In the Matter of:

LAURA VERNACE,

COMPLAINANT,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

RESPONDENT

ARB CASE NO. 12-003

ALJ CASE NO. 2010-FRS-018

DATE: December 21, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

***For the Complainant*:**
Charles C. Goetsch, Esq.; *Cahill, Goetsch & Perry, P.C.*; New Haven, Connecticut

***For the Respondent*:**
Christopher M. Hartwyk, Esq.; *Port Authority Trans-Hudson Corporation*, Jersey City, New Jersey

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

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] On April 30, 2009, Laura Vernace filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that her employer, Port Authority Trans-Hudson Corporation (PATH), violated the FRSA by retaliating against her after she had filed an

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

injury report on April 1, 2009. OSHA found a violation. PATH requested a hearing and a Department of Labor (DOL) Administrative Law Judge (ALJ) also found that PATH unlawfully discriminated against Vernace and (1) ordered PATH to expunge all references to a disciplinary hearing or negative references to the incident, (2) awarded two days lost salary and $1,000 in punitive damages, and (3) found the Respondent liable for her attorney's fee. PATH appealed to the Administrative Review Board (ARB).[2] We summarily affirm.

DISCUSSION

On April 24, 2009, PATH sent a charging letter to the Complainant, stating that on April 1, 2009, she "failed to exercise constant care and utilize safe work practices to prevent injury to yourself when you did not inspect a chair" before sitting on it. Cl. Ex. 6. The ALJ thoroughly considered the evidence of record and the contentions of the parties regarding the essential elements of a FRSA claim: protected activity, adverse action and a causal link.[3] We adopt and affirm the ALJ's findings and add limited discussion.

We reject PATH's argument that it took no adverse action against Vernace. Substantial evidence supports the ALJ's finding of adverse action, and we agree with her legal analysis and conclusions. The ALJ noted that the relevant regulations include "intimidating" and "threatening" actions as prohibited discrimination. We agree with the ALJ's reliance on our analysis of a similar regulation in *Williams v. American Airlines*, ARB No. 09-018, 2007-AIR-004 (ARB Dec. 29, 2010).[4] Moreover, Congress re-emphasized the broad reach of FRSA when

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[2] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

[3] The ALJ and the parties cite four elements, tracking the elements necessary to raise an inference for an OSHA investigation. 49 C.F.R. § 1982.104(e)(3)(2012). But we are reviewing a decision on the merits, not OSHA's investigation decisions. *Cf. Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)(citing three elements for a whistleblower claim under the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (2011)). Case law demonstrates how the final-decision-maker's "knowledge" and "animus" are factors to consider in the causation analysis but not always dispositive factors. *See, e.g., Staub v. Proctor*, 131 S.Ct. 1186 (2011)(Supreme Court examined a retaliation claim under a different anti-retaliation statute and held that the final decision-maker may have unlawfully discriminated where a subordinate supervisor proximately caused retaliation); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 29, 2011)(ARB remanded for the ALJ to re-consider under the totality of circumstances the respondent's potential influence on the final decision-maker's hiring choices).

[4] As the ALJ noted, in *Menendez v. Halliburton*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-2005 (ARB Sept. 13 2011), we explained that adverse action can also include an employment action that "would dissuade a reasonable employee from engaging in protected activity." This factor was an additional consideration in *Menendez* where the unfavorable action (breach of confidentiality) differed from cases where discipline or threatened discipline was involved. Where termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees.

it expressly added "threatening discipline" as prohibited discrimination in section 20109(c) of the FRSA whistleblower statute.[5] The disciplinary investigation stretching one year in this case qualifies as discrimination under the regulations and as "any other discrimination" prohibited by the statute.

PATH unpersuasively challenges the ALJ's factual finding of causation by arguing that it initiated a disciplinary investigation only because of the allegedly unsafe use of a chair (sitting on it) and not because Vernace reported an injury. As the ALJ explained, this clever distinction ignores the broad and plain language of the statute and regulations. It also ignores FRSA's extensive legislative history citing the rampant practices of abuse and intimidation inflicted on railroad workers who reported or even attempted to report work injuries. The ALJ thoroughly explained her factual and legal findings, and we incorporate them into this decision.

Finally, we find that the ALJ adequately considered the nature of the violation and harm caused in this case, sufficiently provided reasons for the relief and damages she awarded, including her award of punitive damages that easily fell within the range of appropriate punitive damages.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's award ordering expungement of the Complainant's record, two days' salary, $1,000 in punitive damages, and an attorney's fee.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

[5] We find that FRSA's legislative history demonstrates a broad Congressional intent, and we rely on our extensive discussion in *Santiago v. Metro-North Commuter RR Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 8-10 (ARB July 25, 2012).