In the Matter of:

CEDRIC SINKFIELD,

COMPLAINANT,

v.

MARTEN TRANSPORTATION, LTD.,

RESPONDENT.

ARB CASE NO. 16-037

ALJ CASE NO. 2015-STA-035

DATE: January 17, 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

***For the Respondent*:**
Stephen A. DiTullio, Esq.; Scott M. Paler, Esq.; ***DeWitt Ross & Stevens S.C.*, Madison, Wisconsin**

Before: Joanne Royce, ***Administrative Appeals Judge*; Tanya L. Goldman,** ***Administrative Appeals Judge*; and Leonard J. Howie III,** ***Administrative Appeals Judge***

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended. 49 U.S.C.A. § 31105(a) (Thomson Reuters 2016); *see also* 29 C.F.R. Part 1978 (2017) (STAA's implementing regulations). Complainant Cedric Sinkfield filed a complaint alleging that Respondent Marten Transportation LTD (Marten) retaliated against him in violation of STAA's whistleblower protection provisions when it fired him shortly after he refused to drive an overweight truck and trailer. On February 4, 2016, a Department of Labor Administrative Law Judge (ALJ) concluded that Marten violated the STAA and awarded remedies. Marten appealed the ALJ's decision to the Administrative Review Board

(ARB or Board). We affirm the ALJ's liability and compensatory damages determinations and vacate the ALJ's punitive damages award and remand.

BACKGROUND

Cedric Sinkfield began working as an over-the-road driver for Marten on March 24, 2014. Marten terminated his employment on June 5, 2014. Connie Ahlers, Sinkfield's Fleet Manager, supervised Sinkfield for most of his tenure at Marten. She reported to Dan Blair and Jason Marten, who were "Team Leaders" responsible for facilitating route management.

All of Marten's trucks, including the truck Sinkfield drove, were equipped with an auxiliary power unit (APU) weighing approximately 400 pounds. Decision and Order (D. & O.) at 3. The APU allows the driver to run heating and cooling without running the truck's engine and thereby reduces fuel costs.

Sinkfield's few months working for Marten were punctuated by numerous performance problems. The ALJ's opinion contains a generally undisputed chronology of the events preceding the termination of Sinkfield's employment that we briefly summarize here.

Warnings

On March 27, 2014, his third day of work, Sinkfield left his trailer at a truck stop that he knew was not authorized as a secure location. Ahlers informed Sinkfield that this was unacceptable and recorded the incident in Marten's Human Resource Information System (HRIS) comments. Joint Exhibit (JX)-7; Transcript (Tr.) at 270-72. Sinkfield again left his trailer at an unsecure location on May 6, 2014, and Marten issued him a written warning. JX-9; Tr. at 276-77, 282. On or about April 10, Ahlers issued Sinkfield a warning for having a high engine idle time.[1] D. & O. at 4. "Idle time" means the engine is running without movement. On or about May 14, 2014, Ahlers assigned Sinkfield to send highly time-sensitive paperwork to a courier for a shipment of meat that was being delivered to Mexico. Sinkfield sent the paperwork eventually but did not, to Ahlers, appear to be sufficiently concerned about the seriousness of the task and the potential cost to the company if it did not arrive on time. Sinkfield told Ahlers that it was not his job to send paperwork. D. & O. at 5. Marten issued Sinkfield a "serious warning." JX-9; Tr. at 345-46.

MillerCoors Load

On May 29, 2014, Ahlers dispatched Sinkfield to transport a trailer of beer from MillerCoors in Golden, Colorado, to Coeur d'Alene, Idaho. In the dispatch, Marten instructed Sinkfield that the load would be heavy, that he should go in with low fuel, and to message dispatch if it was overweight. To transport the load, Sinkfield would have to travel through Colorado and Idaho and either Wyoming or Utah. At some point after dispatching Sinkfield, Ahlers left for the day and the evening Fleet Manager took over.

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[1] Sinkfield claimed that his APU was not working.

When Sinkfield picked up the pre-loaded trailer, he weighed it at the on-site station. The loaded tractor-trailer weighed 80,040 pounds: 12,080 pounds on the tractor axle, 32,040 pounds on the tractor tandem axles, and 35,920 pounds on the trailer tandem axles. Complainant's Exhibit (CX)-3. Sinkfield slid the trailer axles to shift the weight, but after weighing the tractor-trailer a second time, one of the axle weights was still 34,840 pounds and the gross weight was still 80,040 pounds. JX-5, Tr. at 144-45. Federal law requires trucks to have a gross weight at or below 80,000 pounds, 23 C.F.R. § 658.17(b) (2016), and a tandem axle weight of 34,000 pounds or less, § 658.17(d). Because the tractor-trailer gross weight and the tandem axle weight were both over the respective limits, Sinkfield informed the evening Fleet Manager that he could not take the load. JX-2, at 245-46. In the Qualcomm (in-vehicle GPS system that allows communication between the truck and Marten) communication between Sinkfield and dispatch, Sinkfield listed all three weights of the second attempt.

> Steer-12080
> Drive-34840
> TRL-33120

JX-2, p. 245.

The next day, Sinkfield informed Ahlers that he would not take the load. Ahlers had Team Leader Blair talk with Sinkfield. Ahlers and Blair attempted to convey to Sinkfield that the 400-pound APU exemption allowed the transportation of the truck even if it was 40 pounds over gross. Tr. at 80. Federal law permits an APU exemption up to the weight of the unit, or roughly 400 pounds. 23 C.F.R. § 658.17(n). Federal law does not preempt state law; states choose whether to create their own rules and exemptions or to follow federal law. D. & O. at 13-14; Size and Weight Enforcement and Regulations, 72 Fed. Reg. 7741, 7745 (Feb. 20, 2007). Parties dispute whether this May 30, 2014 conversation covered all three weights or just the gross weight being over 80,000 pounds. D. & O. at 7, 9. Sinkfield again refused the load and asked for a new assignment. Marten did not discipline Sinkfield for the refused load and provided him with layover pay until his next assignment, which was assigned later that day.

Ahlers did, however, write up the MillerCoors refusal in Sinkfield's HRIS comments, under the category "CONFLICT WITH FLEET MANAGER":

> CEDRIC IS REFUSING TO HAUL TRIP 7322679 IN CO BECAUSE THE GROSS WEIGHT OF THE LOAD IS 80,040. I HAVE TOLD HIM IT IS OK TO HAUL AND I HAVE HAD HIM TALK TO DAN BLAIR. HE CAN NOT BE REASONED WITH. WE TOOK HIM OFF THE LOAD AND PUT HIM BACK ON THE LIST WAITING FOR A LOAD.

JX-7. Ahlers testified that the HRIS comment was for poor communication and not for refusing a load for being overweight. Tr. at 298-99; *see also* JX-6, 16.

Coca-Cola Load

On June 2, 2014, three days later, Marten dispatched Sinkfield to pick up a load from Coca-Cola in Waco, Texas, to be transported to Harrisonville, Missouri. Sinkfield picked up the load, drove four hours, and then went on a break that ended up lasting 15 and a half hours. Ahlers observed that Sinkfield's truck was not moving for several hours, and thinking there was an emergency, sent someone to check on the truck. Sinkfield stated he had overslept several hours because of some medication he was taking for an injury. Sinkfield delivered the Coca-Cola load approximately 6 and a half hours late, causing a service failure. D. & O. at 10 (citing Tr. at 14, 232). On June 4, 2014, Marten's regional operations manager in Desoto, Texas, informed Ahlers by e-mail that Sinkfield "bombed" the Coca-Cola job and requested that he be written up. JX-22.

Termination

On June 4, 2014, e-mails about the Coca-Cola service failure became an e-mail chain involving numerous individuals and ultimately turned into a termination recommendation. JX-22. Before learning the reason for the delay, Ahlers recommended in an e-mail to the regional operations manager, Jason Marten, a Team Leader covering for Blair on June 4, and Jeremy Guth, Blair's supervisor, that they terminate Sinkfield's employment. D. & O. at 11; JX-22 ("can we just fire this driver when he gets to KC . . . . He needs to be gone from here."). Marten concurred, noting his low mileage, and writing, "I'd move to separate employment. We would be better off parking this truck." JX-22. Marten testified that he reviewed the HRIS comments for Sinkfield before recommending to HR that it terminate Sinkfield's employment. D. & O. at 11; Tr. at 369-79; JX-22. Ahlers added Ann Konsela, a Human Resources (HR) specialist, to the e-mail chain to confirm that they did not need to give Sinkfield a final warning because he was in his probationary period. Konsela confirmed: "Along with being in his introductory period, he was warned twice for the same thing, we don't need to give him another chance to fail another load. Route him to KC for discharge." JX-22.

Konsela reviewed Sinkfield's file and concurred with the termination recommendation. JX-22; Tr. at 397-98, 401. But because Sinkfield was out of her HR jurisdiction at that time, she passed the recommendation to Emma Aikman, another HR specialist, who worked in the area where Sinkfield's employment would be terminated. Sinkfield was routed to a Kansas terminal for employment termination. Aikman had the ultimate authority to accept or reject the termination recommendation.

Aikman reviewed Sinkfield's file, including the HRIS comments, prepared a termination document, and fired Sinkfield by telephone on June 5, 2014. D. & O. at 12. During the phone conversation, Aikman went through Sinkfield's HRIS comments, including the MillerCoors refusal. Aikman generated a termination worksheet and went over the contents of Sinkfield's personnel record with him during the termination call. JX-16. The worksheet lists two previous disciplinary actions: May 6, 2014, and May 14, 2014. Under a section labeled "Comments," the worksheet lists:

> SEVEN NOTABLE ISSUES SINCE 3/24 HIRE. FAILURE TO SECURE EQUIP, HIGH IDLE, (WW) LACK OF COMM, (SW), DRIVER DID NOT OVERNIGHT BILLS AS ASKED, REFUSED LOAD, SERVICE FAILURES.

JX-16. The "refused load" refers to the MillerCoors refusal. The HRIS comments were appended to the termination worksheet. JX-16, p.3. The formal written termination letter is from Aikman, dated June 4, 2014. JX-10.

Sinkfield filed a complaint with the Occupational Safety and Health Administration (OSHA) on June 17, 2014, alleging that Marten discharged him in violation of the STAA because he refused to drive the overweight truck. OSHA dismissed his case, and Sinkfield filed objections with the Office of Administrative Law Judges (OALJ). After a hearing on the merits, the ALJ issued a D. & O. concluding that Marten violated the STAA when it terminated Sinkfield and awarding Sinkfield $1,167.15 in pack pay with interest, $1,000 in compensatory damages, and $50,000 in punitive damages. D. & O. at 29. Marten appealed the ALJ's Order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA. 29 C.F.R. § 1978.109(a); Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). The ARB reviews questions of law presented on appeal de novo, and is bound by the ALJ's factual determinations if the findings of fact are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.110; *Hood v. R&M Pro Transp.*, ARB No. 15-010, ALJ No. 2012-STA-036, slip op. at 4 (ARB Dec. 4, 2015); *Myers v. AMS/Breckenridge/Equity Grp. Leasing 1*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008 (ARB Aug. 3, 2012). The ARB will uphold an ALJ's factual finding "even if we would justifiably have made a different choice had the matter been before us de novo." *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006) (citing *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951)).

DISCUSSION

We affirm the ALJ's conclusions, which are supported by substantial evidence on the record as whole, that Sinkfield engaged in protected activity, that this protected activity contributed to his termination, and that Respondent failed to prove by clear and convincing evidence that it would have terminated Sinkfield's employment in the absence of his protected activity.

STAA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b) (Thomson Reuters 2016). *See* 49 U.S.C.A. § 31105(b)(1); *Tocci v. Miky Transp.*, ARB No. 15-029, ALJ No. 2013-STA-071 (ARB May 18, 2017). To prevail, a successful STAA complainant must

establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action. 49 U.S.C.A. § 42121(b)(2)(B)(iii); *cf. Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012). If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii), (iv).

1. <u>Protected Activity</u>

Sinkfield engaged in protected activity by complaining about and refusing to drive a tractor-trailer he reasonably believed to be over the legal weight limits. STAA protects employees' complaints and refusals:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
> (A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;
> (B) the employee refuses to operate a vehicle because—
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.

49 U.S.C.A. § 31105(a).

Under the STAA, an employee engages in protected activity when he refuses to drive because such operation would violate a rule, regulation, or standard related to commercial motor safety.[2] The ARB has held that for a refusal to be protected under the STAA, § 31105(a)(1)(B)(i), the complainant must demonstrate a subjectively and objectively reasonable

[2] Sinkfield takes issue with Marten's description of his complaint as alleging only a refusal protected activity instead of both complaint and refusal protected activities. Sinkfield Brief (Br.) at 10. The ALJ clearly found protected activity under the STAA's refusal protection at § 31105(a)(1)(B), and we are affirming on that basis.

belief of a violation. *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022, slip op. at 7 (ARB Nov. 28, 2012) (noting that refusals do not need to be based on actual violations to be protected under STAA); *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011) (noting that an employee "need not prove an actual violation of a motor vehicle safety regulation, standard, or order, but must at least be acting on a reasonable belief regarding the existence of an actual or potential violation."). *See also Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (noting that STAA protection is not dependent upon whether complainant proves a safety violation).

The ALJ concluded that Sinkfield engaged in STAA-protected activity for refusing to drive because the gross weight and axle weight of the MillerCoors trailer exceeded federal and state limits or it was reasonable for Sinkfield to believe so.[3] D. & O. at 10, 15. The ALJ found Sinkfield "credible as to his understanding of the law" when he refused the MillerCoors load. D. & O. at 12. The ALJ also found his belief objectively reasonable. *See, e.g.*, D. & O. at 14-15 ("Complainant could reasonably assume that he was protected by state law.").

Marten appeals the ALJ's finding that Sinkfield's refusal to drive an overweight truck was objectively reasonable, averring that a reasonable driver would have known about the APU exemption. Every one of Marten's trucks had an APU. Sinkfield's truck had a certification from Thermo-King, the APU manufacturer that provided citations to federal law creating the APU exemption. Respondent's Exhibits (RX)-2. Marten claims each of the states that Sinkfield would travel through had an APU exemption by law or through a non-enforcement policy. Tr. at 351-52; Marten Br. at 12-14.

Under the objective, reasonable person standard, Sinkfield's concern about the load being overweight was reasonable and constituted STAA-protected activity. Sinkfield weighed the truck twice, and it was overweight in several respects both times. Federal law requires trucks to have a gross weight at or below 80,000 pounds, 23 C.F.R. § 658.17(b), and tandem axle weight at or below 34,000 pounds, § 658.17(d). Department of Transportation regulation 49 C.F.R. § 392.2 requires that commercial motor vehicles be in compliance with federal law and the local regulations of the jurisdiction in which the vehicle is operated. The parties do not dispute that the gross weight was 80,040 pounds on both measurements and that one of the axle weights was 35,920 pounds in the first measurement and 34,840 pounds in the second measurement.

While Marten argues that the 400-pound APU exemption made the gross weight legal, even with an APU exemption or a non-enforcement policy, the tandem axle weight was still at least 800 pounds over the limit, violating federal law and the law in those states that follow

[3] The parties dispute whether Sinkfield made a complaint about only the gross weight or whether he made a complaint about all three elements of the truck's weight being over the limits. The record demonstrates that Sinkfield mentioned all three weights in his Qualcomm communication, which Marten received and reviewed. JX-2, p. 245; D. & O. at 9.

federal law.[4] Marten directs us to the federal law at 23 C.F.R. § 658.17(g) which provides a 2-3% leeway in the measurement of a truck's weight. This leeway may be appropriate for officials exercising discretion over whether to cite a driver with a violation, but not as a provision intended to prevent a finding of protected activity under the STAA. In sum, the ALJ properly concluded that Sinkfield engaged in protected activity.

2. Contributing Factor Causation

The ALJ's conclusion that the load refusal contributed to Marten's decision to terminate Sinkfield's employment is supported by substantial evidence. The ALJ noted that "[d]irect evidence shows that the protected activity contributed to his discharge." D. & O. at 16, 23. Aikman made the final termination decision. Tr. at 398-99, 406; JX-22. Aikman prepared the termination worksheet, in which "refused load" was listed as a "notable issue." JX-6, 16. The termination worksheet also included the HRIS comments about Sinkfield's "Conflict with Fleet Manager." D. & O. at 16 (citing JX-16). In addition, Aikman discussed the refused load with Sinkfield while terminating his employment.

As the ALJ noted, at the time she fired him, Aikman did not think that Sinkfield had a legitimate reason to refuse the load. D. & O. at 12.

> Q Okay. All right. So on—when you fired Mr. Sinkfield, did you think that all states allowed a 400-pound allowance for APUs?
>
> A That's my understanding.
>
> Q Okay. And that was your understanding when you were a dispatcher and an understanding when you fired him. Right?
>
> A Yes.
>
> Q So you have no personal knowledge of whether Wyoming, Idaho, or Utah allow a 400-pound APU allowance.
>
> A I would assume they do.
>
> Q Okay. And that's one of the reasons, assuming—your assumption that all states allowed 400-pound APU allowance, that was one of the reasons why you believed Mr. Sinkfield's refusal of a load at Coors on May 29 and May 30, 2014, was not legitimate. Am I correct?
>
> A Initially, yes.

Tr. at 480-81.

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[4] Marten argues that Sinkfield's refusal to drive must be based on an actual violation, citing *Koch Foods, Inc. v. Sec'y Dep't of Labor*, 712 F.3d 476 (11th Cir. 2013). ARB precedent provides that refusals to drive need only be based on a reasonable belief. *Gilbert v. Bauer's Worldwide Transp.*, ARB No. 11-019, ALJ No. 2010-STA-022 (ARB Nov. 28, 2012). Even if an actual violation were required for protected refusals under STAA, Sinkfield still engaged in protected activity because the axle weight of 34,840 pounds would have violated federal and state laws even with the APU exemption of roughly 400 pounds.

Marten claims that the MillerCoors refusal was listed merely as a notable incident and not necessarily a factor considered in the termination decision. Marten Br. at 10-11. According to Marten, HRIS comments can contain positive, neutral, or negative information; the comments section does not necessarily correlate with termination grounds. But Aikman testified that these were all performance issues:

> Q Okay. So it happened. Okay. So would you agree that everything in the comments section, the seven notable issues, are all performance issues?
>
> A Yes.
>
> Q And he was fired principally because of performance issues, whether you call it company policy violation or unsatisfactory job performance. Correct?
>
> A Yes.

Tr. at 483-84. The ALJ found that when Aikman fired Sinkfield, "she discussed all of his performance-based issues including his refusal to haul the load from Miller/Coors that he believed was overweight." D. & O. at 12 (citing JX-16; Tr. at 124-25, 167, 455, 466). In addition to the temporal proximity between the protected activity and Sinkfield's discharge, there is substantial evidence to support the ALJ's conclusion that Sinkfield was "discharged . . . based on a performance record that included the Miller/Coors incident." D. & O. at 17 (concluding also that in Aikman's "algorithm for discharge, protected activity was part of the equation").

3. Affirmative Defense

The ALJ's findings on Marten's affirmative defense are also supported by substantial evidence. If a complainant meets his burden of proof to prove that protected activity was a contributing factor in the adverse action, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior. 49 U.S.C.A. § 42121(b)(2)(B)(iii),(iv); *Tocci*, ARB No. 15-029. "Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain."[5] As the employer, Marten faces a "steep burden" under the statute—the burden is intentionally high, because "Congress intended to be protective of plaintiff-employees." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 160 (3d Cir. 2013). In *Speegle*, the ARB wrote:

> To sum up the factors that must be considered in applying the "clear and convincing" defense, we find that the statute requires us to consider the combined effect of at least three factors applied flexibly on a case-by-case basis: (1) how "clear" and "convincing" the independent significance is of the non-protected activity; (2) the evidence that proves or disproves whether the employer

[5] *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015).

> "would have" taken the same adverse actions; and (3) the facts that would change in the "absence of" the protected activity.

Speegle v. Stone & Webster Co., ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 12 (ARB Apr. 25, 2014) (footnotes omitted).

The ALJ concluded based on the record evidence that Marten's argument was "unconvincing" and that "Respondent failed to establish" by clear and convincing evidence that it would have terminated Sinkfield in the absence of his protected activity. D. & O. at 24. He reasoned that although the Coca-Cola service failure "could" provide grounds for termination, Marten did not show that it "would" have fired him. The ALJ reasoned that Marten did not have to follow a probationary exception for progressive discipline and did not always fire every employee with a serious service failure or even with multiple service failures during his or her probationary period. *Id.* at 11, 17, 20. Additionally, Marten does not fire all employees who are disciplined with respect to a Coca-Cola delivery, even though Coca-Cola is an important client for Marten. *Id.* at 11, 17.

This comparative evidence supports the ALJ's finding that the termination would not have taken place absent the MillerCoors refused load. When making the termination decision, Aikman specifically mentioned the MillerCoors load as a "notable issue" and did not believe his refusal of the load for being overweight was legitimate.

Additional evidence supports the ALJ's conclusion. Sinkfield's termination was set in place by Ahlers's e-mail on June 4, 2014, five days after he refused the MillerCoors load. D. & O. at 11; JX-22 ("can we just fire this driver when he gets to KC . . . . He needs to be gone from here."). At this point, she did not know the reason for the service failure. Marten approved this recommendation, testifying that he reviewed the HRIS comments for Sinkfield first. D. & O. at 11; Tr. at 369-79; JX-22. The HRIS comments included Ahler's most recent notation regarding "CONFLICT WITH FLEET MANAGER," where she noted that Sinkfield was "refusing to haul," and "can not be reasoned with." JX-16.

While we agree with the ALJ that Marten "could" have fired Sinkfield during his probationary period, there is substantial evidence to support the ALJ's findings that Marten did not meet its "steep burden" of proving its affirmative defense by clear and convincing evidence. *Araujo,* 708 F.3d at 160 (3d Cir. 2013).

4. <u>Remedies and Punitive Damages</u>

Marten does not dispute the ALJ's award of $1,167.15 in back wages or the ALJ's award of $1,000 in compensatory damages. Accordingly, we affirm those awards. The ALJ also awarded Sinkfield $50,000 in punitive damages, to which Marten objects. Because of legal error in the ALJ's analysis, we vacate and remand the punitive damages award.

"Consistent with Supreme Court precedent, the ARB's review of a punitive damages award involves a two-part analysis." *Youngermann v. United Parcel Serv.*, ARB No. 11-056, ALJ No. 2010-STA-047 (ARB Feb. 27, 2013) (citing *Smith v. Wade,* 461 U.S. 30, 52 (1983)).

"We first evaluate whether the ALJ properly determined that punitive damages were warranted. If the Board concludes that the award is warranted, we must then determine whether the amount awarded is sustainable." *Id*.; *see also Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011) (remanding punitive damages award for further analysis).

Turning to the first prong of our analysis, the Board has held that a punitive damages award is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Ferguson*, ARB No. 10-075, slip op. at 8 (citing *Smith*, 461 U.S. at 51). The Supreme Court concluded in *Smith* that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. As the Court subsequently explained in *Kolstad*, "While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award, . . . its intent standard, at a minimum, required recklessness in its subjective form." *Kolstad v. Am. Dental Assn.*, 527 U.S. 526, 536 (1999) (citing *Smith*, 461 U.S. at 45-48).

Terms such as "malice," "reckless indifference," and "callous disregard" ultimately focus on the actor's state of mind. *Kolstad*, 527 U.S. at 534-35; *Youngermann*, ARB No. 11-056. Under *Kolstad*, an employer may avoid liability for punitive damages where it has made a "good faith effort" to comply with the anti-discrimination provisions of Title VII. *Kolstad*, 527 U.S. at 545-46. The Board has recognized similar reasoning in cases arising under STAA. *See, e.g., Youngermann*, ARB No. 11-056, slip op. at 7.

Here, the ALJ's punitive damages analysis included improper considerations, including faulting Respondent for its "vigorous defense" and crediting past violations from an almost ten-year-old case without sufficient explanation of its relevance:

> I assume the Respondent's costs of litigation exceed the compensatory damages and back pay award in this case. I note that Respondent brought a virtual parade of witnesses from several locations and two counsel from Madison, Wisconsin to Ft. Smith. Meanwhile, few complainants can pay for the expenses of litigation. I note the prior claim. I accept that Complainant is correct that punitive damages are an inducement necessary to promote safety at Respondent company.
>
> Although a party has the right to a vigorous defense and can try the case in any manner it deems is fit, I find that a party must consider the exposure and the risk.

D. & O. at 27-28. We therefore vacate the ALJ's punitive damages award at step one of the analysis, and remand for reconsideration.

We agree with Marten that the ALJ wrongfully considered several facts, including that Marten brought several lawyers to defend Sinkfield's small claim as evidence in favor of

punitive damages. Marten Br. at 25-26. A party is entitled to zealous representation, which is a pillar of the legal system and principle of the Model Rules of Professional Responsibility, Rule 1.3.[6] The ALJ's penalization of Marten's legal defense is error and creates due process concerns.

Additionally, on remand, the ALJ should address whether Marten's behavior exhibited a "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Ferguson*, ARB No. 10-075, slip op. at 8 (citing *Smith*, 461 U.S. at 51). The ALJ noted, for example, that MillerCoors often loaded trailers heavily, D. & O. at 27, but did not balance this fact with Marten's warning to Sinkfield to keep the weight low and to message dispatch ASAP if the weight was over. Additionally, Marten assigned Sinkfield a new load and provided layover pay while he waited for it. *See, e.g., Id.* at 8. While the ALJ was understandably troubled that Blair and Ahlers "exerted pressure on Complainant to take the load despite his protestations," *Id.* at 15, he did not consider whether Marten had a good-faith belief that the weight was within the APU exemption or a non-enforcement policy. The parties dispute whether Ahlers and Blair knew specifically about the axle weight when they emphasized that the APU exemption would cover the weight and when Ahlers filled out the HRIS comment. Finally, although we did not consider the federal rule providing a 2-3% leeway on gross or axle weights material to denying Sinkfield protected status, it may be a factor to consider in determining whether Marten acted in good faith.

Marten appeals the ALJ's crediting of past violations from a several-years-old case, *Carter v. Marten*, ARB Nos. 06-101, -159; ALJ No. 2005-STA-063 (ARB June 8, 2008). While we acknowledge that the ALJ presided over this earlier case and was familiar with it, we find the ALJ's reliance on the case is error. If the ALJ chooses on remand to consider a prior judgment against Marten in finding punitive damages, the ALJ must establish, at a minimum, a foundation that demonstrates that Marten's prior act was the same as the current act, under the same circumstances, such that the prior conduct becomes a factor in evaluating Marten's current conduct. In *State Farm Mut. Auto v. Campbell*, 538 U.S. 408 (2003), the Court disclaimed an award for considering past conduct that "bore no relation" to the harm that the plaintiff had suffered in the underlying injury, noting the following:

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties'

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[6] Model Rules of Professional Responsibility, Rule 1.3(a): A lawyer shall represent a client zealously and diligently within the bounds of the law.

> [Comment 1]. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

> hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. . . .
>
> The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "[o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. . . .

538 U.S. at 422-24 (citations omitted). Certainly prior retaliation judgments might be relevant to an analysis of whether a respondent acts with reckless or callous disregard to the plaintiff's federally protected rights, but the ALJ did not provide that analysis here. Upon remand, the parties and the ALJ will have to provide foundation for the relevance, if any, of prior judgments to the issue of punitive damages, and make arguments regarding the lapse in time and individuals involved in these prior cases.[7]

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Order on Marten's liability and the ALJ's award of back pay and compensatory damages but **VACATE** the ALJ's award of punitive damages and **REMAND** for further proceedings. Sinkfield'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.

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[7] Marten Br. at 27. Marten claims that the ALJ should not have considered Sinkfield's arguments concerning *Carter v. Marten* because they were raised for the first time in a post-hearing brief and Marten was not given the opportunity to respond to them before the ALJ considered them. Because we are remanding the question of punitive damages to the ALJ, parties can more fully address the relevance, if any, of Marten's compliance record with the STAA.

Thereafter, Marten shall have thirty (30) days from its receipt of the fee petition to file a response. Since we are remanding this case for further action by the ALJ, Sinkfield's attorney may alternatively submit to the ALJ an augmented fee petition for work before the Board and upon remand.

SO ORDERED.

TANYA L. GOLDMAN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge