letter Rescheduling Hearing*

The hearing was rescheduled for February 17, 2010. The same parties were copied as on the April 24 and April 30 letters, except for R. Bulayev, and a copy to the Central File was added.

- *CX 17: Letter to PATH File*

Mr. Childs met with Signal Testman II Orlando Vason, Chief Signal Supervisor Brian Hodgkinson, and Mr. Easterling on April 9, 2009. He asked Mr. Vason to relate his recollection of the circumstances surrounding Complainant's injury. Mr. Vason replied that he did not know or see that the chair was defective before Complainant sat in it, that chairs are not "tools" and are not provided at all locations, and that many of the chairs that do exist are in used or bad condition.

Mr. Vason said the chair had slipped out from under Complainant when she leaned back to stand up, and she hit her head and flipped over as she fell to the floor. He said she seemed dazed and complained of a headache, but when he suggested seeking medical attention, she said she preferred to wait until her regularly scheduled exam later that morning. He told her to sit and rest, and she used a different chair without wheels. They reported the injury toward the end of their tour of duty.

Mr. Childs told Mr. Vason he should have immediately reported the injury and insisted Complainant seek medical attention, as he was the team leader and she was his subordinate. Mr. Vason said he had witnessed some of Complainant's prior injuries and they had not always sought immediate medical attention.

- *CX 19: March 1, 2010 Letter Withdrawing Charges*

Mr. Childs sent this letter after the informal meeting on February 17, 2010. He said the purpose of the meeting had been to clarify information provided on the injury-on-duty report in order to further their investigation of the incident. He reiterated that they had been unable to speak to her while she was out of work due to injuries, and he had filed the charges to preserve their rights in accordance with the collective bargaining agreement and not because she had filed an injury report.

Mr. Childs said the injury report was ambiguous because Complainant marked "N/A" when asked if she had inspected the chair, but at the meeting she explained that she had made a reasonable inspection and the damage was not readily apparent. He concluded,

> In light of the additional information and clarifications resulting from our meeting, and in consideration of unique circumstances in this matter, the charges of alleged violation of Rules N.2, N.3, and N.4 as contained in my letter of April 24, 2009, are hereby withdrawn and the investigative hearing is canceled. You are, however, strongly reminded and counseled to adhere to all Safety Rules and safe work practices, and to exercise constant care to prevent injury to yourself and others.

This letter was copied to C. Bacon, M. DePallo, C. Easterling, Employee File, and Central File.

2. Respondent's Exhibits

- *RX 2: March 6, 2009 Letter from Mr. Childs to Complainant*

This letter was sent to Complainant regarding excessive absences from 1996 through 2009. She was ordered to report to the 8th floor conference room at Journal Square for a meeting to review her attendance record and the policies, rules, and expectations regarding absences.

- *RX 3: April 1, 2009 Injury-on-Duty Report and Supporting Documentation*

Attached to the copy of the report are photographs of the chair and the room where the incident occurred, a handwritten statement from Orlando Vason describing the incident; a list of all Complainant's injuries and days lost from work; medical evaluations dated April 1, 2009, April 6, 2009, April 16, 2009, and April 22, 2009 describing her as not fit for work; an earlier evaluation dated March 3, 2009 describing her as fit for work with some restrictions; a statement from Paul Aviles describing the telephone conversation and interview with Complainant when she filed her injury report; a statement from Ed Diaz describing the scene of the injury and the condition of the chair; a statement from Bruce Edwards, another signal repairman, who said he had no knowledge of a broken chair; and an email from Brian Hodgkinson to Fred Childs saying none of the supervisors had heard any reports of a broken chair.

In Mr. Aviles' report, he said two points needed clarification when he reviewed the injury report with Complainant. First, he took issue with her refusing medical treatment until later that morning. Second, he wrote, "Also the inspection of the equipment considering the chair she was using as equipment or not, to which she also said that nobody checks chairs ever. Both points were later clarified and they were informed of it."

- *RX 4: February 18, 2010 Letter from Mr. Childs to File*

This letter summarizing the substance of the February 17, 2010 informal meeting was copied to C. Bacon, M. Gulick, B. Hodgkinson, K. Lunan, S. Powell, R. Williams, Employee File, and Central File.

Mr. Childs wrote that Complainant was charged with violating safety rules, but was not charged because she filed an injury-on-duty report. She had not been disciplined and had followed the rules with regard to filing the report. He had scheduled the investigative hearing to preserve his time limits while she was out on IOD status.[4] He reviewed the information written on the form and she described the incident to him. Complainant said she had been informed by Mr. Diaz that the chair was duct-taped together, and Mr. Diaz was summoned to the conference room. He denied having made such a statement to her and said no duct tape was present on the chair when he photographed it. He then left the meeting. Mr. Childs then explained to Complainant that she had not filled out the injury-on-duty form completely, and the lack of information had led to the charges against her. He cautioned her to use safe work practices in the future.

Mr. Childs concluded,

> Ms. Vernace and Mr. Easterling had no further statements or concerns to discuss. Mr. Easterling requested that PATH consider withdrawing the charges. I thanked Ms. Vernace for reviewing the IOD report and providing further information and clarification to help answer questions that could not be answered until we were able to discuss them directly with her. I said this session was helpful in resolving some discrepancies and providing some more details, and I would take this information into consideration in concluding this matter.

- *RX 6: March 1, 2010 Letter Withdrawing Charges*

This is the same document as CX 19.

- *RX 7: Certification of Complainant's Interrogatory Responses*

The certification is signed by Complainant and dated May 24, 2010.

- *RX 8: Complainant's Responses to PATH's First Set of Interrogatories*

Complainant set forth her allegations under the Act. She said she, Mr. Childs, Mr. Hodgkinson, Mr. Aviles, Mr. Diaz, Administrator Regina Branch, PATH Medical Department personnel, Mr. Vason, Mr. Easterling, and possibly other employees might have information relevant to the claim. She asserted that Respondent is a covered entity under the Act.

- *RX 9: Complainant's Response to PATH's First Document Demand*

Complainant provided certain documents to Respondent, but those documents are not attached to the exhibit offered at hearing.

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[4] This is in contrast to his hearing testimony, where he stated she was out due to an off-property injury that was not work-related. (Tr. p. 162).

- *RX 25: April 24, 2009 Charge Letter*

This document is identical to CX 6.

- *RX 26: March 1, 2010 Letter Withdrawing Charges*

This document is identical to CX 19 and RX 6.

- *RX 27: Collective Bargaining Agreement Between PATH and BRS*

The section of the agreement at issue in this case is Article X, entitled "Discipline – Hearings." The relevant text states:

> Employees covered by this agreement (except as provided in Articles XIII and XIV-D)[5] shall not be disciplined without a fair and impartial hearing. Such hearing shall be held within thirty (30) days after PATH has notice of the occurrence or occurrences, which are the subject of the charge. At least three (3) days prior to the date of hearing, the employee involved will be notified in writing of the precise charge against him, and of the time when and place where the hearing will be held. PATH shall designate a hearing officer to conduct the hearing. The said hearing officer shall render his decision, which shall include a statement of the discipline assessed and the reasons thereof, within thirty (30) days after completion of the hearing, and such decision shall be in writing.

- *RX 28: PATH Book of Rules*

Complainant was charged with violating Rules N.2, N.3, and N.4. These rules state as follows:

N.2 The safety of customers and employees is, at all times, to be considered of first importance. All employees are required to exercise constant care to prevent injury to themselves and other persons as well as damage to property. In all cases of doubt they must take the safe course.

N.3 Employees shall utilize safe work practices to avoid injury to themselves and others.

N.4 Tools, materials, machines, chairs or other devices that are provided for employees' use must be inspected by the employee prior to use to ensure that they

[5] These Articles deal with temporary and new employees. As Complainant is a permanent employee who has worked for PATH for many years, neither exception is applicable.

are in proper working condition. Defective equipment must be reported to the supervisor/foreman.

B. Hearing Testimony

1. Laura Vernace, Complainant

Complainant testified she has worked in the signals department at PATH for twenty years. Fred Childs is the top manager in her department. PATH has safety rules with which she is familiar, and all employees must follow these rules. (Tr. p. 215).

According to Complainant, PATH provides some tools and equipment for signal people to use, but does not provide chairs. No written criteria exist for inspecting chairs prior to sitting in them. (Tr. p. 217). PATH does not provide any training on this issue. Complainant testified she sees people sit every day without conducting any special inspection; they just look and sit. She has never seen anyone turn over a chair to inspect the underside. People often move chairs to different locations and then sit. (Id. at 218). Complainant does not know of any other employees charged with a violation for failure to inspect a chair. (Id. at 219).

Complainant said she always checks chairs before sitting because she has a disability. She has had three spinal fusions and a laminectomy, and has spinal stenosis. Therefore, she always pushes on the seat of the chair before sitting to make sure it is stable. (Tr. p. 219). She said no managers have ever disciplined her when they saw her do this, and there was never any reaction to her usual visual inspection, either.

On April 1, 2009, Complainant was working at the World Trade Center ("WTC") from 11:00 p.m. to 7:00 a.m., testing track relays in the main relay room. She said she usually sits when she writes because it is easier than standing. (Tr. p. 220). Her job requires her to fill out Federal Railway Administration ("FRA") cards to prove they tested the relay on the relevant date, along with other information. Her fellow testman reads out values and she writes them down on the cards. (Id. at 221). Her colleague gets the information from the relay itself.

When she decided to sit, Complainant scanned the room and saw a cushiony black chair, which she dragged over to her work site. She said she chose it because she could not sit on the hard wooden bench due to her spinal stenosis, and another chair in the room had no wheels and was too heavy for her to drag over. She said this one looked comfortable and had wheels, and appeared to be brand new. When she eyed the chair, she saw no warning tags or signs. (Tr. p. 222). She physically touched the chair and rolled it by grabbing the back and pulling it a distance of possibly twenty feet. She did not see anything wrong with it, so she used it. (Id. at 323).

Complainant testified that when she first sat, nothing happened for at least five to ten minutes while she sat on the front part of the seat and then solidly in the middle. (Tr. p. 223). She said she usually leans back to talk to people because looking up is difficult due to the fusions and metal in her neck. When she leaned back on the chair to talk to her coworker, it flipped over. She hit her head on the relay rack and the wheels shot forward. She did a complete flip and landed face-down on the floor. (Id. at 224). Complainant said she had not leaned very hard against the

chair back, and she did not hear any cracking or breaking sounds. She said it had been a few months since she was last in that room, but other workers do use it and would have occasion to sit in the chairs on a daily basis. (Id. at 225).

PATH's rules require employees to report injuries immediately, but no later than the end of the work tour; Complainant's work tour ended at 7:00 a.m. (Tr. p. 226). She said she called her supervisor around 4:30 a.m., filled out accident report, and went upstairs to give it to him. The exhibit marked CX-3 is the report she filled out and is in her handwriting. (Id. at 227). She said she indicated her left and right shoulders, neck, and right elbow were injured, and she had a headache. (Id. at 227-28). She marked "n/a" for inspection because she did not consider the chair her equipment, as it does not belong to her, and it is not a tool. She clarified that she was about to call her supervisor when he called her about a vacation or something, and she told him she was about to bring up the injury report. She brought it to him in person and explained what happened. (Id. at 230). He told her she violated something and he would have to write it down, and she replied that she did what everyone does. He then wrote that she hadn't inspected the equipment and she protested, saying she did not consider the chair her equipment but even so, it looked fine to her. (Id. at 231). He said he had to cite her for something, and she asked why. (Id. at 232).

Complainant said she does not know of any prohibition against Mr. Childs calling her for clarification of work incidents or injuries, and she would have been willing to provide the information. (Tr. p. 232). However, she never heard from him or any other supervisor, such as Mr. Aviles, until she received a letter dated April 24, 2009 which ordered her to report for a hearing. (Id. at 233). Complainant said she was very upset by the letter because nobody had reached out to her to clarify their questions. (Id. at 234). The first thing she did after she received the letter was to call Clyde Easterling, and he said he would call Mr. Childs. She said she considered the letter and hearing to be very serious. (Id. at 235). This is because she had never seen anything like it before and thought a lot was at risk, like money, lost time, and promotions. She said she told Mr. Easterling what she had done to inspect the chair, and that she would never sit on an already-broken chair with her medical condition. (Id. at 236). She said she definitely would have talked to Mr. Childs if he had asked, as she has done it in the past. (Id. at 238).

Complainant identified CX-8 as a copy of the letter she sent OSHA, which was produced at her direction as a result of discussions with her attorney. (Tr. p. 239). A copy of the charge letter is attached to the exhibit.. (Id. at 240). She said she cooperated with OSHA investigators and was interviewed by them. She later received a letter rescheduling the hearing. (Id. at 244). At the time, she was hospitalized and could not go to the post office, so the letter was brought to her at the rehabilitation center. She said she became very upset because she was already stressed and in pain, and she thought Mr. Easterling might have been able to resolve things. Complainant returned to work on December 1, 2009 but had some extra vacation days to use before the end of the year, so she was out occasionally. (Id. at 247). She was back to work every day starting in January, and would have talked to Mr. Childs if he had called her while she was on the property. (Id. at 248).

By letter dated February 9, 2010, Complainant was ordered to report to the eighth floor conference room on February 17 for a hearing. She said she felt the same way she had before. (Tr. p. 248). Up to that point, she thought things might have calmed down and worked

themselves out after she returned to work. She called Mr. Easterling after receiving the letter, which arrived on February 16. (Id. at 249). She told him she did not want to go for the hearing and he should contact whomever he had to contact. (Id. at 250). However, she did appear for the hearing, as scheduled, with Mr. Easterling. (Id. at 251). He and Mr. Childs had a discussion, and the hearing was cancelled at that time with the offer of an informal meeting. She accepted the offer and the meeting was held that morning in a room at the back of the eighth floor. (Id. at 252). Mr. Childs was there with Brian Hodgkinson, the chief supervisor of maintenance, who works over her. (Id. at 253).

At the meeting, Complainant did not see Mr. Childs or Mr. Hodgkinson do anything special as far as inspecting their chairs. (Tr. p. 253). She said she was very distressed at the meeting and had a physical reaction. (Id. at 256). Her hands started shaking, her head hurt, and she wanted to leave. (Id. at 262). After she left, she went to the Journal Square medical department, which is on the main concourse floor of the building. She said she sometimes goes there to have her blood pressure checked by Charlene, a nurse at the PATH medical department. She had it checked that day. (Id. at 263). The initial reading was 170/110, whereas her readings are usually very low, around 100-110/65-70.[6] Afterward, she sat for awhile, took medicines, and relaxed. Complainant said she cannot work when her blood pressure is high. (Id. at 270). Twenty to thirty minutes later, it had gone down to about 130 or 140/89, so she was able to leave. (Id. at 271).

Complainant believes PATH discriminated against her on the basis of the injury report she filed because nobody else has ever been penalized for something like that. (Tr. p. 271). She wants PATH to remove everything related to the charge letter from her file, as though it never happened. She also wants them to pay damages and pay her lawyer. She said she had to take two days of vacation for this hearing. (Id. at 273). She thinks her hourly wage is $36.11, which means that an eight-hour day would amount to lost pay of $288.88. (Id. at 273-74). She was under the impression she would not be getting her regular pay for the days she spent at the hearing. (Id. at 274).

On cross-examination, Complainant said she not been in signal room for about six months before her accident, as she was out of work from October 31, 2008 through March 7, 2009. In the past, she had worked in signal room and had experience with the chairs there. (Tr. p. 275). Eight years before, she took issue with the chairs there, but those were not the same chairs which were in the room on April 1, 2009. (Id. at 283). The chairs had been in such bad shape, she said, she brought a chair from Journal Square down to the signal room. That chair was in the room on April 1, 2009, but she didn't use it because it had been crushed. Instead, she used the chair marked as RX-29, which was leaning up against a wall near the picnic table. (Id. at 284).

[6] By affidavit dated September 20, 2010, Charlene Sampson-Wright stated she is a senior nurse at PATH and works at the Journal Square Medical Center. She said she has taken Complainant's blood pressure in the past and is aware Complainant says she took a reading on February 17. She said any blood pressure reading above 140/90 must be reviewed by a staff physician, and it is office practice to make an entry in the employee's chart if such evaluation takes place. She reviewed Complainant's records and said there was no notation, thus she was confident Complainant's blood pressure could not have been 170/110 on that day. As I permitted Employer to obtain and submit this affidavit posthearing, I hereby mark and admit it as RX 30.

The chair she had previously brought over was in the maintainer's room, and Complainant said she does not use the chairs from that room. (Id. at 286). She said she had not brought the chair from Journal Square solely for herself; it was available for anyone to use. (Id. at 287). When Complainant was deposed, she said she had not used the chair she once brought to the signal room because it was farther away and the cushion padding was squished. (Id. at 289). She said a bunch of chairs, the picnic table, and the wooden bench had showed up in the signal room during a cut in, but did not remember the exact date. (Id. at 291). She had seen the chair involved in the incident in the signal room before but could not remember when it showed up and had no sense of how long it had been there or how it got there. She did not know whether it was brought there by PATH or not. She did know that chairs in the room several years before had been broken. (Id. at 292).

The chair incident was not the first time Complainant had been ordered to go to the eighth floor conference room, but this was different because it was for a hearing. (Tr. p. 276). A couple other times, she had meetings regarding attendance issues; she received a letter about that in 2004 and a few others between 2004 and 2009. (Id. at 277). Her attendance records are marked exhibit RX-2-e. (Id. at 278). She testified that anytime she goes upstairs, she brings a union representative with her. (Id. at 282).

During her April 1, 2009 shift, Complainant worked with Orlando Vason. He was the lead man, but she said he was not responsible for her safety in the workplace; it is her understanding that everyone does their own work with no responsibilities for each other. As a testman II, Mr. Vason was responsible to ensure things were safe around the track area and acted as the leader by telling her what they were doing that night. (Tr. p. 293). He also used the radio and checked the monitor to make sure the trains were in safe positions for them to test relays, but she sometimes checks the monitor, as well. (Id. at 294).

Complainant said she considers filling out an injury report optional, not mandatory, because a lot of people get hurt and do not fill it out. However, she said she always fills the form out regardless of the severity of the injury. (Tr. p. 303). She said she understands that if she does not follow PATH rules, she is subject to counseling, reprimand, and/or discipline. She has known this since she started working for PATH, in the early 1990s, and has had training on the rules. (Id. at 304). She is required to report injuries immediately or before end of her tour of duty, and said she did report the chair incident before the end of her tour. (Id. at 306).

In Complainant's opinion, she could not have broken the chair unless she was really heavy. (Tr. p. 307-08). She said she never made any changes to the injury-on-duty form after giving it to Mr. Aviles. She was present when he filled out his portion of the form, and Eddie Diaz was there for a little while but then left. (Id. at 308). He went to take photos, which she understands to be the ones attached as hearing exhibits. She thought the photos were taken between 5:30 and 6:00 a.m. (Id. at 309). She said she did not hear any cracking sounds when the chair collapsed, but it is her understanding that the plywood was cracked completely through as depicted in the photos Mr. Diaz took. (Id. at 310). Although nothing on the form indicates she affirmatively inspected the chair, she testified she wrote "N/A" because she does not consider the chair to be her equipment or a tool. (Id. at 311). She received medical attention during her prearranged appointment in the medical department that morning. (Id. at 313).

Complainant testified she was not discharged as a result of receiving the charge letter. (Tr. p. 325). Nor was she demoted, suspended, or reprimanded. (Id. at 326). However, she said she did not walk out of the informal meeting knowing the charge letter had been withdrawn, and did not learn of this action until she got a registered letter. (Id. at 332).

2. Clyde Easterling

Mr. Easterling testified he has worked in the railroad industry for twenty-eight years, all at PATH. (Tr. at 21). He worked his way up to acting signal supervisor; the signal division is primarily concerned with the safe movement of trains through signal alignments, switch movement, and relays. Fredrick Childs is the top manager in the department, with the title Superintendent of Power, Signals and Communications. (Id. at 22). Mr. Easterling has been General Chairman of the Brotherhood of Railroad Signalmen, Local 60 ("BRS") for eleven years. This union represents signalmen at PATH. Before he was General Chairman, he sat on the grievance committee for nine years. His duties included negotiating contracts, representing members in discipline hearings, and filing grievances. There is a collective bargaining agreement between the BRS and PATH. (Id. at 23). He said he acts as a go-between with union members and management. (Id. at 26).

From Mr. Easterling's point of view as Chairman, nothing prevents a member of management from calling an employee to ask for clarification on the details of work-related injury or incident. (Tr. at 24). There is only one specific situation where calling an employee on medical or sick leave is prohibited, and that scenario is not applicable here. (Id. at 27). Mr. Easterling said he is familiar with the PATH disciplinary process because he has been involved with the union for over twenty years. (Id. at 28). He defined progressive discipline or cumulative discipline as meting out discipline where appropriate that is measured and fits the circumstances. The consequences can range from a formal reprimand and warning to termination, as well as various intermediate levels such as suspensions. A record of such discipline goes in an employee's file. (Id. at 29). The level of discipline is greater if the employee has a previous disciplinary record. (Id. at 31).

A charge letter orders an employee to appear at a certain time and location, and Mr. Easterling was not sure whether pending charges have any effect on employees; pending discipline does. (Tr. p. 33). He takes these letters seriously because they are the first step in the disciplinary process, which may lead to the potential imposition of discipline and loss of income from suspension or termination. (Id. at 34-35). Mr. Childs files the charges in his department. (Id. at 35).

A charged employee has no right of discovery prior to disciplinary hearing, and can only hope for cooperation. At the hearing, a court reporter is present to produce a transcript. (Tr. p. 37). The hearing officer is a senior manager from PATH, and Mr. Easterling said it is sometimes the same person who brought the charges. Evidence might be presented directly or through witnesses, and the hearing officer determines admissibility. The hearing officer also decides whether employee is guilty of the charges. (Id. at 38). Mr. Easterling said he can only remember one not guilty finding in eleven years, which is why he takes charge letters so seriously. (Id. at 42, 72).

Mr. Easterling said PATH provides hand tools and personal tool bags to signal department employees, along with shared equipment and supplies. Signalmen are not provided with their own personal chairs. (Tr. p. 42). There is no written material or training on how to inspect a chair, and although he has seen managers and employees sit in chairs often, no one ever turns them upside-down to inspect the bottom before sitting. (Id. at 43). People sometimes roll or move a chair before sitting in them. Frequently, when working in groups, managers see employees look at chairs and then sit down, and he has done this himself in the presence of managers. Nobody but Complainant has actually been disciplined for failure to inspect a chair. (44).

Mr. Easterling said the hearing Complainant was ordered to attend conformed to article X of the collective bargaining agreement, which governs disciplinary hearings. He received a copy of the letter in his capacity as general chairman and had a telephone conversation with Complainant. (Tr. p. 45). Afterward, he called Mr. Childs to express disappointment, dismay, and surprise about the charges, and he asked for a postponement because Complainant was still out of work with injuries. He said Mr. Childs was determined to have the meeting and would not drop the charges, but did agree to a postponement. He did not ask Mr. Easterling for any clarification at that time. (Id. at 48). Mr. Easterling then told Complainant he thought the situation was very serious because of the uncertain outcome. Although he did not know where it was going to go, in his experience charging letters generally lead to some sort of discipline after the hearing occurs. (Id. at 50).

The hearing was postponed several times while Mr. Easterling was still talking with Mr. Childs. (Tr. p. 52). By the time he received a copy of the Feb. 17th letter, Mr. Easterling was aware that an OSHA investigation was pending and thought it would be better for PATH to drop the charges. (Id. at 54). He arrived with Complainant at the scheduled time for the hearing and was told it would be postponed because PATH was not ready to go forward at that time. PATH offered an informal discussion to clarify things and see where it led. After discussing this with Complainant, Mr. Easterling decided to go forward with the meeting. (Id. at 55).

Superintendent Childs and Chief Supervisor Hodgkinson sat across the table from Complainant and Mr. Easterling. Mr. Hodgkinson has managerial authority and is in charge of power, signals, and communications. Mr. Easterling noted that the PATH managers did not inspect their chairs before sitting, but simply pulled the chairs out, glanced at them, and sat down. (Id. at 56). During the meeting, Mr. Childs asked Complainant how she had inspected or looked at the chair. She responded that she looked at it, pulled it, felt that it didn't wobble when she was pulling it, set it up near her work site, then sat down on it and started doing work. Some time later, it collapsed. During the meeting, Mr. Childs called in Supervisor Ed Diaz and Complainant got agitated. (Id. at 57). Mr. Easterling said he would characterize her as upset because of the process. (Id. at 58).

On cross-examination, Mr. Easterling testified that there is an appeal process after the hearing occurs. The hearing officer has thirty days to make a decision and notify the individual and the general chairman, and if there is finding of guilt and discipline, it can be appealed. The first level of appeal takes place on PATH property. The union notifies the president or general manager of PATH, who refers the issue to the labor relations department, which then schedules

the appeal hearing. Cynthia Bacon is the chief labor negotiator for PATH. (Tr. p. 61). In Mr. Easterling's estimation, the appeals board always sustains the hearing officer's decision. (Id. at 62). The next level of appeal is to the national mediation board, railroad adjustment board. (Id. at 63). There, a third-party referee is present. PATH can also opt to withdraw charges or come to some sort of agreement instead. Mr. Easterling tries to use any informal and formal appeals processes he can on behalf of his members. (Id. at 64).

Although Mr. Easterling has been involved in union duties for many years, he has not sat in on every case because some duties are shared. (Tr. p. 70). He said the occasions on which charges are withdrawn are at the carrier's discretion. He tried to make that happen here, and it took ten months before they were withdrawn after the informal meeting on Feb 17. (Id. at 77). He has successfully done this in other cases, too. (Id. at 78). Sometimes there are other considerations in having the charges withdrawn, such as retraining, consideration of long-term service, or other issues. He would not say that withdrawal of charges is a regular occurrence. (Id. at 81).

Mr. Easterling testified he was not a witness to Complainant's accident. (Tr. p. 83). His understanding is that injuries must be reported before the end of the tour of duty, and employees who have reported injuries later have had their reports rejected and returned to them. (Id. at 85-86). He said he was familiar with Complainant's injury report when he talked to her. (Id. at 86). However, he did not have access to every document contained in exhibit RX-3 at that time. (Id. at 89). He said he had access to the injury report and was aware of Mr. Aviles's side of it, but did not have any photos. He had access to Mr. Vason's statement but did not have access to the medical information or Mr. Greenfield's statement, and did not know if he saw Mr. Aviles's actual statement. (Id. at 92). He said that not all injury reports come to his attention, and he only sees them if the member decides to involve the union. (Id. at 94). Mr. Childs, however, would have had access to Complainant's file including her previous injury reports. (Id. at 99).

3. Frederick Childs

Mr. Childs testified he is the superintendent of the PATH power, signals and communications division. This is the top position in that department, and he supervises one hundred eighty employees. He is responsible for the overall management and oversight of the division. (Tr. p. 116). Mr. Childs said he interprets and applies PATH's safety rules within his division. (Id. at 118). He has discretion whether to charge an employee with a violation of the rules. (Id. at 121).

Mr. Childs testified there is a collective bargaining agreement in place between PATH and the BRS, and Article X governs the conduct of disciplinary hearings. (Tr. pp. 121-22). Disciplinary hearings are called at his discretion, which he said depends on the circumstance of the situation and whether he feels it is appropriate. The hearing officer assigned to the matter also depends on circumstances, and can be a supervisory employee within his division or any other division of PATH. Part of the hearing officer's duties is to present evidence as it exists at that point. At the end, the officer recommends whether the charge is to be sustained or not. (Id. at 122).

According to Mr. Childs, PATH has a safety department which issues monthly reports describing employee injuries throughout the company. The company makes every effort to promote safe work and injury avoidance, and to make sure people are not injured on duty. (Tr. p. 123). PATH also has a law department available to answer questions when appropriate and necessary. (Id. at 124).

Mr. Childs did not recall when he first became aware of the FRSA, but said it had been a matter of years. He could not be more specific, as a number of new federal laws and regulations had applied over the past few years. (Tr. p. 125). Nor could he recall whether he had ever sent a memo or email or had a meeting with the immediate managers below him to talk about the FRSA. (Id. at 128-29). He did not think he changed the way he conducts his department based on any of the provisions of the Act, but he said he is aware of it and thinks some aspects are not entirely clear. (Id. at 130). He had not heard of PATH's internal control plan and had never even heard the term. (Id. at 130-31).

Mr. Childs thought he probably saw Complainant's injury report the same day the injury occurred, and said there is no question she reported an injury on that date. (Tr. p. 131). PATH became aware she had reported the injury either that day or shortly afterward. PATH requires a list of all injury on duty to be attached to each injury report, and this list is the fourth page of the exhibit. Mr. Childs did not know why this is required, but said it is just part of the record and establishes the history of injuries, if any. (Id. at 132).

The department provides some tools and equipment to signal testers and signalmen, Mr. Childs said, but does not provide them with their own chair. (Tr. p. 132). No particular set of chairs is assigned to signal testers or signalmen, to his knowledge, though some may be provided in locker rooms or relay rooms where individuals are assigned on a regular basis. He did not know of any written criteria on how to inspect a chair, and said no training is given on how to inspect chairs. (Id. at 133). He does not feel that everyone should always turn chairs over to inspect the bottom before being seated; he has seen managers sit in chairs without turning them upside down and has done it himself. He thought it was consistent that people usually look at the chair, determine whether it seems safe and suitable, and then sit. (Id. at 134). He said he does not know of anyone other than Complainant who has been charged with violating Rule N.4 regarding chairs. (Id. at 135).

Mr. Childs testified he was aware of Complainant's injury report prior to actually seeing the injury report. (Tr. p. 135). He said he filed disciplinary charges because the injury report was incomplete, he did not have sufficient evidence and information at that time, and the violation she was charged with was a safety rule violation, not the report of injury. He based his decision on his review of the injury report and the supervisor's statement in that report. (Id. at 137). Mr. Childs said the first indication the chair had been broken was Complainant's injury report, and it was subsequently determined there were no other reports that anyone was aware of the defect. He felt the injury raised some questions that could only be answered by Complainant. (Id. at 141). Mr. Childs acknowledged it was not necessary for him to file disciplinary charges without talking to Complainant first. However, she was out of service for several weeks and the collective bargaining agreement contains a time limit of thirty days from the date of the incident

to file charges. He said the reason he initially scheduled the hearing for April 30, 2009 was to meet that time limit. (Id. at 142).

Whenever an employee is out due to illness or injury, Mr. Childs is reluctant to attempt to contact them because the union has made it clear on many occasions they think this is inappropriate and people should be allowed to recover undisturbed. He said there has been at least one grievance filed by the union related to ordering people to the medical department for a fitness determination while they are out sick. Also, he said the federal regulations for hours of service specifically prohibit PATH from contacting employees who are on duty in normal service during their off-duty hours. (Tr. p. 143). In general, Mr. Childs said he does not think it appropriate to make a personal phone call to an employee at home while they are off duty, and he thinks phone calls are less desirable than face-to-face conversations because the employee may want a union representative present. However, nothing in the collective bargaining agreement prohibits phone calls. (Id. at 144). Mr. Childs also said he did not get any useful information from Mr. Easterling during their discussions. (Id. at 145). Mr. Childs said Complainant was not back on duty steadily until sometime in January 2010. He did not talk to her about the incident while she was on the property, and did not call her at home during that time, either. (Id. at 157).

In May 2009, Mr. Childs received a letter from OSHA. (Tr. p. 147). He could not remember whether a copy of the complaint was enclosed, but said there was a series of exchanges following that letter. (Id. at 148). He said he forwarded the documents to PATH's law department immediately after he got them, so he does not have the original documents. The copy of the Complaint introduced as CX 8 looked familiar, but he was not certain it was the exact document he read. (Id. at 151).

At the meeting on February 17, Complainant, Mr. Easterling, and Complainant's chief signal supervisor, Brian Hodgkinson, were present along with Mr. Childs. He said he asked Complainant questions and clarified the incident to his satisfaction. (Tr. p. 158). She said at the meeting that she felt she had made a reasonable observation of the chair before sitting and didn't experience any problems until she leaned back. Mr. Easterling withdrew the charges, and said he tries to make sure withdrawal memos are specific to the case so they are not used as precedent for other cases in the future. (Id. at 161). When asked whether he could have gotten the information before filing the charge letter, Mr. Easterling said Complainant had been hospitalized as the result of an off-duty, off-property injury shortly after the chair incident. When she returned to work, it was a matter of scheduling because she was in and out and he may have had other priorities and situations at the same time. By that time, the formal process had already been initiated and he felt the hearing was the proper way to resolve it. (Id. at 162-63). He did say it may have been possible to get the information before the February 17, 2010 hearing date, though. (Id. at 163).

Mr. Easterling testified he does not know how the chair got to the WTC signal room, and he never heard anything from the other signal repairmen who had been assigned there about a broken chair. (Tr. p. 164). Nobody else was charged with a violation of the rules in connection with that incident, nor has anyone else has been charged with the same violation with respect to chairs. (Id. at 165).

On cross-examination, Mr. Easterling said he did not serve the charge letter in retaliation for Complainant filing an injury report. (Tr. p. 166). When Complainant was injured previously, on April 12, 2008, Mr. Diaz also said safety rules and safe work practices were not being followed. (Id. at 171). However, Mr. Easterling exercised his discretion at that time not to file charges. (Id. at 172-73).

Mr. Easterling said the exhibit at RX-3 is pretty much the entire file from the end of the investigation, including the initial documents and the ones filled in afterward. (Tr. p. 174-75). Two handwritten reports from signalmen were missing. (Id. at 175). The original exhibit, which was not in the witness binder, had the original Polaroid photos and the missing handwritten statements. (Id.) He felt the implication from the injury report was that the chair was broken prior to Complainant's use, and he also based this assumption on her response that she had not inspected the chair. (Id. at 177). He said part of what he tried to ascertain through the investigation was whether any other violations of safety rules occurred, but the evidence did not reveal any. Other employees were asked to provide information about the history of the chair, how it got there, who knew about it, whether anyone knew it was broken prior to incident, why it was there, and why it wasn't labeled or removed if anyone knew it was broken. The supervisors asked for Mr. Vason's statement because he was the witness. (Id. at 180). They also took a statement from Mr. Aviles because the process was taking a long time and they wanted to preserve his recollections. (Id. at 181).

Mr. Easterling said the investigation lasted at least several days following report of accident. (Id. at 182). The photographs showed serious damage to the bottom plywood support of the chair, and he thought it would have taken a fairly substantial force to damage it to that extent. Mr. Easterling felt that leaning back and having the chair roll out from under a person should not cause so much damage, so he could not tell what had happened. He thought a person pushed or pulled the chair from a distance in another part of the room would have noticed such a defect, and this raised questions in his mind that were not answered by the information he had. Also, there were several other choices so he did not know why she chose that particular chair. (Id. at 188).

In any situation where there is a potential rule violation, Mr. Easterling consults with labor relations to determine an appropriate response and action. (Tr. p. 183). In this case, he consulted Ms. Bacon. They discussed generally the decisions he was contemplating, but he did not remember the specific details of the conversation. Mr. Easterling said he is obligated to justify his actions and does not want to charge individuals unnecessarily. Here, he felt he had reasonable grounds to conclude there was a rule violation based on the information and evidence they had at the time. (Id. at 184). He said safety violations are also charged in non-injury situations and can stem from a supervisor's report, another employee, or an external party. He reiterated that he does not file charges for safety violations just because someone submits an injury report. (Id. at 185).

4. Ed Diaz

Mr. Diaz testified he works for PATH as a midnight supervisor for the signal department. He was working the night shift on April 1, 2009 when it came to his attention that Complainant

had an accident. He did not hear this directly from her. (Tr. p. 353). He said he was not asked to take photos, but doing so was just part of his job. He went down to the WTC signal room. (Id. at 354). He testified that the photos in evidence are the same ones he took that night, and the chair which was brought to the hearing room is the same one he photographed. (Id. at 355). He said the chair does not look like it has been changed at all since he took the photos. (Id. at 356).

5. Paul Aviles

Mr. Aviles testified he works for PATH as a midnight signal supervisor. (Tr. p. 358). He was on duty during the early morning hours of April 1, 2009, when it came to his attention that Complainant had an accident. He recognized the injury-on-duty form as the one he had seen that night. (Id. at 359). He said he had a phone conversation with Complainant first, and then had to conduct an interview which happened in his cubicle. (Id. at 359-60). He went over the form line by line as he filled out his portion. He also had the portion she had filled out available at that time because it is part of the same document. He said he got the information for his portion from Complainant. (Id. at 360). He testified that he asked her whether she checked the chair before use and she said no, which is why he marked "no" on the form. (Id. at 361). He then told her he was going to write that she didn't follow safe practices. When he came to the back of the form, he told her he was not sure whether the chair was considered a tool or equipment that she used on a daily basis, so he needed to get clarification from his supervisor, Mike Caluccio, which he did. (Id. at 362).

Mr. Aviles said he gathers facts by starting with an interview of the injured employee. If any questions remain, he is later asked about it. He also gets letters from witnesses to the accident. If he was present when the accident occurred, he also writes a letter, but he was not there when Complainant was injured. (Tr. p. 364). He said he spoke to Complainant in person during the early morning hours of April 1, 2009 and asked what had happened so he could fill out the report. (Id. at 366). She told him she had grabbed the chair by its back and pulled it to the work site. (Id. at 367). He did not know whether she looked at the chair, but said she must have seen it in order to select it and pull it across the room. She did not explain to him whether it had any visible damage or seemed fine to sit in. (Id. at 368). Instead, he was just told she had grabbed it and sat in it. (Id. at 369).

When Mr. Aviles sits in chairs, he said, he looks to see whether they appear normal, suitable, and safe. (Tr. p. 365). Others do the same, and he has never seen anyone turn a chair over to check the bottom. However, he feels an office environment differs from the relay room, which is a work area. (Id. at 369). He said it is unusual to find a chair in a relay room, but they were present in this particular room because an office is attached. (Id. at 369-70). He said people sit in chairs that appear normal in the relay room, just like anywhere else. (Id. at 370). Mr. Aviles said, though, Complainant told him she did not inspect the chair before use; he believes a look is different than an inspection. (Id. at 371).

6. Cynthia Bacon

Ms. Bacon testified she is employed as the chief negotiator for PATH. (Tr. p. 375). She has three major responsibilities in this role: to negotiate agreements between PATH and the

unions, dispute resolution of disciplinary issues and grievances, and contract administration. She said she is familiar with the agreement between PATH and the BRS. The exhibit marked RX-27 is the text of that agreement. (Id. at 376). Under Article X of the agreement, BRS members may not be disciplined without a fair and impartial hearing. The method for scheduling the hearing is through a letter, typically called the charging letter, which invites the employee to an investigation, (otherwise known as a hearing). (Id. at 376-77). After the charging letter is issued, the contract provides that a hearing must be held within 30 days after PATH has notice of the occurrence which led to the charge. The employee must be notified of the precise charge three days prior to the hearing, and a postponement can be granted if the union's general chairman requests it. (Id. at 377).

Occasionally, the parties have conversations about the charges or discussion information and evidence which would be shared at the hearing. Ms. Bacon said the hearings are not legal proceedings, they are administrative processes. She described the hearing as more or less a fact-finding session between the hearing officer and the employee, who can have a union representative present. There are no rules of discovery or evidence, and nobody is sworn. A record is retained. (Tr. p. 378). She said further dialogue and clarification of the circumstances which led to the charge may sometimes lead to a withdrawal if the superintendent feels satisfied that the question has been asked and answered and there is no basis for the charge. Alternatively he could decide to issue counseling rather than hold a hearing. (Id. at 379). Ms. Bacon testified she discussed this matter with Mr. Childs prior to the issuance of the charge letter, and also participated in discussions with him about withdrawing it. (Id. at 379-80).

Ms. Bacon said that, over time, Mr. Easterling has made it clear to PATH he does not want his members contacted during periods of sick absence, but there is no language in the collective bargaining agreement restricting PATH from doing so. In the interest of labor-management harmony, PATH has always abided by that preference and will extend, adjourn, or postpone hearings when necessary. (Tr. p. 381). She said PATH gets notice of violations if someone directly observes it and files a report; if passengers or employees report on an employee's behavior; by observation on video monitors; or through a variety of other ways. (Id. at 382). The potential outcomes from a disciplinary process are that the charges are either not sustained, withdrawn, and record is expunged; the charges are sustained or partially sustained; charges are withdrawn prior to the hearing; or the time limits are exceeded. (Id. at 385). Ms. Bacon could think of at least seven times since 1996 that charges brought against an employee in the power and signals division were not sustained or were partially not sustained. (Id. at 387). She did not know how many of the seven cases she mentioned resulted in fully not-guilty finding. (Id. at 389).

According to Ms. Bacon, when a charge is withdrawn, it is generally expunged from the employee's record. In some cases where charges are withdrawn, a counseling letter is written in exchange and is placed in the file. There may also be a reference to the fact that the charges were withdrawn. (Tr. p. 387). She said a counseling letter is not considered discipline. She agreed it is important not to file unnecessary disciplinary charges, and that it is important for the person filing charges to gather all the available information regarding the incident to determine whether a charge is appropriate. (Id. at 389-90). Ms. Bacon said the superintendent has the discretion to drop a charge, and it is true that clarifying information sometimes leads to dropped or withdrawn

charges. She knew of nothing in the collective bargaining agreement that prevents or restricts PATH from contacting employees for clarification before filing charges. (Id. at 390).

Ms. Bacon said she had heard of FRSA at least a year ago, or maybe more. She understands it prohibits retaliation against employees when they report work injuries. (Tr. p. 394). She could not remember having any conversations with Mr. Childs about the Act prior to this case.

Ms. Bacon described the hearing and appeals process at PATH. She said a stenographer is present at the hearing, as well as a hearing officer who is a manager at PATH but can be from a different division than the employee's. The hearing officer calls witnesses, produces documents, and presents the evidence PATH wants in the record. (Tr. p. 396). She said the hearing officer can restrict or not restrict the evidence presented. Because it is an administrative process, though, the hearing officers are told to let all the information come in and sort it out later. She said the evidence is generally not restricted because the hearings are fact-finding sessions, but the person asking for admission of evidence may be asked about the relevance to the situation. Even so, the hearing officer does have the authority to prevent particular witnesses or exhibits from being introduced. (Id. at 397).

The collective bargaining agreement does not provide for discovery, Ms. Bacon said, but the union generally discusses the situation with the superintendent. She did not know of many cases where there some sharing of information, witnesses, and reports does not occur. She said that generally, if union chairman asks for information, it is provided or he is given ample time at the hearing to review it. (Tr. p. 398).

According to Ms. Bacon, the record developed at hearing goes to the next level of management when there is an internal appeal. Then, if the union is not satisfied, there is an appeal to an arbitrator off the property. (Tr. p. 399). The arbitration is a three-person event, with an independent arbitrator, a union representative, and a PATH representative present. (Id. at 399-400). She said the independent arbitrator cannot go beyond the bounds of the record previously developed. (Id. at 400). However, she said PATH allows additional information to be considered on appeal despite there being no provision for it in the agreement because the company does not want people inappropriately found guilty of charges. (Id. at 402). She said discipline cannot be implemented without a hearing, and in order to have a hearing, a charge letter must be sent according to terms of the agreement. (Id. at 404).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Coverage Under the FRSA

On July 16, 2010, Respondent filed a Motion for Summary Decision, asserting lack of jurisdiction due to PATH's sovereign immunity. I reserved decision on this motion. In filings dated November 9, 2010 and November 12, 2010, Respondent withdrew its jurisdictional argument after determining it was inapplicable in this context because the record had not been sufficiently developed on that issue.

The FRSA applies to any "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." 49 U.S.C. § 20109(a). Respondent is a rail carrier engaged in interstate commerce, carrying passengers between New York and New Jersey. I find Respondent is a covered employer under the FRSA.

B. Applicable Provisions of the FRSA

The Act provides, in relevant part:

> (a) In general.--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—
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> ***
>
> > (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. § 20109(a). If an employee prevails in a claim of discrimination, remedies available under the Act include "all relief necessary to make the employee whole," such as reinstatement with the same seniority status the employee would have had if the discrimination had not occurred, backpay with interest, and compensatory damages including litigation costs, expert witness fees, reasonable attorney fees, and compensation for any "special damages sustained as a result of the discrimination." 49 U.S.C. § 20109(e). Punitive damages may also be granted in an amount not to exceed $250,000. 49 U.S.C. § 20109(e)(3).

The Act incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. §42121 (2011). See 49 U.S.C. § 20109(d)(2). AIR 21, and therefore FRSA, requires a complainant to prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. 49 U.S.C. §42121(b)(2)(B)(2011). A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); see also Barker v. Ameristar Airways, Inc., ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; Hafer v. United Airlines, Inc., ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

The regulations promulgated to administer cases brought under the FRSA are found at 29 CFR Part 1982. They incorporate the General Rules of Practice and Procedure before the Office of Administrative Law Judges ("OALJ"), which are found at 29 CFR Part 18.8.[7]

C. Elements of FRSA Violation and Burdens of Proof

1. Protected Activity

Complainant testified she filed an injury-on-duty report after she fell from the chair on April 1, 2009. (Tr. pp. 226-27). The managers who testified on behalf of PATH did not contest that such report was filed. (Tr. 131, 359). A copy of the report has been admitted into the record. (CX 3).

I find Complainant engaged in protected activity under the Act by filing on an injury-on-duty report. These reports are clearly a method by which an employee may notify an employer of a work-related personal injury or work-related illness. See 49 U.S.C. § 20109(a)(4). Moreover, she did sustain a personal injury, as detailed in her report. This element is satisfied.

2. Knowledge of Protected Activity

Complainants must generally go beyond establishing that the employer, as an entity, was aware of the protected activity; they must instead show that the decision-maker who carried out the allegedly adverse action was aware of the protected activity. See Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-00038 (ARB Jan. 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004).

Here, there is no question that PATH and the relevant decision-maker, Mr. Childs, were aware of Complainant's protected activity. Mr. Childs testified he became aware that Complainant had filed an injury report later in the day on the same day the incident occurred. (Tr. p. 131). He also testified it is within his discretion as superintendent of the power and signals division to bring charges against employees who work under his authority. (Id. at 121). He also has the power to drop charges once they have been filed, if he deems it appropriate. (Id. at 153). In this case, he did file the charges against Complainant and engaged in discussions regarding the postponement of the scheduled hearings, the informal conference that eventually occurred, and the withdrawal of the charges. (Id. at 137, 145, 184). Mr. Childs was also present for Complainant's scheduled formal hearing, which he then downgraded to an informal conference. (Id. at 158).

Based on Mr. Childs' testimony, I find Respondent had knowledge of Complainant's protected activity.

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[7] During the pendency of this matter, on August 31, 2010, the Department of Labor issued "Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act." 75 Fed. Reg. 53,522 (August 31, 2010). These provisions, to be codified at 29 C.F.R. Part 1982, mirror the provisions set forth in the Act with regard to the parties' burdens. I find that these regulations govern the procedures to be used in adjudicating this matter.

3. Unfavorable Personnel Action

The parties disagree about whether filing charges against Complainant was an unfavorable personnel action. There is no question a charging letter dated April 24, 2009 was sent to Complainant. (CX 6). The investigative hearing was rescheduled on April 30, 2009 (CX 9), postponed on May 12, 2009 (CX 10), and rescheduled again on February 9, 2010 (CX 11). After an informal meeting on February 17, 2010, the charges were then dropped. Complainant received a letter to this effect, which was dated March 1, 2010. (CX 19).

The Act specifically prohibits an employer from taking adverse actions against employees who report injuries, including discharge, demotion, suspension, reprimand, or "any other discriminatory action." § 20109(a). The regulations provide that employers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee" for engaging in protected activity. 49 C.F.R. § 1982.102(b)(1).

Complainant contends that filing charges and scheduling a disciplinary hearing constitutes an unfavorable personnel action, even though those charges were later withdrawn. Respondent asserts that no unfavorable action took place because Complainant was not discharged, demoted, reprimanded, or disciplined in any way for filing the injury report.

The Board has held whistleblower laws in general should be interpreted expansively, as they have "consistently have been recognized as remedial statutes warranting broad interpretation and application." Menendez v. Halliburton, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, at 15 (ARB Sept. 13, 2011). In that case, the Board more broadly adopted the standard for determining what constitutes an adverse action, as initially set forth in Williams v. American Airlines, ARB No. 09-018, ALJ No. 2007-AIR-00004 (ARB Dec. 29, 2010). The language of AIR 21's implementing regulation defining adverse actions is identical to that of FRSA. See 29 C.F.R. § 1979.102(b); 49 C.F.R. § 1982.102(b)(1). Thus, I find it appropriate to apply the Williams standard in this case. There, the Board held,

> We view the list of prohibited activities . . . as quite broad and intended to include, as a matter law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline. In fact, given this regulation, we believe that a written warning or counseling session is presumptively adverse where: (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline.

Williams at 10-11. In a footnote, the Board further explained that "it is irrelevant whether the employer's personnel policies allow its employees to appeal or formally challenge a written warning. A great number of workers are 'at will' employees who have no right to appeal a suspension or termination, much less a written warning." Id. at 11 n. 52.

While the ALJ in Williams relied on Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)[8] in reaching a decision, the Board found it unnecessary to do so. Instead, the Board determined that there is a "clear mandate in Section 1979.102(b)." Williams at 12. The Board cautioned against relying too heavily on Title VII precedent when deciding whistleblower cases, because although it may be helpful, such precedent must be used carefully and measured against the safety issues faced in "hazard-laden, regulated industries." Id. at 12 n. 59. Recently, the Board revisited the proper application of Title VII standards to whistleblower claims and stated,

> Over the last decade . . . explicitly broad DOL jurisprudence has been gradually replaced by adverse action standards imported from Title VII cases, including "tangible job consequences,""significantly diminished material responsibilities" and "ultimate employment decisions." This reliance on Title VII adverse action precedent had the effect of narrowing the scope of actionable activity in direct contravention of earlier DOL precedent, which more faithfully reflected the congressional intent to provide broad protection for employees who engage in behavior Congress sought to encourage.

Menendez, ARB Nos. 09-002 and 09-003, at 20 (citations omitted). It is thus apparent that a broad range of actions may qualify as unfavorable personnel actions under whistleblower statutes such as the FRSA, where they may not qualify in Title VII claims.

The Board concluded its decision in Williams by

> clarify[ing] that the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged. Unlike the Court in Burlington Northern, we do not believe that the term 'discriminate' is ambiguous in the statute. While we agree that it is consistent with the whistleblower statutes to exclude from coverage isolated trivial employment actions that ordinarily cause *de minimis* harm or none at all to reasonable employees, an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity. The AIR 21 whistleblower statute prohibits the act of deliberate retaliation

[8] In Burlington Northern, the Court held that a plaintiff alleging retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), must satisfy the "materially adverse" test. Under that test, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in the protected activity]." Burlington Northern, 548 U.S. at 68. The action must amount to more than a "trivial harm" when the totality of the circumstances is considered. Id. at 69. The Court gave examples such as "petty slights," "minor annoyances," "personality conflicts," and "snubbing by supervisors and coworkers" to illustrate the meaning of trivial harm. Id. at 68.

> without any expressed limitation to those actions that might dissuade the reasonable employee.

Williams at 15. The Board has since reiterated that, in claims brought under whistleblower statutes, an adverse action is any action that "would dissuade a reasonable employee from engaging in protected activity." Menendez, ARB Nos. 09-002 and 09-003, at 20. In this context, I consider whether the charges filed against Complainant constitute an unfavorable personnel action.

Although Respondent asserts that no disciplinary action was, in fact, taken against Complainant, the charging letter sent to Complainant on April 24, 2009 explicitly references the potential for discipline after the investigatory hearing. (CX 7). The letter was copied to "C. Bacon, R. Bulayev, M.DePallo, C. Easterling, Employee File." The next letter, dated April 30, 2009, copied the same recipients. (CX 9). The February 9, 2010 letter rescheduling the hearing was copied to the same people, with the exception of R. Bulayev, and was also sent to the "Central File." (CX 11). Mr. Childs also wrote at least one memorandum to the file detailing aspects of the case. (CX 17). No testimony was offered as to whether the letter would remain permanently in Complainant's file and the Central File. Although Ms. Bacon did testify that the employee record is generally expunged when charges are withdrawn, she did not explain what this means and alluded that some reference to the charges may be left under certain circumstances. (Tr. p. 387).

Mr. Easterling testified that charge letters are the first step in the disciplinary process. This process may eventually lead to the potential imposition of discipline and loss of income from suspension or termination. (Tr. p. 34-35). Ms. Bacon also testified that hearings and resulting discipline, if the charges are sustained, cannot occur unless a charge letter is sent. (Id. at 404). Mr. Easterling was not sure whether pending charges have any effect on employees, although he said pending discipline does. (Id. at 33).

The witnesses testified at the hearing about PATH's policy of progressive discipline. Mr. Easterling defined progressive discipline or cumulative discipline as meting out discipline where appropriate that is measured and fits the circumstances, ranging from a formal reprimand and warning to termination, as well as various intermediate punishments. (Tr. p. 29). The level of discipline is progressively greater where the employee has been disciplined previously. (Id. at 31).

The filing of charges against an employee is not *de minimis* harm. Although Mr. Easterling was not sure whether pending charges have any effect on an employee, those charges are the first step in a disciplinary process that has the potential to culminate in a warning, suspension, or termination. Once charges have been sustained and discipline meted out, the employee is then susceptible to a higher degree of punishment if he or she commits a subsequent offense. This is likely to have a chilling effect on reasonable employees, who may be dissuaded from filing injury reports for fear of being charged with safety violations and potentially being disciplined. Indeed, Complainant said she considered the charge letter and hearing to be very serious because she was afraid that money, lost time, and promotions were at risk due to the charges against her. (Id. at 235).

The Board has held a written warning is presumptively adverse, not only where it is considered discipline, but also where it is routinely used as the first step in a progressive discipline policy or it implicitly or expressly references potential discipline. Williams, ARB No. 09-018 at 15. The letter also says, "You may be represented in this matter as provided for in Article X-F, Discipline—Hearings, of the Agreement between the parties." This is an explicit reference to the established disciplinary process, and implies the hearing may result in discipline. I find the April 29, 2009 charge letter both implicitly and expressly references potential discipline; that charge letters are the first step in PATH's disciplinary process and that it is undisputed that no discipline can occur without such a letter.

Respondent's contention that no adverse action occurred in this case because Complainant was never actually disciplined is contrary to the law. I find, under the standard articulated in Williams, the filing of charges against Complainant which carried the potential for future discipline was an unfavorable personnel action.

4. Contributing Factor

Finally, the Act requires that the protected activity was a contributing factor to the unfavorable personnel action against Complainant. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." Clark v. Pace Airlines, Inc., ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 11 (ARB Nov. 30, 2006). The legitimacy of an employer's reasons for taking an unfavorable personnel action should be examined when determining whether a complainant has shown by a preponderance of the evidence that protected activity contributed to the unfavorable action. Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006 AIR-00014 (ARB Sept. 30, 2009).

I find Complainant's injury report was a contributing factor in Respondent's decision to file charges against Complainant. Mr. Childs, who was responsible for filing the charges, testified he did so because the information listed on the injury report was incomplete or ambiguous.[9] Rather than clarify these concerns with Complainant, Mr. Childs relied on statements from other employees who could not provide him with the information he needed. Thus, his decision to file charges was based mainly on the information provided in or lacking from the injury report.

[9] Although Mr. Childs felt Complainant's responses on the injury report were incomplete or inconsistent, he never attempted to contact her for clarification prior to filing charges against her. Mr. Childs and Ms. Bacon testified this was because the union chairman does not like members being contacted while they are out of work due to sickness or injury, and PATH tries to honor this preference. However, it is not forbidden by the collective bargaining agreement. Although the record shows Mr. Childs spoke to Mr. Vason, the only witness to the accident, prior to filing charges, he testified that many of his questions could only be answered by Complainant. (Tr. p. 141).

Respondent also has not shown it would have taken the same action against Complainant had she not filed the injury report. While failure to file a report within the proper time frame would have constituted a violation of another PATH Rule of Conduct, that was not the case here. There were no witness statements attesting she had committed unsafe acts, nor was there any evidence she knew the chair was broken and chose to sit in it anyway. Moreover, the existing policies or procedures regarding the inspection of chairs were, to the extent they existed, unclear. (See CX 2, p. 21, Rule N.4). Complainant, Mr. Easterling, Mr. Childs, and Mr. Aviles all testified that most people engage in a general visual inspection of a chair before sitting in it, but none had ever seen employees regularly turn chairs over to thoroughly inspect them before sitting. (Tr. pp. 218; 43-44; 134; 365-369). Ascertaining that a chair appears normal, stable, and serviceable is the usual practice among PATH employees. Complainant testified she looked at the chair, pulled on it to move it from one side of the room to the other, and pressed on the seat before she sat; none of these actions revealed the chair's hidden defect. (Tr. pp. 322-23). In the absence of any standards or policies mandating a more thorough inspection, I find her actions adequate. =Respondent appears to have singled Complainant out for violating an ambiguous rule whichhas not been enforced against any other employee.

Quite simply, Respondent has no explanation for filing charges against Complainant except that its own standards and procedures regarding the inspection of chairs are unclear, which led Complainant to fill out her injury report in a manner Mr. Aviles and Mr. Childs felt was ambiguous or inconsistent. Rather than investigating the matter first and filing charges only when a violation was substantiated, Respondent chose to file charges based on the information contained in the injury report. On the specific facts of this case, I find a clear causal connection between the filing of Complainant's injury report and the initiation of charges against her.

VI. REMEDIES

When a rail carrier violates the Act's employee protection provisions, remedies are available to the aggrieved employee. These include, where relevant, reinstatement with restoration of seniority; backpay with interest; compensatory damages including emotional distress, litigation costs, expert witness fees, and reasonable attorney's fees; and possible punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e).

Complainant has not been terminated or demoted, thus reinstatement is not necessary here. She testified she was required to take vacation or unpaid time to attend the hearing on August 4 and 5, 2010; she did not allege any other loss of pay. I find those two days of vacation time should be restored to her or, if she took unpaid leave, she should be paid her regular wage as of the dates of the hearing.[10]

Complainant's employee file, as well as the files of other employees within the corporation, apparently still contain documents referring to the charges brought against her. Though the series of documents ultimately shows the hearing was cancelled and charges

[10] Complainant testified she thought her wage was $36.11 per hour, which amounted to $288.88 per day. (Tr. pp. 273-74). However, there is no documentation supporting this assertion. As her employer for twenty years, PATH should be in possession of Complainant's payroll records, which will establish the nature of her leave during the hearing and the appropriate rate of pay.

dismissed, I find any reference to the charges and hearing have the potential to affect her future prospects at PATH. I therefore order PATH to expunge any and all references to rule violations, charges, and the scheduling of disciplinary hearings in this matter.

Although Complainant alleged she suffered emotional distress throughout the pendency of this claim, there is insufficient support for this claim. A complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish in order to receive compensatory damages for those conditions. Testa v. Consol. Edison Co., Inc., ARB No. 08-029, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010). Here, Complainant said she was upset when she received the charge and hearing letters and at the meeting with her supervisors, and alleged her blood pressure was high after the meeting. However, the PATH nurse who took her blood pressure said it could not be as high as Complainant claimed it was. The nurse said a physician would have reviewed a reading as high as Complainant alleged and the fact that there was no physician's note in her chart meant the reading was not considered abnormal. (RX 30). Complainant did not testify about any other manifestations of anguish or distress, such as trouble sleeping or eating, anxiety, difficulty in relationships, or other, similar effects. I do not find Complainant's testimony has established a compensable injury; while I accept that she was upset about potentially receiving discipline after the hearing, the evidence Complainant submitted into the record has simply not established mental suffering or emotional anguish.

No attorney's fee petition has yet been submitted in connection with this claim. As Complainant prosecuted a successful claim, I find she is entitled to litigation costs and reasonable attorney's fees. No expert witness fees are awarded because there was no such testimony in this claim.

Finally, on the issue of punitive damages, I note the OSHA determination contained an award of $1,000. Punitive damages may be assessed in whistleblower cases to "punish wanton or reckless conduct and to deter such conduct in the future." Anderson v. Amtrak, 2009-FRS-00003 (Aug. 26, 2010), at 26 (citing Johnson v. Old Dominion Security, 86-CAA-3/4/5, (Sec'y May 29, 1991)). In determining whether punitive damages are appropriate, factors to assess include the degree of the respondent's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the respondent's actions; and the sanctions imposed in other cases for comparable misconduct. See Anderson at 26 (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001)).

I have already discussed Respondent's failure to investigate known ambiguities or discrepancies in Complainant's injury report prior to filing charges against her. However, although the harm to Complainant was sufficient to sustain her claim, I do not find the harm was so severe as to warrant significant punitive damages. She was not terminated or demoted, and she lost only two days' pay or vacation time. The greatest part of her damages is comprised of the time, energy, and money expended in litigating this claim. I agree with the Secretary's determination that $1,000 in punitive damages is warranted: Respondent should be deterred from engaging in such conduct in the future, but the specific facts of this case do not justify greater punitive damages.

ORDER

For the foregoing reasons, I find that Complainant has established that Respondent retaliated against her in violation of the Federal Rail Safety Act for reporting a work-related injury. It is hereby ORDERED:

- Respondent will expunge Complainant's personnel file of any disciplinary record or negative references related to her April 1, 2009 injury.

- Respondent will pay Complainant two days' salary as of the date of the August 4 and 5, 2010 hearing, plus interest from the date such salary was lost until the date of payment at the rate prescribed in 28 U.S.C. §1961. In the alternative, Respondent will restore two days of vacation time to Complainant, if she had to use them in connection with her attendance at the hearing.

- Respondent will pay $1,000 in punitive damages.

- Respondent will pay Complainant's litigation costs and reasonable attorney's fees. Complainant's attorney may submit a petition for fees within thirty (30) days.

SO ORDERED.

A

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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 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).