



In the Matter of:

MARK BAILEY,

**ARB CASE NO. 13-030
13-033**

COMPLAINANT,

ALJ CASE NO. 2012-FRS-012

v.

DATE: April 22, 2013

CONSOLIDATED RAIL CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Brian Reddy, Esq., *The Reddy Law Firm*, Maumee, Ohio

For the Respondent:

Robert S. Hawkins, Esq., Joseph P. Sirbak, II, Esq., *Buchanan, Ingersoll & Rooney, P.C.*, Philadelphia, Pennsylvania

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

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Mark Bailey filed a complaint with the United States

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 29 C.F.R. Part 1982 (2012) and 29 C.F.R. Part 18, Subpart A (2012).

Department of Labor alleging that Consolidated Rail Corporation (Conrail) violated the FRSA when it discharged him from employment. After an evidentiary hearing, an Administrative Law Judge (ALJ) determined that Conrail's employment action against Bailey violated the FRSA, and granted Bailey relief. On January 15, 2013, Conrail petitioned for review of the ALJ's liability determination, and moved to stay the ALJ's order requiring reinstatement. Bailey petitioned the ARB for review of the ALJ's damages award. On March 26, 2013, the ARB entered an order denying Conrail's motion to stay the ALJ's reinstatement order. That order is final for purposes of this proceeding.

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ's decision pursuant to the FRSA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378, § 5(c)(19) (Nov. 16, 2012). The ALJ's factual findings are reviewed for substantial evidence, and legal conclusions reviewed de novo. *Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ No. 2009-FRS-011, slip op. at 4 (ARB July 25, 2012).

On review of the decision below, we find that the ALJ's factual findings are supported by substantial evidence in the record. While Conrail contests some factual findings, the ALJ effectively reconciled any material conflicts in the evidence. As the trier of fact, the ALJ's factual findings, when supported by substantial evidence in the record as is the case here, and credibility determinations are afforded deference. *See, e.g., Knox v. Nat'l Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 5 (ARB Apr. 30, 2012) ("Because substantial evidence fully supports the ALJ's factual findings and credibility determinations set out in the D. & O. . . . we afford deference to the ALJ."). We also find that the ALJ's legal conclusions are in accordance with law. We find no merit to the legal challenges raised by Conrail.

Bailey petitions for review of the ALJ's award of \$4,000 for pain and suffering, and seeks an increase in compensatory damages for pain and suffering to \$100,000, and \$250,000 for punitive damages. The \$4,000 award for pain and suffering was well within the ALJ's discretion and supported by substantial evidence. Decision and Order (D. & O.) at 34 (ALJ finds that "the emotional distress experienced by [Bailey] is not entirely due to the Respondent's adverse action, and any award of compensatory damages for pain and suffering must account for this fact."). Moreover, there are no findings that Conrail acted with "callous disregard of [Bailey's protected] rights" that would warrant an award of punitive damages. *Youngerman v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 8 (ARB Feb. 27, 2013). The ALJ rejected two of Bailey's claims of "antagonism or hostility" by company managers. Specifically, the ALJ first rejected Bailey's contention that company managers were hostile to him during a counseling session around the time he filed an injury report in August 2010. D. & O. at 26 (ALJ finding that "Dearborn Steel counseling provides little probative evidence of hostility"). The ALJ also rejected Bailey's claim that company managers were

conspiring to terminate his employment. *Id.* at 26-27 (ALJ finding that “[a]lthough the Complainant perceived an effort to get rid of him, I cannot credit the Complainant’s allegation of a conspiracy.”).

The ALJ found, however, based on the record, that “Conrail management was irritated by the Complainant’s written safety complainants [and that the company] viewed the Complainant as a nuisance for frequently raising his safety concerns.” *Id.* at 27-28. The evidence supporting this finding established that Bailey’s written safety reports “were a contributing factor in the adverse action taken against [Bailey].” *Id.* at 28. This evidence, however, did not rise to the level of establishing grounds for awarding punitive damages to Bailey. *See, e.g., Youngerman*, slip op. at 8 & n. 33, citing D. & O. at 19 (affirming punitive damages award based on ALJ’s finding that “Respondent acted with callous disregard for Complainant’s rights when it continuously instructed him to drive a vehicle in violation of the regulations” based on “misinformation that it was in fact not a violation to drive the truck in its condition.”). The ALJ in this case determined that “[a]lthough the Respondent’s actions were sufficient to prove the Complainant’s claim, under the circumstances of the present case I do not find the harm to Complainant so severe, or the Respondent’s actions so reprehensible or culpable as to warrant punitive damages.” D. & O. at 35. We find no reason for disturbing the ALJ’s ruling based on the record.

CONCLUSION

For the foregoing reasons, the ALJ’s December 31, 2012 Decision and Order is summarily **AFFIRMED**. As the prevailing party, Bailey is also entitled to costs, including reasonable attorney’s fees, incurred before the ARB. Bailey’s attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney’s fee petition with the ARB, with simultaneous service on opposing counsel. Thereafter, counsel for Conrail shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Judge Corchado concurring:

I agree with the majority to affirm the ALJ’s order with the following additional comments. First, I expressly incorporate into my reasons our ruling on the Respondent’s

motion for a stay of reinstatement. That order included reasons that are important to my decision on the merits, and it also acknowledged the ALJ's excellent analysis and explanation of the evidence and the basis for her conclusions. Second, as to the ALJ's award of \$4,000 for compensatory damages, I agree with the majority's ruling to the extent that it means that (1) the ALJ's findings of fact that "pain and suffering" and "emotional anguish" occurred must be supported by substantial evidence and that (2) ALJs are afforded wide latitude in trying to quantify the proper amount of damages.

Finally, in denying punitive damages, the ALJ relied on Board precedent, *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 21, 2011). In relying on *Ferguson*, the ALJ noted that she was required to consider whether the violation reflected "corporate policy." D. & O. at 35. The *Ferguson* standard is somewhat unclear to me. But in *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 7 (ARB Feb. 27, 2013), the Board clarified that a "corporate policy" of trying to comply with whistleblower laws "may" justify denying punitive damages under an affirmative defense analysis. In the end, the ALJ did not reach the question of whether corporate policy spoke for or against punitive damages because she did not find sufficiently egregious conduct to begin with. Though I find some troubling facts below, I was not persuaded by the Complainant's appellate arguments and therefore affirm the ALJ's decision to deny punitive damages.

LUIS A. CORCHADO
Administrative Appeals Judge