In the Matter of:

LINDELL BEATTY,

and

APRIL BEATTY,

COMPLAINANTS,

v.

CELADON TRUCKING SERVICES, INC.,

RESPONDENT.

ARB CASE NOS. 15-085
15-086

ALJ CASE NO. 2015-STA-010

DATE: December 8, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lindell and April Beatty, *pro se*, Wilmington, North Carolina

For the Respondent:
Zebulon D. Anderson, Esq. and Kayla J. Marshall, Esq.; *Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.;* Raleigh, North Carolina

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge;* and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (Thomson Reuters 2016), and its implementing regulations, 29 C.F.R. Part 1978 (2016). Complainants Lindell and April Beatty filed a complaint alleging that

Respondent Celadon Trucking Services, Inc. (Celadon) violated the STAA by placing medical holds on the couple, issuing "nonconformance" reports about them, constructively discharging them and refusing to rehire them after their discharge. On August 13, 2015, an Administrative Law Judge (ALJ) granted relief including back pay and punitive damages and ordered Celadon to reinstate Complainants to their former jobs as team drivers.[1] Celadon petitioned the Administrative Review Board (ARB or Board) for review (ARB No. 15-086), and Complainants appealed the amount awarded in punitive damages (ARB No. 15-085). For the following reasons, the Board affirms the ALJ's decision.

FACTUAL BACKGROUND[2]

Celadon hired Complainants Lindell and April Beatty on October 25, 2013 as "team" truck drivers. The team drivers primarily worked in the "expedited" division, which carried penalties for late deliveries. Celadon furnished trucks equipped with Qualcomm on-board computers for communication between the drivers and dispatch that automatically recorded hours driven. During orientation, Celadon informs drivers about Department of Transportation regulations, including hours of service rules, and explains the procedures they must follow should they believe they are too fatigued to drive. The drivers are also informed that they must communicate with their driver-managers as soon as possible when they anticipate they will not make their scheduled delivery times for any reason. The DOT regulations provide that a driver cannot drive after being on duty 70 hours over eight consecutive days, but that a driver may restart a fresh 8-day period by taking 34 or more consecutive hours off duty (a "34-hour restart").[3]

On November 13 2013, the Beattys reported fatigue, began a 34-hour restart, and reported a projected time for availability (PTA) of November 14, 2013. But after receiving the November 13 report of fatigue, Celadon placed the Beattys on illness holds. On November 14, after completing the restart, the Beattys requested another assignment, but were not immediately dispatched. Later that morning, after discussions with Celadon managers, Mr. Beatty was released from the illness hold, and he received and accepted another assignment. Ms. Beatty also drove on that assignment. Initially, Celadon did not pay her for that assignment because it had mistakenly placed her on a medical hold and, unbeknownst to her, Celadon had not released her from the hold. Ordinarily, when a driver is under a medical hold, they are not permitted to drive until they have undergone a physician's evaluation. However, Celadon investigated the hold,

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1 *Beatty v. Celadon Trucking*, ALJ No. 2015-STA-010 (Aug. 13, 2015)(D. & O.).

2 The facts for the Factual Background section are taken from joint stipulations of fact, the ALJ's findings of fact, factual dispute resolutions, and credibility determinations, and the undisputed evidence of record.

3 49 C.F.R. § 395.3(b), (c)(2013).

found that it had mistakenly applied the hold, released Ms. Beatty from the medical hold, and paid her for the previous assignment. D. & O. at 4.

On January 25, 2014, Celadon gave the Beattys a load assignment for pick up in Greensboro, North Carolina and delivery to Farmville, North Carolina. They refused the assignment claiming that they were fatigued. The Driver Manager, Deborah Hart, wrote up the Beattys in a "nonconformance" report which was approved by the Operations Manager. D. & O. at 4, 12.

On March 18, 2014, the Beattys again refused an assignment stating to dispatch that they were fatigued and needed a 34-hour restart. Dispatch refused however to grant them a restart, informing them that they were not eligible for a 34-hour restart since they were each below the 70-hour threshold for a requisite restart. The ALJ found, based on April Beatty's credible testimony, that Driver Manager Barton notified the Beattys that he had to write them up for refusing an assignment.[4] But he later notified them that the write-up had been deleted. D. & O. at 13. The Beattys filed their complaint with the Occupational Safety and Health Administration (OSHA) on March 25, 2014.

On June 9, 2014, the Beattys reported to Celadon that poor weather and the need for trailer repair had caused them delays. They informed the Driver Manager that they could resume driving but could not deliver their load until 11:00 am on June 10. Early on June 10, the Beattys informed Celadon that they would be further delayed and would not deliver the load until 7:00 am on June 11 due to fatigue. Driver Manager Hart wrote a nonconformance report due to this incident. D. & O. at 5.

On June 18, 2014, the Beattys submitted their resignations from Celadon and returned the company truck to the Kernsville, North Carolina terminal. But they reapplied for employment with Celadon July 25, 2014; which Celadon denied.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in STAA cases.[5] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[6] We

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[4] *See* Hearing Transcript. (H. Tr.) at 123.

[5] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

[6] 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citations omitted).

uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."[7]

DISCUSSION

A. Governing law

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.[8] STAA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[9]

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.[10] It is a STAA violation for any person to retaliate against a driver who refuses to operate a commercial motor vehicle while the driver's ability or alertness is impaired due to fatigue, illness, or other cause.[11] Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[12]

B. Issues raised on appeal and analysis

As a threshold matter, we address Celadon's contention that the ALJ erred by entertaining the Beattys' claim of retaliation on November 20, 2013. Celadon avers that Ms. Beatty filed a complaint in January 2014 alleging that Respondent suspended her employment

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7 *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

8 49 U.S.C.A. § 31105(a)(1).

9 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson Reuters 2016).

10 49 U.S.C.A. § 42121(b)(2)(B)(iii).

11 49 U.S.C.A. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(a), (c)(1)(i).

12 49 U.S.C.A. § 42121(b)(2)(B)(iv).

(by placing her on a medical hold) on November 20, 2013, in reprisal for alleged protected activity. OSHA dismissed the case for "lack of cooperation" because Ms. Beatty failed to follow up with OSHA. Celadon argues that because Ms. Beatty never filed objections to the OSHA dismissal, that dismissal became final. Celadon contends that because dismissal of Ms. Beatty's complaint was final, she is barred "as a matter of law" from bringing the factual claims contained in the complaint. Celadon cites no legal precedent to support this contention and we are not aware of any. Moreover, the ALJ credited the Beattys's testimony that they did not intend to file a complaint at that time and were only seeking information.[13] And as the ALJ noted, the initial complaint was dismissed for non-responsiveness (D. & O. at 12) and did not address the merits.[14] Under these circumstances, it was not error for the ALJ to address the claims contained in the dismissed complaint.

Protected activity

The ALJ found that the Beattys established they had engaged in protected activity on November 10, 2013, when they began a restart after reporting fatigue; on January 25, 2014, when they refused a load claiming fatigue; and on March 18, 2014, when they claimed fatigue and declined another load. Celadon challenges these findings with a superficial argument that because the Beattys' logs reveal that they spent sufficient time in their sleeper berths, substantial evidence does not support their claims of fatigue and their refusals to drive were consequently unprotected. The ALJ adroitly addressed this false logic by quoting Celadon's own Handbook that states: "Sleep quality—getting the right kind of sleep is just as important as getting enough sleep . . . ." D. & O at 27. Thus the ALJ rejected employer's evidence that the Beattys' testimony was not credible given the amount of "berth" time they had logged. He found that the calculations and procedures Celadon has in place to avoid drivers becoming overly tired do not outweigh credible testimony that they felt fatigued and unable to safely drive. He found their testimony substantiated by their inability to drive a short distance home without stopping to sleep, and the irritability they felt based on being tired.[15] After observing the Beattys' testimony and demeanor in the court room, the ALJ found the Beattys to be "very credible witnesses."[16] The ALJ credited their testimony and held that the Beattys "suffered cumulative fatigue after weeks on the road living in and out of trucks" and his findings were supported by substantial evidence.[17] The ALJ thus held, and we affirm, that the Beattys' reports of fatigue were protected

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[13] D. & O. at 12; H. Tr. at 115, 180, 269-260.

[14] Additionally, Ms. Beatty testified that she did not intend to file a complaint but rather telephoned OSHA to request information. D. & O. at 12.

[15] *See Id.* at 31.

[16] Specifically, the ALJ found that the Beattys' testimony "was consistent with one-another, the facts, and . . . withstood intense cross-examination by Respondent's counsel." *Id.* at 23.

[17] *Id.* at 29.

given their credible testimony of the circumstances surrounding each of the times they refused to drive.[18] Additionally, the March 2014 OSHA complaint constitutes protected activity.[19]

Adverse action

Celadon does not substantively contest that filing nonconformance reports on the Beattys on January 29, 2014, and June 10, 2014, were adverse employment actions, and we affirm the ALJ's findings on this issue.[20] In addition, we reject Celadon's contention that the "threat" of issuing a nonconformance report did not constitute an adverse action because the disciplinary report was not ultimately issued. The governing STAA regulations explicitly prohibit employers from threatening employees for protected activity and, under the similar FRSA regulatory language, we have repeatedly held that threats of discipline or potential discipline even if never formally administered, may constitute adverse action.[21] The threat to write-up the Beattys contained in an e-mail from Barton constituted an adverse action regardless of whether Celadon formally issued the write-up.[22]

Celadon more convincingly contests the ALJ's findings that the Beattys were subjected to an adverse employment action when it placed them on a medical/illness hold and that the ALJ erred in finding that the Beattys were "constructively discharged." Nevertheless, we affirm them. Under the STAA's implementing regulations it is a violation for an employer to "intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against an employee[.]" 29 C.F.R. § 1978.102(b), (c). In interpreting the relevant regulatory language promulgated under AIR 21, which is nearly identical to the comparable STAA regulatory language, we ruled that "the term 'adverse actions' refers to

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[18] *See Melton v. Yellow Transp. Inc*., ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 6 (ARB Sept. 30, 2008).

[19] *See Dick v. Tango Transp.*, ARB No. 14-054, ALJ No. 2013-STA-060 (ARB Aug. 30, 2016).

[20] *See, e.g., Williams v. American Airlines, Inc*., ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010)(holding warning letters to be presumptively adverse where they are "considered discipline by policy or practice," "routinely used as the first step in a progressive discipline policy," or where they "implicitly or expressly reference potential discipline").

[21] *See Stallard v. Norfolk Southern R.R. Co*., ARB No. 16-028, ALJ No. 2014-FRS-149, slip op. at 8-9 (ARB Sept. 29, 2017); *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 2 (ARB Dec. 21, 2012). *See also, Almendarez v. BNSF Ry. Co*., 13-cv-00086, 2014 WL 931530, at *5-6 (W.D. Wash. Mar.10, 2014) (oral threat related to protected activity, standing alone, may constitute adverse action).

[22] *See* H. Tr. at 123-125; Complainant's Exhibit 9.

unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged."[23]

On November 11, 2013, the Beattys notified Deborah Hart, a Driver Manager at Celadon, that they were "really fatigued" and needed a 34-hour restart.[24] Celadon's M. Hamblet placed the Beattys on a medical or illness hold that restricted their ability to drive.[25] After the 34-hour restart, the Beattys requested another assignment but were not dispatched. Later that day when Mr. Beatty repeated his request to for a job, Celadon released his illness hold and gave him an assignment. But Ms. Beatty remained on a medical hold. The hold that Celadon placed on Ms. Beatty normally requires a physician's evaluation before she could be reassigned. Although Celadon contends that the more severe hold was placed in error and that it released Mr. Beatty from the hold when requested, the ALJ found that these facts did not change the effect the hold had on the Beattys and that the holds were improperly placed on the Beattys when they were fatigued, not ill. An adverse action is simply something unfavorable to an employee, not necessarily unfair, retaliatory or illegal.[26] As an illness/medical hold can affect the ability of a driver to earn money, we affirm the ALJ's finding that this hold was an adverse employment action as it is reasonable and supported by the evidence.

Celadon also contends that the ALJ erred in finding that the Beattys were constructively discharged. 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."[27] Constructive

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[23] 49 U.S.C.A. § 31105(a)(1)(A)(i); *see also Stack v. Preston Trucking Co.*, No. 1986-STA-022, slip op. at 2 (Sec'y Feb. 26, 1987) ("The fact that Complainant's safety complaints filed with the DOT and OSHA between 1981 and 1985 had been subsequently considered and either 'resolved or dismissed,' does not transform them into non-protected conduct, nor eliminate the possibility of subsequent retaliatory action by the employer.").

[24] H. Tr. at 48.

[25] Respondent's Exhibit Q; H. Tr. at 369-370.

[26] *See Occhione v. PSA Airlines*, ARB No. 13-061, ALJ No. 2011-AIR-012 (ARB Nov. 26, 2014).

[27] *Strickland v. United Parcel Svc.*, 555 F.3d 1224, 1228 (10th Cir. 2009); *see also Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002 (ARB Mar. 30, 2016) *vacated on other grounds sub nom, Dietz v. Cypress Semiconductor Corp.*, __Fed.Appx. __, 2017 WL 4676650 (10th Cir. Oct. 17, 2017)*; Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011) (formulating the question of constructive discharge as whether employer created 'working conditions . . . so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign.

discharge is a question of fact, and the standard is objective: the question is whether a "reasonable person" would find the conditions intolerable.[28] But as the Board held in *Dietz*, "that is not the only method of demonstrating constructive discharge. When an employer acts in a manner so as to have communicated to a reasonable employee that [he] will be terminated, and the . . . employee resigns, the employer's conduct may amount to constructive discharge."[29] Under this standard, an employee who can show that the "handwriting is on the wall" and the "axe is about to fall" can make out a constructive-discharge claim.[30] Further, to make the case for constructive discharge, the Beattys are not required to show that Celadon threatened to fire them, "it is enough to show that [Celadon] communicated to [them] that [they] would be fired." Constructive discharge is a question of fact and because the ALJ's finding that the Beattys met the alternate standard for constructive discharge is supported by substantial evidence, we affirm it.

The ALJ found constructive discharge based on the evidence that anytime the Beattys refused loads or dispatch assignments for fatigue, they were likely to receive nonconformance reports that might have led to more serious actions or discharge, which would affect their ability to find other trucking employment. Although there were no overt threats of termination, the Beattys testified that they were continually urged to drive in spite of fatigue and not feeling safe to drive. The ALJ found the Beattys to be "very credible witnesses" (D. & O. at 23),and noted Ms. Beatty's testimony that they made a point of keeping a clean record and that the June 2014 nonconformance report "scared us into resigning" given its threat of routing the Beattys for an "ops meeting" if they got another write-up. *Id.* at 13. The ALJ explicitly credited their testimony that they believed that they would be terminated if they continued to report that they were fatigued, and that "[s]uch discipline would likely have tarnished their driver's records and their ability to find other trucking employment in the future." *Id.* at 25. We affirm the ALJ's finding of constructive discharge as it supported by substantial evidence. We also affirm the ALJ's finding that Respondent's failure to rehire the Beattys is clearly an adverse employment action.

Contributing factor

When a complainant has established that he engaged in protected activity and that his employer took an adverse employment action against him, he must then establish that the

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[28] *Strickland*, 555 F.3d at 1228.

[29] *Dietz*, ARB No. 15-017, slip op. at 13 (quoting *E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002)). *See also Burks v. Okla. Pub. Co.*, 81 F.3d 975, 978 (10th Cir. 1996) ("This court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired.").

[30] *E.E.O.C v. Univ. of Chi. Hosps.*, 276 F.3d at 332; see also *Burks*, 81 F.3d at 978 ("This court has recognized that an employee can prove a constructive discharge by showing that she was faced with a choice between resigning or being fired.").

protected activity was a contributing factor in the unfavorable personnel action. The ALJ held that the Beattys demonstrated that their protected activity contributed to each of the adverse actions taken against them. Celadon argues both (1) that the ALJ's conclusions are not supported by substantial evidence and (2) that the ALJ erred in holding that STAA complainants need not prove retaliatory intent. Both arguments are unavailing and we affirm the ALJ's causation findings. Celadon states that the ALJ "fundamentally misapplied the core legal principle of the STAA" by his ruling that a complainant need not prove retaliatory motive. But we have repeatedly held that an employee need not prove that his employer had a motive to retaliate to demonstrate "contributing factor," and Celadon provides no rationale or legal support to convince us otherwise.[31]

Additionally, substantial evidence supports the ALJ's findings of contributing factor. The ALJ noted that the nonconformance reports filed in January and June 2014 were consistently imposed immediately following the Beattys' protected complaints of fatigue. The closer the temporal proximity is, the stronger the inference of a causal connection. Such indirect evidence can establish retaliatory intent.[32] A temporal connection between protected activity and an adverse action may support an inference of retaliation. And the ALJ so found[33]. Moreover, although the ALJ did not list the June 2014 complaints of fatigue as protected activity, we infer that he made this finding for he noted that the nonconformance report in June specifically refers to these complaints. The ALJ appears to rely on the consistent pattern of nonconformance reports being filed shortly after the Beattys are unable to deliver their loads due to fatigue, and thus we affirm his finding that the adverse employment actions were due, at least in part, to the protected activity. Further, as we affirm the ALJ's finding that Celadon constructively discharged the Beattys because they believed that they would continue to receive nonconformance reports for declining to drive due to fatigue and eventually be terminated, we affirm the ALJ's finding that the protected activity was a contributing factor in the discharge.

We also reject Celadon's contention that the evidence does not establish that the illness/medical holds imposed following the November 2013 refusal to drive due to fatigue were related to protected activity. Celadon contends that the holds were placed to give the drivers a chance to get "ready to drive" but does not dispute that the hold was placed because of their complaints of fatigue. The holds, like the nonconformance reports, were applied immediately

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[31] *Menendez v. Haliburton, Inc*., ARB No. 12-026, ALJ No. 2007-SOX-005, slip op. at 9 (ARB Mar. 15, 2013) *aff'd sub nom, Halliburton, Inc. v. ARB,* 771 F.3d 254, 263 (5th Cir. 2014).

[32] *See, e.g., Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd sub nom, Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006).

[33] *See, e.g., Robinson v. Northwest Airlines, Inc*., ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

following the Beattys' protected claims regarding fatigue and are also therefore supported by substantial evidence.

Moreover, Celadon contends that the ALJ erred in finding that its refusal to rehire the Beattys in July 2014 was based, at least in part, on their protected activity. The ALJ rejected the employer's shifting reasons for its failure to rehire the Beattys[34] and found that Celadon did not rehire them, in part, due to the nonconformance reports that were related to the protected activity. Celadon now contends that it based its refusal to rehire the Beattys on the discovery that they had consistently underperformed, as well as their alleged failure to communicate with Celadon. Substantial evidence, however, supports the ALJ's rejection of these reasons. Noting that the Beattys had not been previously counseled on their purported underperformance, the ALJ implicitly found pretext. D. & O. at 25, 31. The ALJ likewise dismissed "failure to communicate" as a legitimate basis for not hiring the Beattys, finding instead that the record showed "their constant communication with driver managers." D. & O. at 25. We affirm the pretextual nature of these justifications as further support of causation. Finally, Celadon admits that the nonconformance reports played a part in its decision.[35] Thus, as we affirm the ALJ's finding that the nonconformance reports are due, at least in part, to their protected activity, we also affirm the ALJ's finding that the decision to not rehire was also due, in part, to protected activity.

Affirmative defense not established by clear and convincing evidence

The requirement that the employer prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity has two components. The first involves imposition of the clear-and-convincing burden-of-proof standard, a more rigorous burden than the preponderance-of-the-evidence standard. The second is the phrase "would have taken the same unfavorable personnel action in the absence of [the protected activity]." As the ARB wrote in *Speegle v. Stone & Webster Construction*, the plain meaning of the clear-and-convincing phrase requires that the evidence must be "clear" as well as "convincing."[36] "Clear" evidence means the employer has presented an unambiguous

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[34] D. & O. at 25. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012) (noting that "an employer's shifting explanations for its actions," and "the falsity of an employer's explanation for the adverse action taken" are among the types of circumstantial evidence that the ALJ may consider when determining whether protected activity was a contributing factor in the adverse personnel action).

[35] In its response brief, Celadon states that it denied the Beattys' reapplication because in addition to quitting without notice, they had driven fewer miles per week than average Team Drivers and had received two nonconformance reports on two separate occasions. *See* Respondent's Brief in Support of Petition for Review at 27.

[36] *Speegle v. Stone & Webster Constr., Inc*., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014).

explanation for the adverse action(s) in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable."[37] Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.[38]

The ALJ found that Respondent has not met its burden of proving "by clear and convincing evidence" that it would have taken the same adverse action absent the protected activity. The ALJ reviewed Celadon's contentions regarding the reasons it applied the nonconformance reports and the refusal to rehire the Beattys. He concluded that the reasons were not credible or supported by the evidence of record. The ALJ considered and rejected Celadon's contention that the Beattys were primarily disciplined for failure to communicate. Indeed the ALJ found that there had been "ample communication," as reflected in extensive Qualcomm and telephone records and the Beattys' testimony. D. & O. at 25, 31. The ALJ also found that Respondent provided shifting reasons for the refusal to rehire the Beattys including their purported nonperformance. Noting that the record reflected that the Beattys had never been disciplined for low mileage or nonperformance, the ALJ rejected it as not credible. *Id.* at 25, 31. These implicit findings of pretext fatally undermine Celadon's affirmative defense.

Moreover, the ALJ found that Celadon's contention that the record establishes that the Beattys could not have been fatigued was outweighed by their credible testimony that they were too tired to drive and did not feel that they could safely do so. *Id.* at 29. As the ALJ reasoned, "[w]hile Celadon's handbook and witnesses said the right thing, i.e., do not drive tired and no one told the Beattys to drive tired, [Celadon's] actions undeniably conveyed another message." *Id.* at 30. The nonconformance reports were only issued after the Beattys encountered difficulty delivering their assigned loads due to complaints of fatigue and there is no evidence that they were ever disciplined for failure to communicate outside of the context of their refusals to drive due to fatigue.

The ALJ considered and rejected the contentions Celadon raised on appeal, and we affirm his conclusion that the evidence does not establish that Respondent would have taken the same actions in the absence of the protected activity.

Damages

Regarding damages, as we affirm the ALJ's finding that the Beattys did not voluntarily leave their employment with Celadon, but were constructively discharged, we affirm the ALJ's calculation of backpay wages from the date of constructive discharge, not the date employer refused to rehire them.

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[37] *Id.*

[38] *Speegle*, ARB No. 13-074, slip op. at 12.

Lastly, Celadon challenges the ALJ's award of $10,000 in punitive damages as unsupported by the facts of this case. In their appeal of the ALJ's decision, the Beatty's argue that the ALJ erred in failing to impose the maximum punitive damages allowed. We hold that the record supports the ALJ's award of punitive damages in the amount of $10,000. [39]49 U.S.C.A. § 31105(b)(3)(C). An award of punitive damages is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" The size of the punitive award is fundamentally a fact-based determination driven by the circumstances of the case, and we are bound by the ALJ's findings if they are supported by substantial evidence on the record considered as a whole. [40] Gross or reckless indifference to the law can establish the intentional component needed for willfulness.

Substantial evidence supports the ALJ's finding that punitive damages were warranted in this case; the ALJ specifically found that Celadon acted in complete disregard of 49 C.F.R. §392.3, prohibiting operation of a commercial motor vehicle by a driver suffering from fatigue. D. & O. at 34. While the ALJ remarked that Celadon did not act maliciously, he nevertheless found that they acted with "a complete disregard for the safety of the Beattys and the public." *Id.* at 34. Thus, the ALJ concluded that a modest amount of punitive damages may encourage enforcement of the fatigue rules. As the ALJ provided reasoning for the necessity for punitive damages that is supported by the evidence and awarded a modest amount to encourage enforcement of the fatigue rules, but also recognized that Celadon's employees did not act maliciously or with intent to harm, we affirm the award and amount.

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[39] *Youngerman v. United Parcel Serv., Inc*., ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013) (quoting *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 98 (ARB Aug. 31, 2011)).

[40] *Id.* at 10 (citing *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 435 (2001)).

CONCLUSION

Accordingly, the Board **AFFIRMS** the ALJ's August 13, 2015 Decision and Order.[41]

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

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[41] Following the ALJ's issuance of an Order of Reinstatement, the Beattys have raised another issue, i.e., they challenge the sufficiency of an offer of reinstatement. If an ALJ concludes that a respondent has violated the STAA, the ALJ must issue an order requiring, where appropriate, "reinstatement of the complainant to his or her former position with the same compensation, terms, conditions, and privileges of the complainant's employment." 29 C.F.R. § 1978.109(d)(1). Here, that means that Respondent must offer to reinstate the Beattys as they were formerly employed, as ordered by the ALJ. If the Beattys believed that Celadon did not make a bona fide offer of reinstatement, their remedy was to apply to the Assistant Secretary for Occupational Safety and Health for enforcement of the Board's order. *See* Sec'y Ord. 5-2002 (Oct. 10, 2002) 4.a. (1)(h); *Scott v. Roadway Express, Inc*., ARB No. 01-065, ALJ No. 1998-STA-008, slip op. at 2 (ARB May 29, 2003)(Order Denying Motion to Enforce). Under 49 U.S.C.A. § 31105(d), "If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred." Pursuant to 29 C.F.R. § 1978.113, "Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to occur." *See Scott,* ARB No. 01-065; *see also Martin v. Yellow Freight, Inc.,* 983 F.2d 1201 (2d Cir. 1993). But the Secretary has not delegated to the Board the authority to enforce such orders.