



In the Matter of:

JOHN R. LOFTUS,

ARB CASE NO. 16-082

COMPLAINANT,

ALJ CASE NO. 2014-SPA-004

v.

DATE: MAY 24 2018

HORIZON LINES, INC.,

RESPONDENT,

and

MATSON ALASKA, INC.,

SUCCESSOR-IN-INTEREST.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Charles C. Goetsch, Esq.; *Charles Goetsch Law Offices, LLC*; New Haven, Connecticut

For the Respondent:

Kevin S. Joyner, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Raleigh, North Carolina

Before: Joanne Royce, *Administrative Appeals Judge*, and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Seaman's Protection Act, 46 U.S.C.A. § 2114 (Thomson/West 2007) (SPA or the Act), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281 (2017 Thomson Reuters), and

implementing regulations at 29 C.F.R. Part 1986 (2017). In June 2013, Complainant John R. Loftus filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Horizon Lines, Inc. (Horizon), violated the SPA by discharging him in retaliation for making protected safety reports to the United States Coast Guard and the American Bureau of Shipping. Administrative Law Judge Exhibit (ALJX) 1. OSHA dismissed the complaint. *Id.* Loftus requested a formal hearing. A Department of Labor Administrative Law Judge (the ALJ) held a three-day hearing May 5-7, 2015. On July 12, 2016, the ALJ issued a Decision and Order Awarding Damages (D. & O.) finding that Loftus established that he engaged in protected activity and that such activity was a contributing factor in Horizon's decision to demote him in rank from Captain to First Mate. The ALJ also found that the demotion was a constructive discharge and that Horizon did not establish by clear and convincing evidence that it would have demoted Loftus absent his protected activity. The ALJ awarded Loftus \$655,198.90 in back pay plus interest compounded daily; \$10,000 in compensatory damages for emotional distress; \$225,000 in punitive damages, and reasonable litigation costs including attorney fees. Horizon appeals to the Administrative Appeals Board (ARB or Board). We affirm the ALJ's decision for the reasons discussed below.

FACTUAL BACKGROUND

We set forth certain facts pertinent to the disposition of this appeal. The parties stipulated that Loftus was a Master or Captain for twenty years, including on Horizon's ship, the *Horizon Trader*. Loftus served as Captain of the *Horizon Trader* from approximately April 2007 to May 28, 2013, when Horizon informed him that he would not be rejoining the ship as Master. Joint Pre-Trial Stipulation (May 1, 2015), Administrative Law Judge's Exhibit (ALJX) 10. By letter dated May 28, 2013, Peter L. Strolha, Horizon's Vice President and General Manager of Ocean Transportation Services, notified Loftus that Horizon was demoting him due to his lack of good judgment and failure to require a Job Safety Analysis (JSA) in connection with a March 2013 incident at sea in which his First Mate, Robert McCarthy, sustained serious injuries. Strolha indicated that Horizon would place Loftus into a "Chief Mate's position" contingent upon his "commitment to complete" certain training courses. Respondent's Exhibit 28. Loftus filed a grievance seeking restoration of his employment as Captain, but the arbitrator ruled his demotion justified. Respondent's Exhibits 29, 38.

After demoting Loftus from his permanent position as Master, Horizon offered him temporary work as a Relief Chief Mate on different vessels on different coasts. On June 6, 2013, Horizon assigned Loftus to the vessel *Horizon Navigator* as Relief Chief Mate, effective June 16 from the port of San Juan to relieve Manny Ramos. Respondent's Exhibit 30. Loftus's union representative rejected the assignment as "the Relief Chief Mate position offered is not a substantially equivalent job" to the Master's job from which Loftus had been demoted. Respondent's Exhibit 31. Later that month, Horizon assigned Loftus to the *Horizon Pacific* as Relief Chief Mate, effective July 17, from the port of Oakland, California to relieve Greg Gretz. Respondent's Exhibit 33. Again, Loftus's union representative rejected the assignment as "the Relief Chief Mate position offered is not a substantially equivalent job" to the Master's job from which Loftus had been demoted. Respondent's Exhibit 34.

The parties stipulated that Loftus engaged in activity that the SPA protects, ALJX 10, when in October 2011, he contacted the United States Coast Guard (Coast Guard) and the American Bureau of Shipping (ABS) to report what he believed to be safety violations onboard the *Trader* including repeated power box fires. Loftus informed Horizon management by email of these activities. As a result of Loftus's complaint, the Coast Guard investigated and inspected the *Trader* ultimately condemning certain equipment. Complainant's Exhibit 1 at 1-7; Hearing Transcript at 149-52, 166-67.

In August 2012, Loftus notified Horizon management that there existed unsafe conditions that violated both Horizon's internal policies as well as Coast Guard regulations. Two days later, Horizon managers inspected the *Trader*. Loftus told them during this visit that if Horizon did not contact either the Coast Guard or ABS regarding the unsafe conditions that existed aboard the *Trader*, he would contact these agencies himself. Horizon did contact ABS and, after an inspection, ABS gave Horizon thirty days to bring certain equipment into compliance with safety regulations. Complainant's Exhibits 2 at 8-10, 5 at 28-45; Hearing Transcript at 155, 157, 167-68, 253-54, 333, 655-656, 710.

In February 2013, Loftus contacted an ABS inspector and expressed safety concerns about the condition of the ship. During the ensuing inspection, Loftus questioned the inspector as to how ABS could have allowed the *Trader* to sail given numerous unsafe conditions. After the inspection, Loftus admitted to Strolha, upon being questioned, that he had contacted the ABS inspector. Hearing Transcript at 158-59.

In April 2013, Loftus contacted the Coast Guard, ABS, and a Horizon manager to express a conflict in priorities between a Master's duty to ensure the safety of a vessel in a situation where the Master also has a duty to ensure that timely mandatory drug testing is conducted, such as during the March 2013 accident at sea. Complainant's Exhibit 26s at 175, 27 at 176-179, 28 at 180; Hearing Transcript at 195, 196, 297, 493. Loftus told Horizon managers that he had contacted these agencies about his concerns. Complainant's Exhibit 15 at 99-100, 16 at 101-04; Transcript at 196-97, 202, 362, 368, 414, 665.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final decisions under the Seaman's Protection Act. 29 C.F.R. § 1986.110(a); 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). We review the ALJ's factual determinations to determine whether they are supported by substantial evidence. 29 C.F.R. § 1986.110(b). The Board reviews the ALJ's legal conclusions de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004). See *Dady v. Harley Marine Servs., Inc.*, ALJ No. 2012-SPA-002, ARB Nos. 13-076, -077 (ARB July 31, 2015).

DISCUSSION

Legal Standard

“A person may not discharge or in any manner discriminate against a seaman because . . . the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.” 46 U.S.C.A. § 2114(a). The “SPA incorporates the procedures, requirements, and rights described in the whistleblower provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105.” 29 C.F.R. § 1986.100(a). In turn, the STAA provides, “All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b)” of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. 49 U.S.C.A. § 31105(b) (Thomson Reuters 2016); 49 U.S.C.A. § 42121(b)(Thomson Reuters 2016).

A determination that a SPA violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint. If such a determination of a violation is made, relief may not be ordered if the respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity, thereby establishing its affirmative defense to any liability for the violation. 29 C.F.R. § 1986.109(a), (d).

In this appeal, Horizon alleges that certain activity, in which Loftus engaged, does not constitute protected activity, and that even if Loftus engaged in protected activity, the ALJ erred in finding that Horizon did not prove by clear and convincing evidence that it would have demoted Loftus in the absence of such activity. Horizon also contests the ALJ’s finding that Loftus’s demotion amounted to a constructive discharge, and alleges error in the damages awarded.

Protected Activity

Horizon argues that Loftus did not engage in protected activity when he contacted ABS in February 2013 as he did not report a safety violation or file a complaint as required, but only inquired about previously filed complaints, citing *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 812 (5th Cir. 1990)(the employee protection provisions of the Seaman’s Protection Act are narrowly tailored to protect only the seaman who has reported or is about to report a violation).

The ALJ rejected this argument, as do we, by rationally distinguishing the facts in *Garrie* from the facts here. D. & O. at 16-17. Specifically, the ALJ found that Loftus’s communications with ABS “went beyond mere inquiries” in that he alerted the ABS inspector to “numerous safety violations” aboard the *Trader* when it sailed from China and “conveyed the information to Deitrich [ABS] with the hopes that it would facilitate bringing the ship into compliance.” *Id.* at 17. The ALJ concluded, “Unlike in *Garrie*, Loftus did not ask Deitrich any

questions, but instead expressed disbelief that ABS allowed the *Trader*'s problems to persist for as long as it had, citing a long, detail-specific list of items that warranted immediate action." *Id.*

Horizon next asserts that Loftus did not engage in protected activity in April 2013 when he contacted the Coast Guard and ABS as, it asserts, Loftus merely requested "clarification" of a Master's ultimate authority under two statutes for timely conducting drug testing when weighed against the International Safety Management code (ISM) and a Master's duty to ensure the safety of the vessel.

We reject this argument. The ALJ properly found that Loftus's communications were "not limited to just inquiries as Horizon suggests." Specifically, the ALJ noted that in Loftus's initial email to the Coast Guard, he "discussed his experience surrounding McCarthy's accident, and said the following about Horizon: 'In my case, I believe they lost sight of the overall safety of the ship and crew in favor of a piece of paper certifying a test was done. To me this is a breach of the broader concepts of the ISM code.'" D. & O. at 17-18. The ALJ added, "Unlike in *Garrie*, Loftus tried to convince the [Coast Guard] to take action against Horizon over the course of three emails. *See id.* [Complainant's Exhibit 27] at 176-79." *Id.* The ALJ similarly found that when Loftus emailed ABS, *see CX 28* at 180, he "did more than just inquire about the regulations . . . [Loftus] disclosed that he had filed a Corrective Action Report with Horizon over what transpired following McCarthy's accident and explained how the company put the *Trader* at risk by demanding that drug tests be administered under the dangerous circumstances that existed at the time. *Id.* In concluding, Loftus said, 'I appreciate your formal follow up.' Loftus did not ask any questions." D. & O. at 18.

Loftus's conduct easily fits within one or more of the categories of protected activity listed in the SPA that include engaging in one or more of the following: (1) reporting (or about to report) maritime law violations to the Coast Guard, and (2) furnishing information to the Secretary, the National Transportation Safety Board, or any other public official about any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation. 46 U.S.C.A § 2114(a)(1)(A), (C), (F). The combined effect of these provisions is that the SPA protects individuals, who publicly disclose maritime law violations and safety issues connected with vessel transportation, conduct in which Loftus clearly engaged. Because the ALJ's finding that Loftus engaged in protected activity is supported by substantial evidence and is consistent with applicable law, we affirm it.

Horizon's Affirmative Defense

Horizon asserts that even if Loftus established that he engaged in protected activity, the ALJ erred in finding that Horizon did not prove by clear and convincing evidence that it would have demoted Loftus in the absence of such activity. D. & O. at 24-31. Horizon argues that it decided to demote Loftus *solely* as a result of the poor judgment he exhibited in the March 2013 incident at sea when he ordered McCarthy onto the ship's deck in, it asserts, severe and unsafe weather conditions. McCarthy was injured while attempting to execute Loftus's directive to secure loose items on the deck. Respondent's Exhibits 6, 11 at 45, 16 at 5, 21; Hearing Transcript at 59, 225, 503, 718.

Upon review of the ALJ's findings, we find no reversible error in his determination that Horizon failed to demonstrate by clear and convincing evidence that it would have demoted Loftus in the absence of his protected activity. The ALJ acted within the purview of his discretion when he discounted Horizon's stated reasons for demoting Loftus by crediting the four expert opinions Loftus adduced regarding the circumstances of the at-sea incident. Specifically, Respondent's evidence did not persuade the ALJ and he made several credibility findings, all supported by the evidence, to the effect that its evidence did not amount to clear and convincing evidence that it would have demoted Loftus in the absence of his protected activity. D. & O. 24-31.

Loftus proffered expert witness opinions that the ALJ relied upon. *See* Complainant's Exhibits 32-35. The ALJ permissibly credited this evidence over Respondent's evidence to the effect that it demoted Loftus based solely on the at-sea incident. Specifically, the ALJ found "virtually no evidentiary basis" to support Horizon's reasons for its disciplinary actions against Loftus. First, the ALJ found that Strohla's reference in the demotion letter to weather "as bad as anyone had experienced in recent memory," Complainant's Exhibit 8 at 49-50, was contrary to the uncontroverted evidence that weather conditions at the time of the accident were "moderate," *Id.* at 49; four experts testified to this fact. D. & O. at 25. The ALJ further found that Horizon made no effort to verify the actual weather at the time of the accident. *Id.* Second, the ALJ determined that the fact that Horizon cited lack of a Job Safety Analysis as grounds for disciplining Loftus before even determining whether Loftus was required to perform one "demonstrates the superficial nature of Horizon's investigation. Horizon appears to be manufacturing reasons to justify its illegal behavior of retaliating against Captain Loftus." D. & O. at 26. Third, the ALJ found that expert testimony established that Loftus used a Master's standard of care and reasonably tried to avoid an International Convention for the Prevention of Pollution From Ships (MARPOL) violation, but McCarthy's standard of care in the accident was never investigated. D. & O. at 27-28. The ALJ added that the fact that Horizon "failed to consider MARPOL as part of its investigation of Loftus, is further evidence that the investigation was merely window dressing used to disguise its true motives for disciplining Loftus." D. & O. at 28. Fourth, the ALJ determined, after providing a detailed analysis of the record including investigative reports and expert opinions, that Horizon's contention that Loftus's decision-making on March 6, 2013, highlighted "an inadequate safety climate onboard the *Horizon Trader*" is overwhelmingly unsupported by the record and is rejected as a fabrication." D. & O. at 28-31. Finally, the ALJ noted that while Horizon argued that it demoted Loftus *solely* based on an asserted lapse of judgment, even its letter disciplining Loftus refers to other factors as justification for demoting him. Complainant's Exhibit 8 at 49 (Respondents Exhibits 3, 22).

Accordingly, we hold that substantial evidence supports the ALJ's finding that Horizon failed to establish an affirmative defense to liability here by establishing by clear and convincing evidence that it would have demoted Loftus absent his protected activity. Consequently, we affirm the ALJ's finding and his decision to impose liability for the SPA whistleblower violation demonstrated in this case.

Constructive Discharge

Horizon argues that the ALJ erroneously found that Loftus was constructively discharged and entitled to full back pay from his May 2013 demotion to January 2015 when Horizon ceased its East Coast operations and closed those shipping lines. D. & O. at 31-37. Horizon argues that Loftus voluntarily resigned in May 2013 rather than sail as a Chief Mate and, consequently, is not entitled to full back pay but only to the pay difference between a master's and chief mate's salaries. Horizon also contests the ALJ's award of \$100,000 in severance pay that Horizon awarded its employees in January 2015 because, it argues, Loftus was not an employee in January 2015—having resigned in May 2013.

The legal standard ordinarily used to determine what constitutes a constructive discharge is whether the employer has created “working conditions so intolerable that a reasonable person in the employee’s position would feel forced to resign.”¹ Constructive discharge is a question of fact,² and the standard is objective: the question is whether “a reasonable person” would find the conditions intolerable, and the subjective beliefs of the employee (and employer) are irrelevant.³

The ALJ made numerous explicit factual findings based on the evidence in concluding that Loftus was in fact illegally constructively discharged when Horizon demoted him and offered him temporary Chief Mate sails at the demoted level. D. & O. at 36. The ALJ specifically found that Horizon demoted Loftus in retaliation for his repeated protected disclosures about the unsafe conditions and operation of his vessel, in violation of the SPA’s employee protection provisions. *Id.* at 3-4, 20-24. The ALJ determined that if Loftus had accepted either of the two temporary sails Horizon offered him at the demoted level (and one position being on the West Coast), either position would have resulted in a significant cut in pay. D. & O. at 35, 36. Critically, Horizon’s Strolha, who wrote the letter demoting Loftus, admitted at the hearing that Horizon offered nonpermanent positions to Loftus, a permanent employee, because it did not have any permanent jobs. Hearing Transcript at 740; *see* Respondent’s Exhibits 30, 33. The ALJ further specifically determined that “uncontroverted evidence is that demoting a master to chief mate was unprecedented” from Horizon management. D. & O. at 23, (citing Strolha Hearing Testimony at 747). Based on supporting expert opinions adduced by Loftus, *see* Complainant’s Exhibits 32, 33, as well as Loftus’s “credibl[e]” testimony, *see* D. & O. at 17 at n.6, the ALJ also found that it “would have been practically impossible for Loftus to operate effectively as Chief Mate because the position is not only more physically demanding

¹ *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016)(citing *Strickland v. United Parcel Svc.*, 555 F.3d 1224, 1228 (10th Cir. 2009)) reversed on other grounds, *Dietz v. Semiconductor Corp.*, 711 Fed. Appx. 478 (10th Cir. 2017).

² *Deitz*, ARB No. 15-017, slip op. at 12 (citing *Strickland*, 555 F.3d at 1228).

³ *Id.*

than a Master, but he also would have received little to no respect from his crew.” D. & O. at 23, 35.⁴ In so finding the ALJ relied in part on Loftus’s specific testimony as follows:

[I]t’s not feasible for a demoted master to go on to another ship and have any respect from the crew or the officers. The chief mate’s position, he’s a primary officer with regard to safety. He needs to be able to command respect from everybody on the ship . . . to put a guy in that position who has no respect, he’s not going to be able to do the job properly.

Hearing Transcript at 213 (cited by ALJ at D. & O. at 23).

Further, the ALJ’s findings under the subtitle of “Hostility Towards Loftus’s Protected Activity,” provide additional support for his conclusion that Horizon constructively discharged Loftus when it demoted him for engaging in safety complaints the SPA protects. The ALJ found:

The evidence similarly supports that Horizon displayed hostility towards Loftus’s protected activity. William Barclay, Horizon’s Manager of Safety and Designated Person, confirmed that “it did not always bode well shore side” when Loftus reported safety concerns to the regulatory agencies. CX-40 at 291; *see also* Compl. Br. at 15. Wally Becker, Jr., the *Trader’s* Vessel Superintendent until September of 2012, testified that his immediate supervisor, Vice President and General Manager of Ocean Transportation Services, Joe Breglia, twice attempted to terminate Loftus in 2012 for reporting safety concerns to the [United States Coast Guard (USCG)] and the [American Bureau of Shipping (ABS)]. Breglia was not successful in terminating Loftus because Becker correctly advised him that doing so would be improper given Horizon’s internal policy of encouraging employees to report safety concerns. [Hearing Transcript at 353-54.

While Breglia was replaced by Strolha and therefore no longer employed by Horizon at the time of Loftus’s discipline, Breglia’s sentiments are illustrative of management’s attitude toward his protected activity. Becker admits that even he once told Loftus, out of frustration, that he should be fired over his frequent communications with the regulatory agencies. [Hearing Transcript] at 669-70. This preference was further exhibited during Strolha’s meeting with Loftus in April of 2013, when Loftus informed Strolha that he contacted the USCG and ABS

⁴ The ALJ noted Loftus’s hearing testimony that he was sixty-six years old and had been diagnosed with Parkinson’s disease. Hearing Transcript at 147-48, 169, 348-49; D. & O. at 5, 37-38.

regarding Horizon's drug policy and Strolha responded as follows: "Please contact us first so it at least looks like we know what we're doing." [Hearing Transcript] at 198; *see also* CX-15 at 99-1000 (RX 26); CX-16 at 101-04 (RX-27). Interestingly, Strolha is also the individual ultimately responsible for Loftus's discipline. [Hearing Transcript] at 715.

D. & O. at 21-22. The ALJ also specifically determined that once off the vessel subsequent to his demotion, Horizon denied Loftus the opportunity to retrieve six-years of personal belongings from the *Trader*. These belongings were delivered to the dock in a pickup truck. *Id.* at 14, 23. This pattern of hostility to Loftus himself and to his protected safety complaints, when Horizon was on probation and operating under a "comprehensive Environmental Compliance Plan," *id.* at 6, further supports the ALJ's cumulative finding that Horizon created working conditions sufficiently intolerable to substantiate a finding of constructive discharge in violation of the SPA. *See Bryant v. Wilkes-Barre Hosp. Co.*, 146 F. Supp. 3d 628 (M.D. Penn. 2015).

Because it is supported by substantial evidence in the record and consistent with applicable law, we affirm the ALJ's finding that Horizon constructively discharged Loftus when it demoted him based on his safety complaints in violation of the SPA, where "new duties as Chief Mate would have been so difficult and demanding that a reasonable person in his shoes would have felt compelled to resign." *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016), reversed on other grounds, *Dietz v. Semiconductor Corp.*, 711 Fed. Appx. 478 (10th Cir. 2017).

Damages

Horizon challenges the ALJ's finding that Loftus is entitled to \$655,198.90 in back pay, which includes \$555,198.90 "in lost wages and benefits from his removal as Master on May 28, 2013, up until Horizon ceased operations on January 15, 2015, plus a severance payment of \$100,000." D. & O. at 36. Horizon argues that the evidence *only* supports a finding that Loftus did not accept his demotion but refused to sail as a First Mate, thereby voluntarily resigning his employment. Based on the asserted fact that Loftus's resignation was voluntary, Horizon argues that Loftus is entitled to no back pay as a matter of law. Horizon asserts that the ALJ's conclusion that Loftus's demotion constituted a constructive discharge entitling him to back pay is thus unsupported by any evidence or law and cannot stand. Petition for Review at 6; Opening Brief at 20-25. Horizon also argues that since Loftus was not constructively discharged and by his own choosing was not an employee when in January 2015, it "closed those shipping lines," the ALJ erred in finding that Loftus was entitled to severance pay of \$100,000. Opening Brief at 20, 21.

As set forth above, we affirm, as supported by substantial evidence and consistent with applicable law, the ALJ's conclusion that Horizon constructively discharged Loftus when on May 28, 2013, it demoted him from Master/Captain to First Mate. *See* Discussion, *supra* at 7-9. Therefore, we reject Horizon's argument that the evidence of record is susceptible to only one interpretation, that is, that Loftus resigned his employment with Horizon. Because Loftus was constructively discharged, he is entitled to an award of back pay and Horizon's argument to the

contrary must fail. Likewise, because Loftus would have been a Horizon employee in January 2015, but for Horizon's unlawful constructive discharge, Loftus is entitled to the severance payment other employees received at that time. Employer's argument to the contrary must fail as it does not recognize the unlawful constructive discharge here as found by the ALJ. Further, to the extent that Horizon objects to the ALJ's finding that Loftus met his burden to show mitigation of damages, Petition for Review at 6, we disagree. *See* D. & O. at 36-37. Having rejected Horizon's challenges thereto, we affirm the ALJ's award of \$555,198.90 in lost wages and benefits from Loftus's May 28, 2013 discharge to January 15, 2015, plus severance in the amount of \$100,000. D. & O. at 47.⁵

In its Petition for Review, Horizon objects to the ALJ's conclusion that Loftus is entitled to \$10,000 in compensatory damages for emotional harm. Petition for Review at 6. Horizon does not provide supporting argument in its brief to the ARB. The ALJ rendered a comprehensive analysis of the pertinent evidence in determining that Loftus met his burden to establish entitlement to compensatory damages for emotional harm. Among other things, the ALJ specifically noted Loftus's testimony about the harm he suffered, including anxiety. D. & O. at 40. The ALJ concluded that the "record as a whole supports awarding Loftus compensatory damages for emotional distress." *Id.* at 40 (footnote deleted). Upon review, we find no reversible error, and therefore, we affirm the ALJ's award of \$10,000 in compensatory damages for "emotional distress resulting from Horizon's adverse action" in violation of the SPA. D. & O. at 38.

We next address Horizon's challenge to the ALJ's award of \$225,000 in punitive damages. Horizon argues that its conduct towards Loftus was not reprehensible and thus does not warrant any award of punitive damages. Our review of the ALJ's punitive damages award is two-fold. First, we consider whether punitive damages are warranted, and second, we determine whether the amount is appropriate. Punitive damages are warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." *Smith v. Wade*, 461 U.S. 30, 51 (1983); *see Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 6 (ARB Feb. 27, 2013). Egregious or reprehensible conduct is not necessarily required but may serve as evidence of an employer's intentional or reckless misbehavior. *Raye v. Pan Am Rys., Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8 (ARB Sept. 8, 2016). Here, the ALJ flatly found that "Horizon's conduct was reprehensible" based in part on Horizon's "persistent indifference" to Loftus's safety concerns and recurring retaliation against him despite "his reputation for being an exemplar of safety." D. & O. at 43. Substantial evidence of record supports the ALJ's findings of intentional misconduct warranting punitive damages against Horizon.

We also find that the ALJ did not abuse his discretion in determining that an award of \$225,000 was necessary to punish and deter Horizon for its misconduct. *See Raye*, ARB No. 14-074, slip op. at 9. Consistent with our precedent, the ALJ based his evaluation on three guideposts widely recognized as determinative: (1) the degree of reprehensibility of the respondent's misconduct; (2) the relationship between the harm to the complainant and the size

⁵ We note that Horizon makes no argument about the *amount* of the back pay award, only whether back pay was warranted. Accordingly, we do not review the figures.

of the punitive award, and (3) punitive damage awards in comparable cases. *Id.* at 6. The ALJ supported each of these factors with comprehensive fact findings and legal analysis. D. & O. at 42-46. In sum, the ALJ reasoned that a large punitive damage award was necessary to deter and punish Horizon given its longstanding “inaction in addressing Loftus’s safety concerns,” the chilling effect Horizon’s retaliatory actions likely had on other marine employees, and the harm it visited upon Loftus personally. *Id.* at 46. We thus affirm the ALJ’s \$225,000 punitive damage award.


Finally, in its Petition for Review, Horizon objects to the ALJ’s determination that Loftus is entitled to reasonable attorney’s fees and costs. Petition for Review at 7. Due to Loftus’s success on the merits of his complaint filed with OSHA, Loftus is entitled to reasonable attorney’s fees and costs. We thus find no merit in Horizon’s objection to the ALJ’s holding.

CONCLUSION

Accordingly, the ALJ’s Decision and Order Awarding Damages is **AFFIRMED**.

To recover reasonable attorney’s fees and litigation costs incurred in responding to this appeal before the Board, Loftus must file a sufficiently-supported petition for such costs and fees within 30 days after receiving this Final Decision and Order, with simultaneous service on opposing counsel. *See* 29 C.F.R. § 1988.110(d). Respondents have 30 days from their receipt of the fee petition to file a response.

SO ORDERED.


LEONARD J. HOWIE III
Administrative Appeals Judge


JOANNE ROYCE
Administrative Appeals Judge