In the Matter of:

CYNTHIA RAE FERGUSON, **ARB CASE NO. 10-075**

COMPLAINANT, **ALJ CASE NO. 2009-STA-047**

v. **DATE: August 31, 2011**

NEW PRIME, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Paul O. Taylor, Esq.; ***Truckers Justice Center,*** **Burnsville, Minnesota**

For the Respondents:
Charles A. Cox, III, Esq.; ***Cox, Goudy, McNulty & Wallace, P.L.L.P.*;**
Minneapolis, Minnesota.

Before: Paul Igasaki, ***Chief Administrative Appeals Judge;*** **E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge;*** **and Lisa Wilson Edwards,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER OF REMAND

Cynthia Rae Ferguson filed a complaint under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010), and its implementing regulations at 29 C.F.R. Part 1978 (2010). She alleged that her former employer, New Prime, Incorporated, terminated her employment in retaliation for activity protected under the Act. The STAA protects from discrimination employees who refuse to operate a vehicle when such operation would violate commercial motor vehicle safety rules. After a hearing on the merits, a

Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R .D. & O) on March 14, 2010, finding that New Prime terminated Ferguson's employment because of her protected activity. The ALJ ordered the Complainant's reinstatement, back pay from the date of her termination to the day she receives a bona fide offer of reinstatement, compensatory damages in the amount of $50,000, and punitive damages in the amount of $75,000.

BACKGROUND

Ferguson leased a truck from Success Leasing, Incorporated on September 8, 2008, and was responsible for making a weekly rental payment of $810 in addition to the truck's operating expenses. Respondent's Exhibit (R. Ex.) A. She contracted to lease the truck to New Prime, which had exclusive possession, control, and use of the truck. R. Exs. B, C. New Prime paid Ferguson 72 percent of the line haul revenue that New Prime received from its customers to which the Complainant transported freight. Ferguson authorized New Prime to take weekly deductions of $810 plus $0.045 per mile for the truck payment, operating expenses of $159.66, $0.015 per mile for a tire replacement expense, and $0.02 per mile for a fuel and road use tax. Ferguson worked for New Prime for approximately 16 weeks, and drove an average of 1,699 miles per week. After the deductions taken per the lease agreement and payments on the advances given to her, Ferguson carried a negative balance for the entire 16 weeks. When New Prime terminated Ferguson's employment, she had a negative balance of $5,000.

In December of 2008, Jeremy Thomas, the fleet manager responsible for supervising Ferguson's schedule, assigned a trainee to ride with Ferguson. Although he testified that he intended the move to increase her profitability, he scheduled her runs as "team drivers." However, Ferguson refused to rest while the trainee drove because she testified that she could not train from the sleeping berth, and thus the loads were not delivered by the scheduled time. On the fourth run with the trainee, which began on December 20, 2008, Ferguson encountered severe winter weather on her run from Lancaster, Pennsylvania to Medford, Oregon. On December 23, Ferguson encountered black ice in Iowa and she "shut down," or stopped driving until conditions cleared. She testified that Thomas called her cell phone and told her that she would be fired if she shut down again. Ferguson testified that she was forced to shut down again on December 24 in Laramie, Wyoming due to poor visibility and slow moving traffic. Joint Exhibit (J. Ex.) at 48. After resuming driving at around 8:00 am, Ferguson encountered "very bad" weather conditions near Fernly, Nevada, and checked ahead to determine the conditions in the Donner Pass. She received information that the pass was being shut down intermittently and was advised not to proceed because it was too hazardous. On December 26, Ferguson notified Thomas that she had decided against driving through the pass until the weather improved. J. Ex. 1 at 51. Thomas responded, telling her to "chain up asap," which Ferguson interpreted as an order to drive the pass at that time. *Id.* On December 28, 2008, Thomas wrote an incident report noting the circumstances regarding

the frequent breaks due to weather. He also complained about Ferguson's attitude and noted that she had not made a paycheck since her arrival.

On December 31, 2008, Ferguson received a message instructing her to see Jack Ewing, New Prime's Fleet Manager, the following day at the Kansas City, Missouri terminal. She arrived the evening of December 31, and slept in her truck at the terminal. The next morning, Ferguson received a phone call asking her to come and speak with one of the dispatchers. She did not want to go, but was told it was mandatory, so she started to get dressed. When a security officer appeared, she informed him she was dressing and would not leave the truck until she was finished. He called the police, but by the time they arrived, Ferguson was dressed. Ewing came to the truck and told Ferguson that her lease was terminated and that she had two hours to pack up and leave.

Ferguson filed a complaint on March 3, 2009, with the Secretary of Labor alleging that New Prime had discharged her and discriminated against her in violation of the STAA's employee protection provisions. On June 2, 2009, the Secretary of Labor issued preliminary findings in an order, finding that New Prime did not terminate Ferguson's employment because of protected activity but because she was difficult to work with and because of her lack of profitability. Ferguson filed objections to the Preliminary Order and requested an ALJ hearing. The ALJ recommended granting relief under the Act.

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. 49 U.S.C.A. § 31105(a)(1). To prevail on her STAA claim, Ferguson must prove by a preponderance of the evidence that she engaged in protected activity, that New Prime took an adverse employment action against her, and that the protected activity was a contributing factor to the adverse employment action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *see also Clarke v. Navajo Express*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011). A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams*, ARB No. 09-092, slip op. at 5. Ferguson can succeed by "providing either direct or indirect proof of contribution." *Id.* "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." *Id.* If Ferguson "does not produce direct evidence, [s]he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating h[er] employment." *Id.* "One type of circumstantial evidence is evidence that discredits the respondent's proffered reasons for the termination, demonstrating instead that they were pretext for retaliation." *Id., citing Riess v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 6 (ARB Nov. 30,

2010). If the complainant proves pretext, we may infer that the protected activity contributed to the termination, although we are not compelled to do so. *Williams,* ARB No. 09-092, slip op. at 5.

New Prime may avoid liability if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams,* ARB No. 09-092, slip op. at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv)(Thomson/West 2007); 29 C.F.R. § 1979.109(a)(2010)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams,* ARB No. 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing BLACK'S LAW DICTIONARY at 577).[1]

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[1] The ALJ used a "dual motive analysis" stemming from the burden-shifting standard employed under Title VII pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See* R. D. & O. at 7, *Regan* v. *National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 6 (ARB Sept. 30, 2004). This burden of proof standard was amended on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b)(Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry. Under that standard, complainants must show by a "preponderance of evidence" that a protected activity was a "contributing factor" to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53545, 53550 (Aug. 31, 2010). The employer can overcome that showing only if it demonstrates "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." 75 Fed. Reg. 53545; *see also id.* at 53550; 49 U.S.C.A. § 42121(b)(2)(B)(ii). The ALJ's failure to apply in this case the standard the 9/11 Commission Act adopted, however, is harmless error because the "contributing factor" standard that the complainant is required to meet is a lesser burden of proof than that which the ALJ used, and the "clear and convincing evidence standard [required of the employer] is a higher burden of proof than the preponderance of evidence standard." 75 Fed. Reg. 53550. "In the review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowan*, 302 U.S. 238, 245 (1937). Since in this case the ALJ's findings of fact are supported by substantial evidence, and the 2007 STAA amendment employs a lesser burden of proof for complainants and a higher burden of proof for employers, the result would be no different even had the ALJ employed the correct legal standard. *See Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 765 (9th Cir. 1986) (agency may rely on harmless error rule when its mistake does not affect the result); *Knight v. Mills*, 836 F.2d 659, 661 n.3 (1st Cir. 1987) ("It is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground.").

1. Causation

The ALJ determined, and the parties do not dispute, that Ferguson engaged in protected activity when she stopped several times in the course of driving from Pennsylvania to Oregon in December 2008, due to hazardous weather conditions.[2] However, the Respondent contends that it did not terminate Ferguson's employment because of her protected activity, but because she was not profitable and had a "bad attitude." Thomas testified that he had recommended terminating seven drivers due to unprofitability within 6 months of Ferguson's termination, with negative balances ranging from $2500 to $9000 and the average being $3500. Ferguson's balance was $4200 when the decision was made and $5000 when New Prime terminated her employment. She testified that she was not told to improve and was told she was doing well for that time of year. Hearing Transcript at 115. The ALJ found that the Respondent terminated the lease in part because of the negative balance and therefore had shown a legitimate, nondiscriminatory reason for her termination.

The ALJ also found that Ferguson's protected activity was a contributing favor to New Prime's decision to terminate her. The ALJ credited Ferguson's testimony that Thomas told her in Iowa that if she shut down again she would be fired. See R.D. & O. at 9-10. The ALJ also found that Thomas's response to Ferguson when she told him about the unsafe conditions in the Donner Pass was meant to pressure her to drive through the pass, despite the hazardous, unsafe conditions. *Id.* at 10. The ALJ noted that Thomas stated in his incident report that most trucks pushed through with little delay, there is nothing in the record to substantiate Thomas's claim in the report, and the ALJ was reasonable to give the statement "little weight." *Id.* at 10. The ALJ also found that the temporal proximity between Ferguson's protected activity, the incident report to headquarters recommending termination, and Ferguson's actual termination supports a strong inference of discrimination. *Id.* at 10.

Substantial evidence supports the ALJ's factual findings and credibility determinations regarding Ferguson and Thomas. The ALJ appears to have credited Ferguson's testimony that Thomas had not addressed the issue of her negative balance prior to recommending that she be terminated. R. D. & O. at 3. Although the ALJ recognized that an employee who was allowed to carry a negative balance of $9,000 was an unusual situation because he had a newborn baby at home, the ALJ also appears to have credited Ferguson's contention that other drivers were allowed to carry larger negative balances and were not terminated. *Id.* at 9. In any event, given the substantial evidence in the record, the ALJ reasonably concluded that if the Respondent was motivated to terminate the Complainant due to the negative balance, it could have done

[2] The ALJ found that the Complainant would have violated a federal statute if she had driven in the hazardous weather and thus is protected under Section 31105 (a)(2)(B)(i) of the Act. 49 U.S.C.A. § 31105(a)(1)(B)(i). The ALJ also found that the Complainant had a reasonable apprehension of serious injury and, as New Prime was not in the position to correct the weather, her actions were also protected under Section 31105(a)(1)B(ii). 49 U.S.C.A. § 31105(a)(2)(B)(ii).

so at any time during the sixteen weeks of her employment, but did not until after Thomas filed the incident report regarding the protected activity. *Id.* at 10.

Accordingly, the record fully supports the conclusion that Ferguson engaged in protected activity that was a contributing factor to her termination, and that New Prime would not have terminated her employment absent the protected activity. *See, e.g., Fleeman v. Nebraska Pork Partners*, ARB No. 09-0986, ALJ No. 2008-STA-015 (ARB May 28, 2010). Substantial evidence also fully supports the ALJ's determination that New Prime did not terminate Ferguson's employment due solely to her negative balance. Thus, we conclude that New Prime violated the STAA when it terminated Ferguson's employment. *See Williams* ARB No. 09-092.

2. Relief

A. Reinstatement

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 Ferguson be reinstated as a driver with New Prime, which is affirmed as it is unchallenged on appeal. R. D. & O. at 13.

B. Back pay

The ALJ also found that Ferguson is entitled to back pay in the amount of $26,601.40, or $31,601.40 minus the $5,000 Ferguson owed the company, and $509.70 each week until she is reinstated. The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. *Clifton v. United Parcel Serv.*, ARB No. 97-045, ALJ No. 1994-STA-016, slip op. at 2, (ARB May 14, 1997), *rev'd on other grounds sub nom. United Parcel Servs., Inc. v. Administrative Review Bd.*, 166 F.3d 1215 (6th Cir. 1998)(table); *accord Blackburn v. Metric Constructors, Inc.*, No. 1986-ERA-004, slip op. at 8 (Sec'y Oct. 30, 1991), *aff'd in relevant part and rev'd in part sub nom. Blackburn v. Martin*, 982 F.2d 125 (4th Cir. 1992).

In calculating Ferguson's back pay award, the ALJ found that the Respondent's company drivers are paid approximately $.30 per mile and that the Complainant drove an average of 1,699 miles a week while she worked for New Prime. Thus, he concluded that the Complainant is entitled to a back pay award of $509.70 per week, which results in an award of $31,601.40, for the 62 weeks she has been out of work. As she was $5,000 in arrears to the Respondent, the ALJ awarded back pay in the amount of $26,601.40, plus interest, and $509.70 per week until she is reinstated. The record contains the Complainant's weekly settlement sheets, which report the number of miles driven, the

revenue received from the customers, and the amount deducted for expenses and payments for advances New Prime gave Ferguson. R. Ex. D. The sheets indicate that while the Complainant drove for New Prime, she never earned a net income.

While the Board has held that a formula for computing back pay keyed to the earnings of a representative employee may give a reasonable approximation of what a complainant would have earned but for the discrimination, *Reed v. National Minerals Corp.*, No 1991-STA-034 (Sec'y July 24, 1992), the ALJ did not explain the reason for choosing a company driver's wages to calculate the amount of the back pay award, rather than a leased driver. The Administrative Procedure Act (APA) requires that decisions rendered on the record provide the "findings and conclusions, and the basis therefor, on all the material issues of fact, law or discretion presented on the record . . . ." 5 U.S.C.A. § 557(c)(3)(A) (West 1996); *see Lockert v. Sec'y of Labor*, 867 F.2d 513, 517 (9th Cir. 1989) (arising under Energy Reorganization Act, 42 U.S.C. § 5851 (1988)). Consistent with the mandate of Section 557(c)(3)(A), the ALJ's findings of fact must provide an explanation for the resolution of conflicts in the evidence and must reflect proper consideration of evidence that could support contrary findings. *See NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983); *see also* 29 C.F.R. § 18.57(b)(2010) (summarizing contents of ALJ decisions). As the ALJ did not provide a rationale for his determination of the amount due for back pay, we vacate the ALJ's finding that Ferguson would have earned an average of $509.70 per week had New Prime not discriminated against her, and remand the issue of the amount of back pay to which Ferguson is entitled for reconsideration based upon further findings and explanation.

C. Compensatory Damages

Under the STAA, a successful complainant is entitled to compensatory damages in addition to back pay. 49 U.S.C.A. § 31105 (b)(3)(A)(iii). Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091; ALJ No. 2006-STA-032 (ARB Sept. 24, 2010). 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. *Id.*

The ALJ awarded $50,000 in compensatory damages for emotional distress, noting that Ferguson sought an award of $100,000 in damages for emotional distress as she experienced hardship similar to that of the complainant in *Michaud v. BSP Transport, Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997). R.D. & O. at 12

The Secretary and the Board consistently have held that compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation. New Prime argues that the record contains "no evidence" that Ferguson suffered emotional injury. Although Ferguson's testimony was unsupported by medical evidence, it was unrefuted and, according to the ALJ, credible. We have affirmed

reasonable emotional distress awards based solely upon the employee's testimony. *See, e.g., Jackson v. Butler & Co.*, ARB Nos. 03-116,-144; ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, -095; ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004). The ALJ properly considered the relevant record evidence in light of compensatory damage awards other courts made in similar cases and settled on $20,000.00. See *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -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"). Therefore, since substantial evidence supports the ALJ's finding that Ferguson suffered emotional injury as a result of the discharge, we affirm the $50,000 compensatory damage award.

D. Punitive Damages

In the amendments effective August 2007, the STAA provides that "relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000." 49 U.S.C.A. § 31105(a)(3)(C). The Respondent contends on appeal that the ALJ erred in awarding punitive damages in the amount of $75,000, as the matter with Ferguson was an isolated incident and there was no evidence that pressuring drivers to operate in unsafe conditions was an institutional problem.

The United States Supreme Court has held that punitive damages may be awarded 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). The Court explained the purpose of punitive damages is "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908(1) (1979). The focus is on the character of the tortfeasor's conduct – i.e., whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id*. at 54.

The ALJ found that Thomas, the fleet manager, intentionally violated a federal safety statute when he pressured Ferguson to drive through the Donner Pass in hazardous conditions. He found that Thomas demonstrated a total disregard not only for Ferguson and her co-driver's safety but for the safety of other drivers on the road. Thus, he concluded that this behavior was both reprehensible and inimical to the purpose of the Act. However, the ALJ did not consider whether Thomas's behavior reflected a corporate policy of STAA violations or whether punitive damages are necessary in this case to deter further violations. *See generally White v. The Osage Tribal Council,* ARB No. 96-137, ALJ No. 1995-SDW-001 (ARB Aug. 8, 1997); *Johnson v. Old Dominion Sec.,* Nos. 1986-CAA-003, -004, -005, slip op. at 29 (Sec'y May 29, 1991). Moreover, the ALJ accepted the Complainant's request for damages in the amount of $75,000 without discussing the evidentiary basis for this finding. Thus, we vacate the ALJ's punitive damages award and remand the case for further findings on the necessity and amount of such damages under the facts of this case. In his analysis, the ALJ should

include consideration of the size of the award that would adequately deter New Prime from future violations and the punitive impact of the damages on the company.

CONCLUSION

For the above stated reasons, we affirm the ALJ's decision finding that New Prime terminated Ferguson's employment because she engaged in activity that the STAA protects. We affirm the ALJ's order reinstating Ferguson to her former employment and awarding compensatory damages in the amount of $50,000. We vacate the ALJ's award of back pay and punitive damages and remand the issues of back pay and punitive damages to the ALJ for further findings and disposition consistent with this opinion.

Ferguson's attorney shall have thirty (30) days from receipt of the Final Decision and Order of Remand in which to file a fully supported attorney's fee petition for costs and services before the ARB, with simultaneous service on opposing counsel. Thereafter, New Prime shall have thirty (30) days from its receipt of the fee petition to file a response.

SO ORDERED:

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge