



In the Matter of:

DENNIS COATES,

ARB CASE NO. 14-019

COMPLAINANT,

ALJ CASE NO. 2013-FRSA-003

v.

DATE: July 17, 2015

**GRAND TRUNK WESTERN RAILROAD
CO.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Robert E. Harrington, III, Esq.; *Harrington, Thompson, Acker & Harrington, Ltd.*;
Chicago, Illinois**

For the Respondent:

Joseph D. Weiner, Esq.; *Little Mendelson, P.C.*; Minneapolis, Minnesota

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Luis A. Corchado, *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 September 19, 2011, Dennis Coates filed a complaint with the

¹ 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2015), 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 (2014) and 29 C.F.R. Part 18 Subpart A (2014).

Occupational Safety and Health Administration (OSHA) alleging that his employer, Grand Trunk Western Railroad Co. (GTW), violated the FRSA by retaliating against him because he filed a prior FRSA complaint in January 2011, and he filed a report of a work-related accident and injury on April 2, 2011.² OSHA found no violation and Coates requested a hearing before a Department of Labor (DOL) Administrative Law Judge (ALJ). After a formal hearing, the ALJ found that GTW violated the FRSA and unlawfully discriminated against Coates and awarded damages, costs, and other relief in two separate orders.³ We affirm and summarily explain.⁴

DISCUSSION

In affirming the ALJ's Decision and Order, we limit our comments to the most critical points.⁵ The essential time period in this case occurred between December 22, 2010, and September 16, 2011, when GTW terminated Coates's employment. On December 22, 2010, Coates left work because his heart was racing, went to the hospital, and was diagnosed with tachycardia. GTW suspended Coates from work for one month beginning on December 22, 2010. On January 20, 2011, Coates returned to work. On March 14, 2011, GTW sent a notice for an investigatory hearing to Coates regarding a charge that he falsified his "tie-up" (clocking out) time on March 11, 2011. On April 2, 2011, Coates tripped, fell, and suffered a severe head

² Coates filed a complaint with OSHA in January 2011, based on a separate work-related incident occurring in December 2010. OSHA denied the complaint in April 2011. Coates appealed OSHA's denial, but withdrew his appeal in June 2011. The merits of the January 2011 complaint are not before the Board in this appeal.

³ *Coates v. Grand Trunk W. R.R. Co.*, ALJ No. 2013-FRS-003 (Dec. 19, 2013) (D. & O.); *Coates v. Grand Trunk W. R.R. Co.*, ALJ No. 2013-FRS-003 (Jan. 21, 2014) (Clarification D. & O.). Pursuant to a contractual remedy under the Railway Labor Act, the Public Law Board (PLB), in an Interim Award issued on September 18, 2013, ordered GTW to reinstate Coates with his seniority unimpaired. The issue of back pay was to be addressed in the full award, at a later date. Claimant's Post-Hearing Brief Exhibit 2.

⁴ For the ARB's authority, see Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

⁵ We do not adopt every collateral ruling of the ALJ not necessary to affirming his ultimate decisions as to protected activity, causation, and damages. For example, while the ALJ cited employer knowledge as an element (in addition to the three elements of protected activity, adverse action, and a causal link), we have held that knowledge is not a separate element, but instead forms part of the causation analysis. See *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 29, 2011) (*Bobreski I*). See also *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)).

injury that kept him out of work from April 3, 2011, to August 31, 2011. D. & O. at 4. On September 1, 2011, GTW held Coates out of service without pay pending his completion of a mandatory re-certification requirement. On September 9, 2011, GTW held a hearing on the charges stemming from the March 11, 2011 incident, and then terminated Coates's employment. Out of the nine months described above, Coates worked for GTW for approximately two months.

With respect to protected activity, GTW does not object to the ALJ finding that Coates engaged in protected activity on April 2, 2011, when he reported a work-related accident and injury.⁶ Citing that Coates lacked good faith, GTW disagrees with the ALJ that Coates engaged in protected activity in January 2011, when he filed an OSHA complaint. Substantial evidence supports the ALJ's finding that Coates filed the earlier complaint in good faith and that the filing is protected activity. D. & O. at 11-12. It is undisputed that Coates experienced a racing heartbeat at work on December 22, 2010; left work to go to the hospital; and was diagnosed with tachycardia. It is also undisputed that he was not permitted to return to work until after January 20, 2011. Coates testified that he told GTW about his racing heart. Coates consulted with a union representative about filing an OSHA claim. This evidence, among other evidence, provides sufficient substantial evidence to support the ALJ's conclusion that Coates filed in good faith a complaint with OSHA that alleged that GTW retaliated against him for reporting a work-related injury, even if Coates's allegations later proved to be incorrect. The ALJ's conclusion, in turn, establishes that the OSHA complaint was protected activity.

Regarding the element of causation,⁷ we are unpersuaded by GTW's multiple challenges to the ALJ's factual finding of causation. As the ALJ properly stated, a complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor to the unfavorable employment action and that this element may be established by direct evidence or indirectly by circumstantial evidence.⁸ Contributing factor is a low standard of causation. "[It] is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."⁹ Under the contributing factor causation standard,

⁶ GTW also did not object to the ALJ finding that Coates proved the element of adverse action. The ALJ found that Complainant was "discharged from service, held out of service, and experienced a negative change in attitude directed towards him. . . ." D. & O. at 13.

⁷ We note that the ALJ stated Coates's causation burden was to prove by a preponderance of the evidence that "the circumstances were sufficient to raise [an] inference" of causation (D. & O. at 10), but the statute requires Coates ultimately to prove to the ALJ, as a fact and not simply to raise an inference, "that protected activity was a contributing factor in the adverse action." 29 C.F.R. § 1982.109(a).

⁸ *Bobreski I*, ARB No. 09-057, slip op. at 13-14.

⁹ *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013) (quoting *Ameristar Airways, Inc. v. Admin. Review Bd.*, 650 F.3d 562, 567 (5th Cir. 2011) (internal quotation omitted)). The FRSA statute's prohibition of discrimination "in whole or in part" (subsection 20109(a)) mirrors the causation phrase used in the railroad negligence cases under FELA, a phrase

protected activity and non-retaliatory reasons can coexist; therefore, Coates is not *required* to prove the employer's proffered non-discriminatory reasons are pretext. See D. & O. at 20-21, and n.17. The ALJ thoroughly discussed his view of the hearing testimony, documentary evidence of record, the circumstantial evidence, among other things, in deciding whether Coates's protected activity was a contributing factor in the unfavorable employment actions. See D. & O. at 15-20. We find the ALJ's discussion thoroughly describes the evidence supporting his ultimate conclusion that Coates's protected activity was a contributing factor in GTW's refusal to return Coates to work and the termination of his employment.

We are not persuaded by GTW's appeal of the ALJ's rejection of its affirmative defense. As the ALJ stated, once a complainant demonstrates that protected activity was a contributing factor in the unfavorable employment action, the burden shifts to the respondent to prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity. This is a very high burden.¹⁰ The ALJ thoroughly addressed GTW's affirmative defense that it would have terminated Coates's employment apart from the protected activity. Stated succinctly, GTW faced a difficult task to prove by clear and convincing evidence that termination would have occurred, given that (1) Coates worked only approximately two months in between the filing of his first OSHA complaint (January 2011) and the termination of his employment in September 2011, (2) he was on medical leave for five months due to a serious work-related injury, and (3) his only infraction during that time was phoning in with an incorrect clock-out time. Most importantly, the ALJ disbelieved GTW's primary evidence in support of its affirmative defense, the testimony of Philip Tassin, the GTW official responsible for the termination decision. See D. & O. at 21. We appreciate that Coates had a troubling disciplinary

that has been interpreted to mean any causal connection, even in the "slightest" degree. *Rogers v. Missouri Pac. R. R. Co.*, 352 U.S. 500, 506 (1957).

¹⁰ *Araujo*, 708 F.3d at 159 ("To meet the burden, the employer must show that 'the truth of its factual contentions are highly probable.'") (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (internal quotation omitted)). See also *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (describing the burdens of proof framework of the Energy Reorganization Act, a statute that uses a similar burden-shifting framework to the FRSA, as a "tough standard" and "not by accident" so that companies in the nuclear industry face a difficult time defending themselves). "In addition to the high burden of proof, the express language of the statute requires that the 'clear and convincing' evidence prove what the employer 'would have done' not simply what it 'could have' done." *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014).

history.¹¹ But, so long as the ALJ applies the proper legal standards, we cannot overturn his ultimate finding on GTW's affirmative defense if it is supported by substantial evidence as we have previously defined that term.¹² In this case, we hold that the ALJ's findings of fact are supported by substantial evidence including numerous credibility findings; therefore, we reject GTW's multiple challenges to the ALJ's factual findings.

With regard to damages, GTW's challenges are again unpersuasive. GTW had the burden of proving that Coates failed to mitigate by establishing that comparable positions were available to him and that Coates failed to use reasonable diligence in attempting to secure such positions.¹³ Here, the ALJ found that GTW did not introduce any evidence that comparable positions were available.¹⁴ The ALJ's finding is supported by substantial evidence and we affirm it.

Similarly, we find that the ALJ adequately addressed the nature of the violation and harm caused in this case, sufficiently provided reasons for the damages he awarded, including his award of back pay and the award of compensatory damages that fell within the range of comparable damages for emotional distress.

CONCLUSION

For the preceding reasons, we **AFFIRM** the ALJ's award.

¹¹ We note that GTW also argues that the ALJ erroneously prevented GTW from presenting some evidence about Coates's disciplinary history. Resp. Br. at 16. However, GTW has failed to sufficiently explain what evidence the ALJ "prevented" GTW from presenting or how it would have affected the outcome in this case. To vacate or reverse for an evidentiary error, GTW must prove that the ALJ committed reversible error, that is, an error that could have affected the outcome of the case. AM. JUR. 2d APPELLATE REVIEW § 692 (errors are harmless if they could not have changed the result of the case). GTW has failed to articulate any reversible error.

¹² We have previously explained that the "substantial evidence standard" requires analysis of three questions: "(1) whether the ALJ and/or the parties have identified record evidence for each of the material fact findings; (2) whether the supporting evidence logically supports the fact finding; and, if so, (3) whether the record as a whole overwhelms the fact finding or contains factual disputes that expose the fact finding as still unresolved." *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 14 (ARB Aug. 29, 2014) (*Bobreski II*).

¹³ *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Mar. 31, 2005) (quotation omitted).

¹⁴ D. & O. at 24.

Under FRSA, “[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.”¹⁵ The statute states that relief shall include “compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”¹⁶ Under the regulations, if the Board “concludes that the respondent has violated the law, the final order will order the respondent to take appropriate affirmative action to make the employee whole, including, where appropriate: . . . compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney’s fees.”¹⁷

As the prevailing employee, Coates is entitled to “compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”¹⁸ Complainant shall have thirty (30) days from receipt of this Final Decision and Order in which to file a fully supported statement of costs with the ARB, with simultaneous service on opposing counsel. Thereafter, GTW shall have thirty (30) days from its receipt of the costs statement to file a response.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹⁵ 49 U.S.C.A. § 20109(e)(1).

¹⁶ 49 U.S.C.A. § 20109(e)(2)(C).

¹⁷ 29 C.F.R. § 1982.110(d).

¹⁸ 49 U.S.C.A. § 20109(e)(2)(C).