U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

TRAVIS KLINGER,

COMPLAINANT,

v.

BNSF RAILWAY COMPANY,

RESPONDENT.

ARB CASE NO. 2023-0003

ALJ CASE NO. 2016-FRS-00062
ALJ RICHARD M. CLARK

DATE: July 23, 2024

Appearances:

For the Complainant:
Matthew L. Rabb, Esq. and Lloyd L. Rabb, III, Esq.; *Rabb & Rabb, PLLC*; Tucson, Arizona

For the Respondent:
Bryan P. Neal, Esq. and Micah R. Prude, Esq.; *Holland & Knight LLP*; Dallas, Texas

Before WARREN and THOMPSON, Administrative Appeals Judges

DECISION AND ORDER

PER CURIAM:

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Complainant Travis Klinger (Complainant) filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent BNSF Railway Company (Respondent) violated the FRSA by suspending Complainant for reporting a

[1] 49 U.S.C. § 20109, as implemented by 29 C.F.R. Part 1982 (2024).

workplace injury.[2] OSHA dismissed Complainant's complaint upon finding that his allegations did not support a claim of retaliation under the FRSA. Complainant objected to OSHA's determination and the case was assigned to an Administrative Law Judge (ALJ).[3] The ALJ decided the case on the record. In a Decision and Order (D. & O.) issued on November 30, 2018, the ALJ entered judgment in Complainant's favor and awarded Complainant monetary and non-monetary relief.[4] On March 18, 2021, the Administrative Review Board (ARB or Board) issued an Order Reversing and Remanding the decision.[5] On remand, the ALJ issued a Decision and Order Following Remand (D. & O. on Remand) finding in Complainant's favor and awarding Complainant monetary and non-monetary relief.[6] Respondent filed a petition for review of the ALJ's D. & O. on Remand. For the following reasons, we affirm.

BACKGROUND

Specific facts of this case can be found in *Klinger I*.[7] The relevant facts are as follows. On August 9, 2015, Complainant injured his shoulder while working for Respondent. Complainant later submitted a letter signed by his doctor, dated August 13, 2015, stating that he should remain off work until September 25, 2015. Respondent granted Complainant's request for leave.

Over the ensuing months, Complainant submitted three requests from his doctor to extend his medical leave by approximately one month each time. The extension requests did not include any additional information regarding Complainant's condition or treatment. Respondent granted each extension.

Respondent automatically enrolled Complainant in its Medical Care Management Program (MCMP), a voluntary program designed to help injured workers safely return to work. Kevin Vaudt (Vaudt) served as a field manager for Respondent's Southwest Division and coordinated the MCMP for Complainant.

Vaudt initially contacted Complainant about the MCMP by phone on or about August 10, 2015, and by letter the following day. On at least one occasion, Vaudt also tried obtaining medical records from Complainant's doctor directly. Complainant—who had not requested to participate in the MCMP—did not respond

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[2] ARB Order Reversing and Remanding (*Klinger I*) (formally cited as *Klinger v. BNSF Ry. Co.*, ARB No. 2019-0013, ALJ No. 2016-FRS-00062, slip op. at 1 (ARB Mar. 18, 2021)).

[3] *Id.* at 2.

[4] *Id.*

[5] *Id.*

[6] D. & O. on Remand at 1.

[7] *Klinger I*, ARB No. 2019-0013, slip op. at 2-5.

to any of Vaudt's communications and his doctor did not respond with medical records.

After Complainant failed to respond, Vaudt escalated the matter to Steve Curtright (Curtright), the General Manager of the Southwest Division. Curtright sent Complainant a certified letter on October 14, 2015, which ordered Complainant to have his doctor provide medical information to Vaudt. The letter warned that Complainant's failure to comply with Curtright's instruction would be considered misconduct and could subject Complainant to discipline.

On October 21, 2015, Complainant asked his doctor to send the requested records to Respondent, but the doctor's office forgot to send them. Respondent issued Complainant a notice of investigation on November 2, 2015, stating that Respondent would conduct a hearing regarding Complainant's alleged failure to comply with Vaudt's instructions. After receiving the notice of investigation, Complainant called Vaudt on November 9, 2015, and supplied Vaudt with a medical release on November 11.

Despite receiving the medical release, Respondent conducted a hearing on November 23, 2015. Curtright did not attend the hearing but reviewed the transcript and exhibits and found that Complainant had violated multiple General Code of Operating Rules regarding furnishing information, conduct, and reporting and complying with instructions. Curtright assessed Complainant a level S serious, 30-day record suspension. Although Complainant did not lose any pay, he was placed on a three-year review period during which any rules violations could result in further discipline.

On November 30, 2018, the ALJ issued a Decision and Order (D. & O.) in favor of Complainant.[8] The ALJ found that Complainant established that his protected activity was a contributing factor in Respondent's decision to discipline him based on an "inextricably intertwined" analysis.[9]

However, while *Klinger I* was pending before the Board, the Board overturned application of the inextricably intertwined doctrine in *Thorstenson v.*

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[8] D. & O. at 1.

[9] *Klinger I*, ARB No. 2019-0013, slip op. at 8-10. This analysis stood for the proposition that where protected activity was inextricably intertwined (either by arising out of the same event or by a chain of events) with the employer's asserted reasons for the adverse action, causation was established presumptively as a matter of law and could not be refuted with regard to the element of causation at the hearing stage. *See Thorstenson v. BNSF Ry. Co.*, ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 8 (ARB Nov. 25, 2019); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 13 (ARB Oct. 26, 2012).

BNSF Ry. Co.[10] In light of the Board's holding in *Thorstenson,* the Board issued an Order Reversing and Remanding (*Klinger I*) on March 18, 2021.[11] The Board concluded that the ALJ committed reversible legal error in applying the inextricably intertwined analysis and that the ALJ's analysis improperly evaluated the merits of the MCMP as opposed to evaluating whether Complainant's injury report contributed to his suspension.[12]

On September 29, 2022, the ALJ issued the D. & O. on Remand in Complainant's favor.[13] The ALJ found that Complainant established causation based on evidence of pretext and a pattern of antagonism,[14] and that Respondent failed to establish the same-action defense.[15] The ALJ ordered Respondent to, among other things, post the D. & O. on Remand for a minimum of 60 days and pay punitive damages in the amount of $40,000.[16]

On October 13, 2022, Respondent filed a petition for review of the ALJ's D. & O. on Remand with the Board. Both parties filed briefs. For the reasons discussed below, we affirm the ALJ's D. & O. on Remand.

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[10] *Thorstenson*, ARB Nos. 2018-0059, -0060, slip op. at 10 (finding that application of the "inextricably intertwined" or "chain of events" analysis was reversible legal error explaining that its application inappropriately substituted for, and at times circumvented, the contributing factor causation analysis). The Ninth Circuit then reversed the Board's decision. *Thorstenson v. U.S. Dep't of Lab.*, 831 F. App'x 842 (9th Cir. 2020). The Ninth Circuit found, in an unpublished Memorandum, that the ARB erred in not finding causation and for imposing "a new burden of proof for causation under which FRSA claimants must demonstrate that the protected activity was a proximate cause of the adverse action," because employees only need to prove "that their protected conduct was a 'factor, which alone or in connection with other factors, tend[ed] to affect in any way the outcome of the decision.'" *Id.* at 843-44 (quoting *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019)) (other citations omitted).

[11] *Klinger I*, ARB No. 2019-0013, slip op. at 1, 8-13. The Board stated that although the Ninth Circuit took issue with the Board's reference to "proximate cause" in *Thorstenson*, it did not discuss *Thorstenson*'s principal holding that the inextricably intertwined/chain-of-events analysis was an improper substitute for contributing factor causation analysis. *Id.* at 9 n.58. The Board stated that given this issue, combined with the fact that the Ninth Circuit's *Thorstenson* decision was unpublished, it would continue to adhere to the holding that an ALJ's reliance on the inextricably intertwined/chain-of-events analysis was reversible legal error. *Id.*

[12] *Id.* at 7-13.

[13] D. & O. on Remand at 1.

[14] *Id.* at 13-19.

[15] *Id.* at 19-21.

[16] *Id.* at 22-25.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to review ALJ decisions under the FRSA.[17] The ARB will affirm the ALJ's factual findings if they are supported by substantial evidence but reviews conclusions of law de novo.[18] In addition, we generally defer to an ALJ's credibility findings "unless they are 'inherently incredible or patently unreasonable.'"[19]

DISCUSSION

We conclude that there is substantial evidence in the record supporting the ALJ's D. & O. on Remand and, therefore, we affirm. Our discussion here is limited to the key issues involved.

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[20] To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) they engaged in a protected activity, as statutorily defined; (2) they suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action.[21] If a complainant meets this 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 absent the complainant's protected activity.[22]

The FRSA also provides that an employee who prevails in a discrimination action shall be entitled to all relief necessary to make the employee whole.[23] The FRSA specifically provides the following remedies: (A) reinstatement with the same

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17 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 1982.110(a).

18 *Yowell v. Fort Worth & W. R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009, slip op. at 4 (ARB Feb. 5, 2020) (citations omitted).

19 *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012) (citation omitted).

20 49 U.S.C. § 20109(a), (b).

21 *Id.* § 20109(d)(2)(A)(i) (incorporating legal burdens of proof set forth in 49 U.S.C. § 42121(b)); 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1982.109(a).

22 49 U.S.C. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b).

23 49 U.S.C. § 20109(e)(1).

seniority status that the employee would have had, but for the discrimination; (B) any backpay, with interest; and (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.[24] Relief may also include punitive damages in an amount not to exceed $250,000.[25] Punitive damages are warranted "where there has been reckless or callous disregard for the plaintiff's rights," or where there have been "intentional violations of federal law."[26]

1. Substantial Evidence in the Record Supports the ALJ's Finding of Contributing Factor Causation Through Evidence of Pretext

The ALJ found, and we agree, that Complainant established by a preponderance of the evidence that Complainant's protected activity of reporting a work-related injury contributed to Complainant's 30-day record suspension based on the evidence of pretext.[27] The ALJ's pretext finding was based on the disparate treatment of Complainant, the falsity of Respondent's explanations for its actions, and Respondent's inconsistent application of its policies.

The ALJ found that Respondent treated workers who were injured off the job differently than Complainant.[28] None of the workers whose reported injuries occurred away from the job were subjected to the level of scrutiny and incessant record demands that Respondent subjected Complainant to.[29] While Respondent contends the ALJ erred in finding other injured employees were similarly situated to Complainant because those employees did not refuse to provide medical documentation,[30] we find that the ALJ properly compared whether Respondent treated Complainant differently than other injured workers who had engaged in protected activity.[31]

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[24] *Id.* § 20109(e)(2).

[25] *Id.* § 20109(e)(3).

[26] *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 22-23 (ARB May 19, 2020) (citation omitted).

[27] D. & O. on Remand at 12-18.

[28] *Id.* at 15.

[29] *Id.* at 15-16.

[30] Respondent's Brief in Support of its Petition for Review (Resp. Br.) at 13-14.

[31] As the ALJ found, employees who were injured off-duty were not required to participate in the MCMP program, they were not subjected to "incessant requests for records," nor were they required to submit medical documents until they were preparing to return to work. D. & O. on Remand at 15; Complainant's Exhibit (CX) 32 at 4-12; CX 33 at 4-8; CX 34 at 4-9; CX 35 at 5-10, 21-22. In contrast, after Complainant reported a work-place injury, they were forced to participate in the "voluntary" MCMP and were required to

We likewise agree with the ALJ that Respondent's argument that it acted solely because it needed additional medical information from Complainant for manpower planning purposes and because it believed Complainant's medical leave was longer than reasonably necessary is unpersuasive.[32] The ALJ found that Vaudt and Curtright were not credible in explaining the reasons for their actions because Vaudt's explanations regarding the MCMP shifted, Vaudt was duplicitous in communications with Complainant, and Vaudt and Curtright gave inconsistent explanations as to how the matter was referred to Curtright.[33]

The record supports the ALJ's credibility determinations. Respondent has not put forth evidence to demonstrate that the ALJ's credibility determinations are inherently incredible or patently unreasonable, neither has Respondent offered a sufficient explanation as to why it approved Complainant's leave requests based on notes from Complainant's doctor if it believed Complainant's leave was unreasonably long.

We further agree that Respondent's failure to follow its own company policy regarding disqualification from the MCMP constituted circumstantial evidence that the decision to suspend Complainant was pretextual.[34] The MCMP's stated policy is that the program was voluntary and anyone who did not want to participate in the program would be disqualified.[35] And yet, Respondent did not disqualify Complainant when he did not comply.[36] Respondent's failure to follow its own policy, and its inability to explain its deviation from its policy, constitutes circumstantial evidence that its decision to suspend Complainant was pretextual.

We do not, however, rely on the ALJ's finding of causation based on Respondent's pattern of antagonism against Complainant after he reported the workplace injury.[37] The ALJ specifically found that Vaudt initially offered to help Complainant but that Vaudt's "attitude changed once Complainant refused to

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submit medical records far earlier than their counterparts. D. & O. on Remand at 15; CX 1-2; CX 4; CX 6-7; CX 10-11; CX 14. In addition, Complainant was monitored much more closely than workers injured off-duty to the degree that the ALJ found Vaudt harassed Complainant. D. & O. on Remand at 15; *compare* CX 32 at 6-9; CX 33 at 6-8; CX 34 at 7-11; CX 35 at 5-10, 21-22 *with* CX 6-7; CX 10-11; CX 14.

[32] D. & O. on Remand at 13.

[33] *Id.* at 13-14.

[34] *Id.* at 16.

[35] *Id.*; CX 24; CX 27.

[36] D. & O. on Remand at 16.

[37] *Id.* at 17-18.

voluntarily cooperate" with requests for additional records.[38] Because the ALJ found that Vaudt's pattern of antagonism began when Complainant failed to comply with Vaudt's instructions, and not when Complainant engaged in protected activity, we find that antagonism does not support a finding of causation. However, we find that evidence of pretext outweighs this and provides substantial evidence that Complainant reporting a workplace injury contributed to the adverse action.[39]

Based on the disparate treatment of Complainant, the falsity of Respondent's explanations for its actions, and Respondent's inconsistent application of its policies, we affirm the ALJ's finding that Complainant's reporting of a workplace injury contributed to Respondent's decision to suspend him.

2. Respondent's Affirmative Defense Fails

The ALJ found that Respondent failed to meet the clear and convincing standard to establish that it would have taken the same action against Complainant in the absence of protected activity.[40] The ALJ did not credit Curtright's testimony that they imposed the standard discipline for failing to comply with instructions because Respondent did not provide examples of any other employee who was disciplined for failing to comply with instructions, and because Curtright did not address the voluntary nature of the MCMP.[41] The ALJ also found that Respondent's temporal proximity argument was not compelling.[42]

Respondent contends the ALJ erred in finding that it failed to establish the same-action defense.[43] We agree with the ALJ that Curtright's generalized and unsubstantiated testimony that they applied the same discipline to Complainant that they would have applied to any other employee who failed to provide requested information, standing alone, is insufficient to meet Respondent's high burden. Thus, we affirm the ALJ's finding that Respondent did not establish by clear and convincing evidence that it would have taken the same action in the absence of Complainant's protected activity.

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38 *Id.* at 17.

39 *See March v. Metro-North Commuter R.R. Co.*, ARB No. 2021-0059, ALJ Nos. 2019-FRS-00032, -00035, slip op. at 16 (ARB Jan. 21, 2022) ("[E]ven if there were shortcomings or errors in the ALJ's analyses regarding [certain pieces of circumstantial evidence], the other circumstantial evidence cited by the ALJ adequately supports his conclusion that [the complainant's] protected activity contributed, at least in part, to his discipline and the termination of his employment.").

40 D. & O. on Remand at 19-21.

41 *Id.*

42 *Id.* at 21.

43 Resp. Br. at 14.

3. The ALJ's Remedies are Reasonable and Supported by Record Evidence and Law

The ALJ ordered Respondent to post the D. & O. on Remand for a minimum of 60 days in a place and manner that is usual and customary for employees to gather and review employment related information.[44] Respondent contends that the FRSA does not authorize this type of relief.[45] However, the regulations authorize the ALJ to take "[a]ffirmative action to abate the violation,"[46] and the preamble to the regulations explicitly states that "[t]he posting of a notice to employees regarding the resolution of a whistleblower complaint can be important to remedying the reputational harm an employee has suffered as a result of retaliation."[47] The Board has found remedies permissible that are not explicitly listed in subsection 20109(e), if the remedies are necessary to make the complainant whole.[48] Moreover, a posting requirement is a standard remedy in discrimination cases.[49] Thus, we conclude that a posting requirement is permissible under the FRSA, and we affirm the ALJ's order that Respondent post the D. & O. on Remand for a minimum of 60 days in a place and manner that is usual and customary for employees to gather and review employment related information.

The ALJ also ordered Respondent to pay $40,000 in punitive damages because it engaged in behavior that "shows a callous indifference to Complainant's right to report his work-related injury without fear of retaliation."[50] To support the punitive damages award, the ALJ relied on Respondent's misuse of the voluntary MCMP to retaliate against Complainant for reporting a workplace injury,[51] Respondent's failure to follow its own procedures regarding the MCMP, and the untruthful and contradictory testimony of Vaudt and Curtright regarding their

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44 D. & O. on Remand at 22.

45 Resp. Br. at 17 (citing 49 U.S.C. § 20109(e)).

46 29 C.F.R. § 1982.109(d)(1).

47 Procedures for the Handling of Retaliation Complaints Under the National Transit System Act and the Federal Railroad Safety Act, 80 Fed. Reg. 69115, 69126 (Nov. 9, 2015).

48 *See Brough v. BNSF Ry. Co.*, ARB No. 2016-0089, ALJ No. 2014-FRS-00103, slip op. at 17-18 (ARB June 12, 2019) (sealing an employee's disciplinary record is a permissible remedy pursuant to subsection 20109(e)'s directive for "all relief necessary to make the employee whole").

49 *See Shields v. James E. Owen Trucking, Inc.*, ARB No. 2008-0021, ALJ No. 2007-STA-00022, slip op. at 14 (ARB Nov. 30, 2009) (citations omitted).

50 D. & O. on Remand at 23-25.

51 *Id.* at 23-24.

involvement.[52] The ALJ determined that the manner in which Respondent used the MCMP to retaliate not only harmed Complainant, but also "could cultivate an atmosphere of discouraging employees from reporting injuries."[53] Thus, the ALJ found that $40,000 in punitive damages was warranted to deter Respondent's use of the MCMP in a manner that may chill the reporting of workplace injuries and found that this amount was consistent with awards in similar cases.[54]

The ALJ's decision is well-reasoned and supported by substantial evidence. Further, while Respondent argues that no punitive damages should be awarded, Respondent has not argued that the amount ordered was excessive. We note that the amount of punitive damages awarded is comparable and within the ranges of other punitive damages awards that the Board has affirmed.[55] Thus, we affirm the ALJ's award of punitive damages in the amount of $40,000.[56]

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[52] *Id.* at 24.

[53] *Id.*

[54] *Id.* at 25 (citing *D'Hooge v. BNSF Rys.*, ARB Nos. 2015-0042, -0066, ALJ No. 2014-FRS-00002 (ARB Apr. 25, 2017) (ALJ ordered "a punitive damage award of $25,000 in a case where one manager had made a 'snap, personal assumption' that a report was made in bad faith"); *Burt v. Nat'l R.R. Passenger Corp.*, ARB No. 2020-0042, ALJ No. 2018-FRS-00015 (ARB Apr. 29, 2021) (ALJ ordered "$35,000 in punitive damages where the ALJ found that the respondent's culture recklessly disregard[ed] a complainant's anonymity when they engage in protected activity or other confidential reporting")).

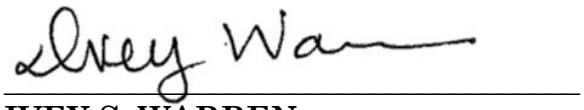
[55] *See Burt*, ARB No. 2020-0042, slip op. at 17 (affirming an ALJ award of $35,000 in punitive damages); *Fink v. R&L Transfer, Inc.*, ARB No. 2013-0018, ALJ No. 2012-STA-00006 (ARB Mar. 19, 2024) (affirming an ALJ award of $50,000 in punitive damages); *Youngermann v. United Parcel Serv., Inc.*, ARB No. 2011-0056, ALJ No. 2010-STA-00047 (ARB Feb. 27, 2013) (affirming an ALJ award of $100,000 in punitive damages).

[56] Respondent did not appeal the other remedies ordered by the ALJ.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the ALJ's D. & O. on Remand.[57]

SO ORDERED.



IVEY S. WARREN
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

[57] In any appeal of this Decision and Order, the appropriately named party is the Secretary, U.S. Department of Labor, not the Administrative Review Board.