



In the Matter of:

HARRY SMITH,
COMPLAINANT,

ARB CASE NOS. 09-033
08-091

v.

ALJ CASE NO. 2006-STA-032

LAKE CITY ENTERPRISES, INC.,

DATE: September 24, 2010

and

DATE REISSUED: September 28, 2010

CRYSTLE MORGAN and
DONALD MORGAN,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq., *Tate & Renner*, Dover, Delaware

For the Respondents:

Brent L. English, Esq., *Law Offices of Brent L. English*, Cleveland, Ohio

Before: Wayne C. Beyer, *Administrative Appeals Judge*, Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*

FINAL DECISION AND ORDER OF REMAND

Harry Smith filed a complaint under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (Thomson/West

2007),¹ and its implementing regulations at 29 C.F.R. Part 1978 (2009). He alleged that his employer, Lake City Enterprises, Inc. (LCE), fired him because he complained about the operating safety of his tractor-trailer.

After a hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that LCE had violated the STAA. In a Recommended Decision and Order (R. D. & O.) dated May 21, 2008, he awarded Smith back pay and compensatory damages. The ALJ subsequently awarded attorney's fees in a Recommended Supplemental Decision and Order (R. S. D. & O.) issued on October 14, 2008. Both decisions are now before the Administrative Review Board (ARB), docketed as ARB Case Nos. 08-033 and 08-091.

BACKGROUND

LCE contracted with CRST² International, Inc., to deliver steel coils and bars from manufacturers to customers in Ohio and Illinois. Crystle Morgan owned LCE and hired Smith on September 5, 2005. He used LCE's tractor truck and a 1997 trailer to haul the steel. Smith complained repeatedly to Ken Morrison, dispatcher and terminal manager, about the unsafe handling abilities of the trailer – parts of it had been rewelded and the trailer flexed and swayed under certain loads. Hearing transcript (TR) at 286-87.

On November 8, 2005, when Smith turned into a fuel depot in Effingham, Illinois, the steel coil he was hauling rolled to the side and lifted up the trailer's wheels, almost flipping it over. Respondents' Exhibit (RX) DD at 4. Jacob "Scooter" McNutt had been following Smith and helped him right the trailer. RX EE at 2-3. Smith completed the delivery to Granite City and called Morrison the next morning to report the incident. Smith told Morrison, "either you replace this trailer or you will have to replace a driver." TR at 475-76. Smith's log for November 9 stated: "unsafe to operate on roadway." RX MM.

¹ Congress amended the STAA in 2007 to incorporate the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(b) (Thomson/West 2007). See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(b)(1)(Thomson/West Supp. 2010). Smith filed his complaint prior to the effective date of the amendments, which in any event do not affect our disposition of this case.

² OSHA dismissed Smith's complaint against CRST on March 21, 2006. ALJX 1. The ALJ issued an order to show cause after Smith had failed to file timely objections. Ultimately, the ALJ dismissed that complaint, ALJX 18, and the ARB affirmed. *Smith v. CRST Int'l, Inc.*, ARB No. 06-146, ALJ No. 2006-STA-031 (ARB June 30, 2008). Smith appealed to the United States Court of Appeals for the Sixth Circuit, which remanded the case for further proceedings. *Smith v. Solis & CRST Int'l, Inc.*, No. 08-4058 (6th Cir. July 26, 2010)(unpub.).

Morrison reported Smith's incident to Morgan who called Smith and asked him if he could continue to Cleveland. Smith told her that she needed to replace her "junk trailer" because it was unsafe, but that he would deliver the load. Later that morning, CRST agent Milton Parks told Morgan that Smith had called him and threatened to have the Department of Transportation (DOT) inspect the trailer. TR at 347-49, 633; Complainant's Exhibit (CX) 1. Morgan then told Morrison to tell Smith to return to the LCE terminal, where she fired him. Morgan testified that she believed that Smith's remark to Morrison about replacing the trailer or replacing the driver was an ultimatum, which she interpreted as a resignation, and that his intent to have DOT inspect the trailer was a "verbal threat" against LCE. TR at 659-61.

Smith filed complaints against CRST and LCE with the Occupational Safety and Health Administration (OSHA) on November 15, 2005. Administrative Law Judge Exhibit (ALJX) 1, 3. OSHA dismissed the complaint against LCE, and Smith requested a hearing, which was held on April 16-17 and May 9, 2007.

The ALJ concluded that LCE had violated the STAA in firing Smith. He ordered reinstatement of Smith to his previous position, \$17,799.19 in back pay, and \$20,000.00 in compensatory damages. Subsequently, the ALJ ordered LCE to pay \$57,388.77 in attorney's fees and costs. We affirm the liability finding, the back pay award, and the compensatory damages; modify the attorney's fee award; and remand the case for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1978.109(a). In reviewing STAA cases, the ARB is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted). The ARB reviews the ALJ's conclusions of law 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).

DISCUSSION

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who

“refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;” or who “refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition. See 49 U.S.C.A. § 31105(a)(1).

To prevail on a STAA claim, an employee must prove by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding his pay or terms or privileges of employment; and that the employer took such action because he engaged in protected activity. *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, -159; ALJ No. 2005-STA-063, slip op. at 11 (ARB June 30, 2008). The ARB has interpreted “because” to mean that a STAA complainant must show that the protected activity was a “motivating factor” in the employer’s decision to take adverse action. *Id.*

Once the employee proves that the employer violated the STAA, the employer may escape liability only by establishing by a preponderance of the evidence that it would have taken the adverse action absent the employee’s protected activity. *Pollock v. Cont’l Express*, ARB Nos. 07-073, -051, ALJ No. 2006-STA-001, slip op. at 7 (ARB Apr. 7, 2010).

Protected activity/knowledge

Under 49 U.S.C.A. § 31105(a)(1)(A), the ALJ credited Smith’s testimony that he informed Morgan about the unsafe condition of the trailer. The ALJ also found that Smith had a reasonable, good-faith belief that his complaints to Morrison “on a daily basis” about how the trailer flexed and swayed with certain loads were related to safety violations.³ TR at 286-87, R. D. & O. at 126-30. Smith also testified that he told Morgan that she needed to “replace her junk trailer” because it was unsafe. TR at 334-37. The ALJ concluded that, based on Smith’s testimony and that of Morgan, Smith had established protected activity and employer knowledge.

On appeal, LCE essentially recites the facts favorable to its position and asserts that the ALJ erred in believing Smith and McNutt instead of Morrison and Morgan. LCE contends that the evidence in the record “overwhelmingly” shows that Smith’s claim of safety-related complaints is “meritless and disingenuous.” Respondents’ Brief at 1-16.

³ As the ALJ noted, complaints to a supervisor relating to alleged violations of Department of Transportation safety regulations constitute protected activity under 49 U.S.C.A. § 31105(a)(1). R. D. & O. at 126. Such complaints are protected even if proved meritless unless the complainant cannot show that he reasonably believed that he was complaining about a safety hazard. *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, 054, ALJ No. 2003-STA-039, slip op. at 13-14 (ARB June 29, 2007).

The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable." *Mailloux v. R & B Transp.*, ARB No. 07-084, ALJ No. 2006-STA-012, slip op. at 8-9 (ARB June 16, 2009). In weighing the testimony of witnesses, the ALJ as fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony was supported or contradicted by other credible evidence. *Id.* at 9.

The ALJ found that Morgan's statement that she did not recall all the safety complaints she received from her drivers called into question her testimony that Smith never complained about the trailer prior to November 8. Further, when viewing her testimony with the entirety of the record, the ALJ found she had not adequately reconciled the numerous factual inconsistencies in her deposition, hearing testimony, and the documentary evidence. R. D. & O. at 129. *See* CX 1, R. D. & O. at 97-111.

We affirm the ALJ's credibility findings. While Morrison claimed that Smith had never complained to him about the trailer's safety deficiencies even though he talked with Smith daily, he testified that he called Morgan because Smith's complaint related to the safety of the equipment. TR at 505. Thus, Morrison acknowledged his awareness of the November 8 complaint. CX 10 at 17-18, CX 8 at 15. Morgan admitted that Smith told her that what was wrong with the trailer was "the same thing that has been wrong with it since you issued it to me." TR at 591. Morgan added that Smith informed her that the November 8 incident was due to "faulty equipment." CX 1.

Further, substantial evidence supports the ALJ's finding that Smith had a reasonable belief that the 1997 trailer he drove was unsafe. LCE's experts testified that the 1997 Transcraft trailer had "different handling characteristics" than other makes and that flexing and bouncing were normal and not structural defects. TR at 374-76, 423. Smith testified, however, that the trailer swayed "more than it should" and flexed back and forth when carrying a steel coil. RX BB at 79-80. He added that this flexing caused the Effingham incident in which the rear wheels on the right side of the trailer were almost off the ground and "the center had twisted and turned almost vertical." RX BB at 109.

Adverse action

The ALJ found that Smith's statement that LCE should replace the equipment or him was another complaint about the safety of the trailer, not an offer of resignation. R. D. & O. at 132. The ALJ credited witnesses' testimony that Smith became upset and angry when Morgan informed him that she was accepting his resignation. TR at 84, 491-92, 524. He also credited Smith's testimony that he had asked LCE to replace the trailer on numerous occasions, but LCE told Smith to wait a little longer. TR at 107-08, RX BB at 90. The ALJ thus concluded that Smith never intended to quit his job and that LCE had fired him.

LCE argues that Smith “concocted a story” about how his trailer had almost flipped over and gave his employer an ultimatum – replace the trailer or replace him – to cover up his driver error on November 8. LCE contends that Smith’s ultimatum was really a resignation, which it reasonably accepted. Respondents’ Brief at 16-17.

Substantial evidence supports the ALJ’s findings that Smith did not resign and that LCE fired Smith. Smith testified that he told Morgan repeatedly on November 9 that “he was not resigning, he was not quitting” even though she tried to get him to say otherwise. TR at 352. He added that he “wanted” his job, and that if he had been going to quit, he would have made arrangements to get home. RX BB at 148. Smith stated that what he actually said to Morrison was that LCE “needed to get another trailer or get another driver because this was going to kill me.” RX EE at 2. Further, after the incident on November 8, Smith kept working – he delivered that steel coil load and asked Morrison for another dispatch, which he also delivered. He then called in for another dispatch, but LCE recalled him to the facility and fired him. TR at 486-89, 512. Smith’s behavior after the incident did not support the alleged intent to resign.

Causation

In concluding that Smith had proven that LCE fired him because of his protected activity, the ALJ relied on Smith’s testimony, Morgan’s statement about her motivation for firing Smith, and temporal proximity. The ALJ fully credited Smith’s account of his discharge from LCE. He also credited Morgan’s testimony that Smith’s statement to CRST that he would have DOT inspect the trailer was disloyal to her company and played a role in her decision to fire him. TR at 591-94, 600-02. Finally, the ALJ determined that the close proximity between Smith’s November 8 complaint and his discharge the next day supported causation. R. D. & O. at 133.

Temporal proximity is “one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010). In this case, Morgan fired Smith just a few hours after he reported that the trailer was unsafe to operate and needed to be replaced, thus raising an inference that Smith’s protected activity motivated Morgan’s action.

LCE argues that the ALJ erred in relying on Morgan’s motivation because there is no evidence that she was aware when she decided to replace Smith that he had told CRST that he would have DOT inspect the trailer. LCE contends that the ALJ’s conclusion that Smith’s comment to CRST motivated his discharge was “unsupportable speculation.” Respondents’ Brief at 18-19.

We disagree. Morgan testified that CRST’s Parks had told her the morning of November 9 “or the day before” about Smith’s “threat” to have the trailer inspected by DOT. She also testified that Morrison called her about 7:45 a.m. on November 9 and told

her about Smith's ultimatum to replace the trailer. TR at 590-92. And she testified that she told Smith during his exit interview that she needed drivers who were going to be loyal and respectful to the company. TR at 600-02. Morgan's own testimony supports the ALJ's conclusion that Smith's complaints about the trailer motivated her to fire him.

Finally, Smith testified that Morgan told him that she did not like the fact that he had threatened to take her trailer to DOT for inspection and that she fired him because he was a threat to her company. TR at 349-51, RX BB at 147. He also stated that he told Morgan that LCE's faulty equipment caused the Effingham incident, not driver error. TR at 5591-92. Morgan admitted that Morrison told her that Smith had "verbally threatened" him by saying either replace me or this equipment and that she needed employees who would be loyal to the company. TR at 596-600. Because substantial evidence supports the ALJ's findings based on Smith's testimony, Morgan's statements, and temporal proximity, we affirm them. The ALJ correctly concluded that Smith proved that LCE fired him because of his protected activity.

LCE would not have fired Smith absent protected activity

The ALJ concluded that LCE failed to prove by a preponderance of the evidence that it would have discharged Smith absent his protected activity. R. D. & O. at 137-38. The ALJ gave little weight to Morgan's assertion that she would have fired Smith absent any protected activity because he damaged her company's equipment and failed to report the November 8 incident. TR at 653-56, *id.* at 136-37. Similarly, he discounted LCE's claim that it would have fired Smith because he falsified his logs, contravened company policy by unhooking his tractor from the trailer to right it, and stonewalled Morgan and Morrison about the details of the November 8 incident. *Id.* at 137.

Substantial evidence supports the ALJ's findings. Morgan admitted that she had no prior reason to fire Smith – she had sent him a letter on November 1 commending his performance –and was not aware of the alleged damage to the trailer until after firing Smith. CX 19, TR at 736. Also, Smith did report the November 8 incident to Morrison within hours of its occurrence, and he then told Morgan the next morning. Both Morrison and Morgan confirmed Smith's telephone conversations about the incident. TR at 347-49, 475-76. Finally, Morgan admitted that LCE had never disciplined Smith or the other drivers for falsifying logs⁴ and took no disciplinary action against McNutt, who had assisted Smith in unhooking his tractor from the trailer to right it. Therefore, we reject LCE's argument that it would have fired Smith absent his protected activity.

In sum, the ALJ's decision thoroughly recites the relevant facts underlying the elements that Smith must prove as part of his complaint. Substantial evidence on the record as a whole supports the ALJ's factual findings, which are therefore conclusive. Accordingly, we affirm the ALJ's conclusions that Smith established by a preponderance of the evidence that he engaged in protected activity, that LCE was aware of his protected

⁴ Don Morgan testified that LCE had no responsibility for drivers' logs. TR at 733.

activity and terminated his employment, and that LCE would not have fired Smith absent his protected activity.

Individual liability of Morgan

The ALJ determined that Crystle Morgan, as the president and sole shareholder of LCE, was individually liable for violating the STAA, and that her husband was not liable because his relationship with LCE was “too tenuous” to be considered co-ownership. R. D. & O. at 139.

LCE argues that Crystle Morgan’s actions were within the course and scope of her employment with LCE, a corporation registered in Ohio, and that she is therefore not individually liable for the debts or actions of this separate legal entity. Respondents’ Brief at 22-23.

The STAA provides that “A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because the employee . . . has filed a complaint” 49 U.S.C.A. § 31105(a)(1)(A)(i). The STAA defines an employer as a “person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce” 49 U.S.C.A. § 31101(3)(A). Thus, the STAA’s express language covers a person that is an employer. *See Wilson v. Bolin Assocs., Inc.*, ALJ No. 1991-STA-004 (Sec’y Dec. 30, 1991) (the express language of [two environmental statutes] covers individuals because of the use of the word person, as does the STAA). There is no question that Morgan was Smith’s employer and that she was engaged in the commercial motor vehicle business as the president of LCE. Accordingly, we reject LCE’s argument.

Smith argues that Donald Morgan was a joint employer with his wife because he managed LCE’s equipment, hired staff, conducted inventory, and fielded equipment complaints. Complainant’s Brief at 24-26.

The crucial factor in determining whether an entity is a joint employer with another is whether the entity exercised control over the complainant’s employment. *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 2002-CAA-012, -014, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004). Such control includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 9 (ARB Jan. 31, 2001); *see generally Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043 (ARB May 1, 1996).

The record amply demonstrates that while Donald Morgan advised his wife about her business, stored and maintained his truck at the LCE facility, and helped with equipment issues, he exercised no control over Smith’s employment. Crystle Morgan

testified that her husband had never been a shareholder or employee of LCE. TR at 553-54, 648-49. Donald Morgan stated that he spoke with Smith prior to his employment and again on September 5 to give him directions and do an inventory, but played no role in hiring or firing him. TR at 694-96, 728, 734-35. Donald Morgan acknowledged that he met Smith and McNutt at a truck stop on October 13, 2005, but denied any conversation about Smith's trailer or safety issues. TR at 707-12. Smith himself testified that on November 9, 2005, Donald Morgan was not present when his wife fired Smith. TR at 344-45.

Because substantial evidence supports the ALJ's conclusion that Donald Morgan was not liable for LCE's STAA violations, Donald Morgan was properly dismissed as respondent. *See Stephenson v. Nat'l Aeronautics & Space Admin.*, No. 1994-TSC-005, slip op. at 3-5 (Sec'y July 3, 1995) (ALJ dismissed individual respondents because they failed to constitute "employers" within the meaning of the environmental whistleblower statutes).

Reinstatement and back pay

The STAA provides that, if the Secretary decides on the basis of a complaint that a person violated the STAA, the Secretary shall order the person to (1) take affirmative action to abate the violation; (2) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (3) pay compensatory damages, including back pay. 49 U.S.C.A. § 31105(b)(3)(A).

The ALJ ordered that Smith be reinstated as a driver with LCE. R. D. & O. at 140. The ALJ awarded a total of \$17,799.19 in back pay,⁵ including \$1,630.50 for the week and a half Smith was unemployed, based on his W-2 form which showed \$9,535.42 in earnings, CX 32; \$2,348.00 for the month he was employed by Coshocton Trucking, RX BB at 9; \$8,036.00 for the 28 weeks he drove for Ameristate Transportation, *id.* at 165-66; and \$3,532.20 for the 40 weeks he was an owner operator for that company, *id.* at 166.

LCE does not challenge the actual amount of the \$17,799.19 back pay award up to May 7, 2007. Accordingly, we affirm it. 29 C.F.R. § 1979.110(a); *Palmer v. Triple R. Trucking*, ARB No. 06-072, ALJ No. 2003-STA-028 slip op. at 5 (ARB Aug. 30, 2006).

Smith argues that the ALJ erred in deducting his actual earnings with Coshocton and Ameristate. He claims that he is entitled to a total back pay award of \$101,202.81, plus \$1,187.00 a week after September 30, 2007 until reinstatement. Complainant's Brief at 27-29.

⁵ As part of the back pay award, the ALJ included health insurance coverage, for which Smith would have been eligible beginning on December 1, 2005. Finding that Smith was entitled to 65 days toward his benefit status when reinstated, the ALJ awarded \$5,784.69, which equals \$142.48 times 40 weeks and three days. R. D. & O. at 144.

The purpose of the STAA's back pay remedy is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Assistant Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7 (ARB June 30, 2005). Thus, back pay awards are ordinarily reduced by the amount of an employee's interim earnings prior to reinstatement. *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051; ALJ No. 2006-STA-001, slip op. at 17 (ARB Apr. 7, 2010). Without such reduction, a back pay award could place the employee injured by the employer's discrimination in a better position than he was when employed. We therefore reject Smith's argument.

The ALJ calculated back pay as of the last day of the hearing, May 9, 2007, noting that Smith had left Ameristate but had submitted no further employment evidence. R. D. & O. at 143 n.14. This was error and requires remand.

Ordinarily, back pay runs from the date of the discriminatory discharge until the date the employer reinstates the complainant or the date on which the complainant receives an unconditional, bona fide offer of reinstatement. *Shields v. James E. Owen Trucking Co.*, ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 12 (ARB Nov. 30, 2009). In this case, however, reinstatement is impossible if, as LCE asserts on appeal, the company went out of business on May 15, 2008. See Respondents' Brief, Exhibit A, Certificate of Dissolution dated May 15, 2005; see also discussion, *infra*.

The functional equivalent of reinstatement is front pay, which provides the complainant with the same benefit (or as close an approximation as possible) as he or she would have received with reinstatement. Thus, front pay is designed to place the complainant "in the identical financial position that he would have occupied had he been reinstated." *Bryant*, ARB No. 04-014, slip op. at 8-9. The ALJ did not address front pay and was unaware when he issued his May 21, 2008 decision that LCE had been dissolved the week before.

On remand, the ALJ must determine the correct amount of back pay from the date of the hearing, May 9, 2007, until LCE's dissolution on May 15, 2008. Since reinstatement became impossible on that day, the ALJ must next consider front pay for a reasonable period, taking into consideration Smith's earnings during both periods of back pay and front pay. Further, the ALJ should determine the interest on both pay awards and include in his calculations the amount of Smith's insurance benefits.⁶ Compare *Palmer*, ARB No. 06-072, slip op. at 7 (declining to decide the duration of a front pay award dependent on complainant's purchase of a truck) with *Bryant*, ARB No. 04-014, slip op. at 9 (remanding for a determination of the total amount of front pay).

⁶ Smith argues that his health insurance should be paid for the 138 weeks and counting since he became eligible on January 1, 2006. Complainant's Brief at 29-30.

Compensatory and punitive damages

The ALJ awarded \$20,000.00 in compensatory damages for emotional distress and loss of reputation, based on Smith's testimony and that of his wife. R. D. & O. at 145-49. The ALJ based this award on Smith's testimonial evidence of objective manifestations of his emotional distress, including irregular sleeping and eating patterns, anxiety, and marital stress, TR at 84-88, 136-40, citing a myriad of cases in which the ARB affirmed compensatory awards upon similar showings. R. D. & O. at 145-48. As further support for the award, the ALJ found that LCE's actions following his discharge prevented Smith from entering the owner-operator program at CRST. TR at 250-53.

On appeal, LCE disputes the award on appeal as "unquestionably meritless. Respondents' Brief at 24-25. Smith, on the other hand, asks that the amount be increased to \$75,000. Complainant's Brief at 26-27.

The parties' wishful thinking does not, in our opinion, warrant either reversing the ALJ's award or awarding a higher amount. Compensatory damages compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. 49 U.S.C.A. § 31105(b)(3)(A)(iii); *Shields*, ARB No. 08-021, slip op. at 12-13. To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Testa v. Consol. Edison Co., Inc.*, ARB No. 08-029, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010).

The ALJ properly considered the relevant record evidence in light of compensatory damage awards made by other courts in similar cases and settled on \$20,000.00. See *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169; ALJ No. 1990-ERA-030, slip op. at 32 (ARB Feb. 9, 2001) ("a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases"). Smith's argument does not warrant a higher amount. Nor is there any evidentiary support for reversing the award beyond LCE's assertion that the award is "unquestionably meritless." We thus find the ALJ's award of \$20,000.00 to be both supported by substantial evidence and in accordance with applicable law.

Smith also sought an award of punitive damages that the ALJ denied since Smith had filed his claim prior to the effective date of the 2007 amendments that permit such damages. R. D. & O. at 149-50. On appeal, Smith argues that punitive damages of \$160,000 are nevertheless warranted because of the deterrence value in assuring that LCE does not engage in similar unlawful conduct in the future, and because such an award furthers the STAA's remedial purpose. Complainant's Brief at 20-24.

However, at the time this claim arose, the STAA did not provide for such awards. Nor can Smith rely on the subsequent amendments to the STAA that include provision for punitive damages. As noted in *Elbert v. True Value Co.*, 550 F.3d 690, 693 (8th Cir.

2008), the STAA amendments that provide, among other things, for the award of punitive damages, do not apply retroactively to pending claims. *See also Elbert v. True Value Co.*, ARB No. 07-031, ALJ No. 2005-STA-036 (ARB Dec. 18, 2009). Smith's attorney disagrees with the *Elbert* holding, but the ARB does not. We therefore affirm the ALJ's denial of punitive damages.

Motion to reopen the record

Smith filed a motion with the ARB to reopen the record on the grounds that LCE is no longer in business⁷ and that the ALJ found Morgan to be personally liable for damages. Motion to Reopen at 1. In its opposition to the motion, LCE revealed that both Donald and Crystle Morgan were in a Chapter 13 bankruptcy proceeding. Memorandum in Opposition at 4.

The ARB's standard of review does not permit examination of any new evidence to be submitted in this case. Thus, granting leave to reopen the record is committed to the sound discretion of the ALJ. *Dalton v. Copart, Inc.*, ARB Nos. 04-027, -138; ALJ No. 1999-STA-046, slip op. at 6 (ARB June 30, 2005); *see* 29 C.F.R. § 18.54(c) (2010). On remand, the ALJ shall consider Smith's well-founded motion to reopen the record.

Although the bankruptcy proceedings are not in the record, we take judicial notice of the Morgans' filing. *See* 29 C.F.R. § 18.201. The docket of the United States Bankruptcy Court for the Northern District of Ohio shows that Donald A. Morgan, Jr. and Crystle L. Morgan filed under Chapter 13 of the Bankruptcy Code on April 14, 2005, Case No. 05-52119; their case is still pending.

The Bankruptcy Code's automatic stay provision applies to the "continuation of any judicial, administrative, or other action or proceeding against the debtor **that was or could have been commenced before the commencement**" of the bankruptcy case. 11 U.S.C.A. § 362(a)(1) (2010) (emphasis added).

While the Morgans were in bankruptcy, Smith was fired and filed his complaint on November 15, 2005. Smith could not have filed his complaint until after Crystle Morgan fired him and thus could not have commenced the STAA proceeding before she and her husband had filed for bankruptcy in April 2005. Therefore, the automatic stay does not apply. *See Williams v. United Airlines, Inc.*, ARB No. 08-063, ALJ No. 2008-AIR-003, slip op. at 4 (ARB Sept. 21, 2009) (the Bankruptcy Code automatically stays proceedings concerning claims arising before the bankruptcy is filed, but does not protect

⁷ Exhibit A appended to LCE's Brief on appeal was a copy of the State of Delaware short form Certificate of Dissolution. It stated that LCE had no assets and had ceased transacting business. The board of directors authorized dissolution of LCE as of May 15, 2008.

debtors from claims arising after the bankruptcy filing). As previously discussed, Crystle Morgan is personally liable for damages under the STAA.

Attorney's fees

The STAA provides: "If the Secretary issues an order [finding a STAA violation] and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred." 49 U.S.C.A. § 31105(a)(3)(B).

Reasonableness is the key. The ARB uses the "lodestar method" to calculate attorney's fees. This requires multiplying the number of hours reasonably expended by a reasonable hourly rate. *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 5 (ARB May 29, 2003).

The attorney requesting fees bears the burden of proof that the claimed hours of compensation are adequately demonstrated and reasonably expended. *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144; ALJ No. 2003-STA-026, slip op. at 10 (ARB Aug. 31, 2004). In addition, the attorney must demonstrate the reasonableness of his hourly fee by producing evidence that the requested rate is in line with fees prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *Cefalu v. Roadway Express*, ARB Nos. 04-103, -161; ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008).

The ALJ noted that LCE did not respond to Smith's application for attorney's fees in the amount of \$62,340.76.⁸ After cutting the hourly rate of Attorney Richard Renner to \$300.00 and that of his two associates to \$200.00, the ALJ awarded a total of \$55,350.00 in fees and \$2,038.77 in costs. R. S. D. & O. at 1.

In determining the reasonableness of an attorney's hourly rate, the ALJ looks to the prevailing market rate in the relevant community. *Jackson*, ARB Nos. 03-116, -144, slip op. at 11. The attorney must "produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

The ALJ noted that Renner had outlined an "extensive background in providing representation in whistleblower cases" since 1981 and had submitted the affidavits of three attorneys in practices similar to his in the Northeast Ohio legal community. R. S. D. & O. at 3. Considering Renner's professional status, customary billing rate, and

⁸ The ARB will ordinarily consider issues not raised before the ALJ to be waived. In this case, however, we will modify the ALJ's award of attorney's fees to conform to our case precedent.

statements indicating the basis for the hourly rate and describing Renner's experience and expertise, the ALJ concluded that \$300.00, rather than the requested \$325.00 an hour, represented a reasonable hourly rate for Renner's services. *Id.* at 4. We affirm this hourly rate as supported by substantial evidence.

Nevertheless, the ALJ erred in three other respects, namely, travel time, duplicative hours, and work unrelated to this case. We will correct those errors in accordance with our case precedent.

The ARB has indicated that travel time is generally compensable, but often at a reduced hourly rate. *Simon v. Sancken Trucking, Co.*, ARB Nos. 06-039, -088; ALJ No. 2005-STA-040, slip op. at 11 (ARB Nov. 30, 2007). See *Pollock*, ARB Nos. 07-073, 08-051, slip op. at 17 (travel time compensated at \$137.50 an hour); *Pierce v. United States Enrichment Corp.*, ARB Nos. 06-055, -058, -119; ALJ No. 2004-ERA-001, slip op. at 21 (ARB Aug. 29, 2008) (travel hours reduced by half).

Applying the *Pollock* standard of charging half the hourly rate, 3.2 hours of travel time on April 16 and 17 and May 9, 2007 would be charged at \$150.00 an hour, for a total of \$480.00, a deduction of \$480.00. Also, a two-hour charge for serving a subpoena on April 10, 2007, was duplicated, resulting in a deduction of \$300.00. See *Jackson*, ARB Nos. 03-116, -144, slip op. at 11 (time that is duplicative will be excluded). Finally, LCE should not be charged for the work done on the CRST case, totaling 3.1 hours at a rate of \$300.00 an hour for a deduction of \$930.00. See *Fleeman v. Nebraska Pork Partners*, ARB Nos. 09-059, -096; ALJ No. 2008-STA-015, slip op. at 8 (ARB May 28, 2010) (time entries for work unrelated to the instant case will be excluded).

Deducting the total of \$1,710.00 from the fee award of \$55,350.00 leaves a final fee of \$53,640.00. With these modifications, we affirm the ALJ's award of attorney's fees and costs as supported by substantial evidence of record and in accordance with the ALJ's discretionary authority and law.

CONCLUSION

Substantial evidence supports the ALJ's findings that Smith engaged in protected activity and that LCE fired him because of that activity, thus violating the STAA. Substantial evidence also supports the ALJ's back pay award of \$17,799.19 and \$20,000 in compensatory damages. We therefore **AFFIRM** these parts of his recommended decision. We also **AFFIRM** his conclusion that Crystle Morgan is individually liable for

LCE's discriminatory action. Finally, we **MODIFY** the ALJ's award of attorney's fees for the reasons expressed above and **REMAND** this case for the ALJ to consider Smith's motion to reopen the record and to determine additional back and front pay awards.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge