



Issue Date: 03 August 2018

Case Number: 2014-FRS-00057

In the Matter of

CURTIS HOLMQUIST,
Complainant,

v.

WISCONSIN CENTRAL RAILROAD
d/b/a CANADIAN NATIONAL RAILWAY (CN),
Respondent,

and

BRIDGET A. BRINE,
Party-in-Interest.

DECISION AND ORDER ON REMAND
DECLINING TO AWARD PUNITIVE DAMAGES
OR DAMAGES FOR EMOTIONAL DISTRESS

Background

This matter arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRSA” or the “Act”), Title 49 U.S.C. § 20109, as amended, and as implemented by 29 C.F.R. Part 1982. Curtis Holmquist (“Complainant”) began working for Wisconsin Central (“Respondent” or “CN”), or one of its predecessor railroads, in 2000.¹ He has held a variety of positions, including maintenance, trackman, machine operator and foreman and is currently a structures carpenter in Respondent’s Duluth, Minnesota docks. (Tr. 138; 185-87; 236)². On July 9, 2012, Complainant was ordered to act as an Employee-in-Charge (“EIC”) of a

¹ Wisconsin Central Railroad is a freight carrier operating primarily in Minnesota and Wisconsin acquired by the Canadian National Railway in 2001.

² The abbreviation “Tr.” refers to the transcript of the hearing held on September 9-10, 2014, discussed below. “RX” refers to an exhibit from Respondent. “ALJX” refers to an administrative law judge exhibit.

rail grinding train.³ He had never piloted a rail grinder prior to this date. After the shift, Complainant called his supervisor, Tony Hardy, and left a message for him that he did not feel comfortable or safe piloting the rail grinding train and asked him to get someone else. Respondent subsequently disqualified Complainant from holding any CN positions requiring him to act as an EIC, not just those piloting rail grinding trains. Complainant filed a complaint with the Secretary of Labor on January 28, 2013, later amended on October 29, 2013, alleging Respondent violated the Act when it disqualified him as an employee in charge because of his refusal to carry out orders for which he is not or did not believe himself to be qualified.⁴ Following an investigation, the Area Director for the Occupational Safety and Health Administration (“OSHA”), dismissed the complaint on February 10, 2014 as untimely filed. (ALJX 1; RX 24).

Complainant timely appealed to the Office of Administrative Law Judges (“OALJ”), (ALJX 2), and the case was assigned to the undersigned on March 10, 2014. After one continuance, a *de novo* formal hearing was held in St. Paul, Minnesota on September 9-10, 2014. Eleven witnesses, including Complainant, testified at the hearing.

The parties were granted leave to file post-hearing briefs. Complainant and Respondent filed their respective briefs on December 4 and 5, 2014, and reply briefs on December 15, 2014. Supplemental briefs were submitted on March 30, 2015,⁵ April 14, 2015⁶ and April 21, 2015.⁷

³ Rail grinding trains ride along the track and grind down them down increasing the rail’s life by reducing the friction between the rail and the train. (Tr. 305-06).

⁴ Complainant initially alleged that his supervisor notified him on July 9, 2012 that he was disqualified from all jobs that required or could require him to obtain track time or other Road Worker Protection (“RWP”) authority. Complainant submitted “this extreme and groundless restriction has eliminated the vast majority of jobs and work for which [he] is eligible.” On October 29, 2013, Complainant filed an *Amended Complaint* alleging that the disqualification from all jobs requiring track time or other RWP authority was not an immediate disqualification from all EIC positions within the company but rather constituted evidence of an intent to disqualify, which did not occur until receipt of the disqualification letter on July 31, 2012. Complainant subsequently testified that the first he learned anything about being disqualified was on July 31, 2012. This is consistent with Respondent’s evidence. Thus, the complaint was timely filed.

⁵ Respondent filed a copy of another ALJ’s March 15, 2015 decision in *Hunter v. CSX Transportation Inc.* (2014-FRS-00128) (Mar. 24, 2015) dismissing an FRSA complaint finding that Complainant did not engage in protected activity under section 20109(b)(1)(A) because his “hazardous condition” was “beyond work-related safety conditions under the rail carrier’s control.”

⁶ Complainant’s April 14, 2015 responses were two letters. The first argued *Hunter* can be distinguished on its facts. The second discussed the ARB’s recent decision in *Powers v. Union Pacific Railroad Co.*, explaining what plaintiffs must prove to establish a prima facie case and submits that Respondent’s reliance on *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014) is misplaced and does not stand for the proposition that the 8th Circuit has “specifically rejected the [ARB’s] contributory factor analysis” and Complainant need not prove retaliatory intent.

⁷ Respondent’s April 21, 2015 reply again submitted that this court should follow the analysis set forth in *Hunter* and find that the alleged hazardous conditions in this case were beyond the rail carrier’s control.

On September 25, 2015, I issued a *Decision and Order* dismissing the complaint.⁸ Complainant appealed to the Administrative Review Board (“ARB” or “Board”).⁹ On January 12, 2018, the ARB issued a *Decision and Order of Remand* (“Remand Order”).

⁸ I found that Complainant had demonstrated he engaged in protected activity, that he suffered an adverse action and his engagement in the protected activity contributed to the adverse action. However, I found Respondent had demonstrated that it would have taken the same adverse action despite Complainant’s engagement in the protected activity. As I denied the complaint, I did not address Complainant’s entitlement to compensatory or punitive damages.

⁹ Complainant filed the instant retaliation complaint on January 28, 2013; he amended it on October 29, 2013. On November 4, 2013, while this complaint was pending, Complainant and his spouse filed for chapter 7 bankruptcy. *In re Holmquist*, No. 13-50951 (ECF No. 1.) (Bank. D. Minn. Nov. 4, 2013). Bridget Brine was appointed chapter 7 trustee. Complainant did not disclose the instant FRSA complaint on his bankruptcy petition. As Ms. Brine did not find any assets to liquidate, Complainant and his spouse received a discharge on February 4, 2014. OSHA dismissed the retaliation complaint on February 10, 2014. Complainant appealed on February 19, 2014 and the matter was assigned to me on March 10, 2014. On August 26, 2014, Complainant made a specific demand to settle this matter. On September 5, 2014, the Bankruptcy Court granted Complainant’s motion to reopen his case and disclose the instant retaliation complaint, with an \$11,095.00 exemption if assets were recovered. On September 9, 2014, the retaliation complaint proceeded to hearing. Neither Complainant nor his counsel notified this Court or Respondent’s counsel that Complainant had previously filed for bankruptcy, that he received a discharge or that the Bankruptcy Court granted his request to reopen his case. The first time this court was made aware of the bankruptcy was on May 26, 2015, when Complainant moved to join the Trustee as a necessary party. Complainant’s current counsel, Mr. Thompson, averred that the bankruptcy trustee had retained him to represent her in the instant matter as she had an interest in the action. Respondent objected to the joinder motion in writing on June 14, 2015, submitting, in part, that:

Not only had Holmquist filed for bankruptcy and obtained a no asset discharge in February 2014, after failing to disclose his claims against [Respondent] on his bankruptcy petition, leaving him with no interest in his claims, but he litigated this matter for months thereafter, all the while concealing this fact from [Respondent]. Holmquist and his counsel also concealed that Holmquist had his bankruptcy estate reopened on September 6, 2014, for the sole purpose of disclosing the [instant matter] to the bankruptcy court. Holmquist and his counsel, however, continued to deliberately withhold this highly relevant information from [Respondent] and this court, and without standing or authority to do so, went to trial on claims that Holmquist did not own. Holmquist’s deception, which is consistent with his pattern of self-serving dishonest behavior, and his counsel’s shocking lack of candor have impermissibly damaged [Respondent], and impugned the integrity of the forum.

Complainant replied on June 29, 2015 asserting, in part, that his failure to disclose this retaliation claim was inadvertent and he subsequently disclosed, curing any defect. Complainant submitted that when “respondent’s rhetoric is pushed aside and the facts and law are viewed dispassionately, it is evident that Holmquist and his counsel complied with the rules of this court and the law,” and “if Holmquist and his lawyers had the bad intentions Respondent ascribes them, they would never have disclosed the mistake (either to the bankruptcy court or this Court).”

I did not rule on that part of Respondent’s motion to dismiss based on lack of standing and judicial estoppel as I found the instant complaint should be dismissed on the merits. I also did not determine whether Complainant’s apparent lack of candor towards this tribunal was inadvertent or intentional. I specifically informed counsel and Complainant that should circumstances change such that I am required to reach such a finding, I would do so at that point. The ARB’s remand is such a changed circumstance and I find Complainant’s lack of candor regarding his bankruptcy filing relevant to a determination as to compensatory and punitive damages.

In its Remand Order, the ARB first affirmed the following findings as supported by substantial evidence: (i) Complainant engaged in protected activity when he told Tony Hardy that he could not safely operate a rail grinding train on July 10, 2012; (ii) Respondent subjected Complainant to an adverse action when it disqualified him from all positions requiring track approval authority; and (iii) Complainant's protected activity was a contributing factor in the adverse action.

However, the ARB reversed my legal conclusion that Respondent met its burden of proof by establishing that it would have taken the same adverse action in the absence of Complainant's protected activity. Accordingly, the ARB awarded judgment for Complainant. The ARB remanded the matter for the purpose of determining if Complainant is entitled to the punitive damages and damages for emotional distress that he requested before the OALJ.¹⁰

At a March 2, 2018 telephone conference with counsel for Complainant and Respondent, the parties indicated no additional hearings were necessary and the court could address the ARB's Remand Order on the current record.

Positions of the Parties on Damages

Complainant. Complainant started with one of CN's predecessor railroads on May 16, 2000. He did not have any major problems until Tony Hardy became his supervisor in 2009. With little railway experience under his belt, Hardy emphasized productivity over safety. On July 9, 2012, Hardy told Complainant to pilot a rail grinding train, something Complainant had never done before. Complainant did his best but determined it was more than he could handle. Consequently, after the shift, Complainant called Hardy and asked that he get someone else to pilot the rail grinding train for the next day's shift, reiterating his discomfort in acting as an EIC of a rail grinding train. However, Hardy ordered Complainant to pilot the rail grinder. Complainant declined and called a CN risk management official, who informed him that he had made a good-faith challenge and that someone else would be found to pilot the train. CN management subsequently accepted Hardy's recommendation that Complainant be disqualified from being an EIC for all track positions because of his refusal to pilot the rail grinding train. Contemporaneous with the disqualification, Complainant's Vac-Track helper position was abolished. Because of the disqualification, Complainant was unable to get track authority for any other position. The only job he was qualified for, that did not require moving more than 100 miles away, was at the Duluth, Minnesota docks, which did not require EIC authority but paid at least the same wage.

Given that CN has now withdrawn the EIC disqualification letter from all appropriate personnel files, Complainant has withdrawn his request that CN be ordered to reinstate his EIC rights and remove the disqualification from the records. Complainant has also withdrawn his request for back pay with interest. (Tr. 544). Complainant seeks \$100,000.00 compensation for emotional distress and other compensatory damages and \$250,000.00 in punitive damages. (Tr. 546); *Complainant's Post-Trial Brief*, ("Comp. Br."), dated December 4, 2014.

¹⁰ As Complainant was not terminated, and experienced no loss in income from the disqualification, he did not suffer nor did he seek back wages.

Respondent. On July 9, 2012, Complainant was asked to pilot a rail grinding train, something he was capable of doing given he was trained and qualified on all rules required to properly obtain track authority. He did, and was asked to pilot the rail grinding train again the next day, July 10, 2012. Despite his training and experience, Complainant told his supervisor that he did not feel safe, comfortable or qualified to obtain track authority for a rail grinding train. He was then informed by his supervisor that another employee would perform the assignment. Because Complainant said he did not feel safe, comfortable or qualified to obtain track authority piloting a rail grinder, Respondent took the safer course of action and disqualified Complainant from holding any position that would require him to perform this task, not just piloting a rail grinding train. Complainant has presented no evidence he has suffered any emotional distress related to this claim and he is not entitled to punitive damages. *Respondent's Post-Hearing Brief*, (“Res. Br.”), dated December 5, 2014.

Remedy

The FRSA provides, in general, that “[a]n employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.” § 20109(e)(1). Relief shall include: (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) any back pay, 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. § 20109(e)(2). Furthermore, “[r]elief in any action under subsection (d) may include punitive damages in the amount not to exceed \$250,000.” § 20109(e)(3); *see also* 29 C.F.R. § 1982.109(d)(1).

Reinstatement. Complainant was never terminated and has withdrawn his request that CN be ordered to reinstate his EIC rights and remove the disqualification from the records.

Loss of Wages. Complainant does not seek back pay.

Emotional Distress. To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City enters., Inc.*, ARB Nos. 09-033, 08- 091, ALJ No. 2006-STA-032 (Sept. 24, 2010)) (affirming ALJ’s award of \$50,000 in compensatory damages for emotional distress). Compensatory damages for emotional distress may be awarded for violations of FRSA. 29 C.F.R. § 1982.109(d)(1); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based “solely upon the employee’s testimony.” *Ferguson*, ARB No. 10-075, slip op. at 7-8.

Complainant testifies that he is entitled to \$100,000 in other compensatory damages for the pain, suffering, and emotional toll taken upon him and his estranged family as a result of the disqualification. He lost a position he really enjoyed, had to learn a new skill set, and had to work with people with whom he was unfamiliar. (Tr. 221-222). He also submits the new work

location was dusty, dirty, and hazardous to his health. (Tr. 222). Because these workplace inconveniences lack the severity to constitute compensable emotional distress, I find any “emotional toll” suffered by Complainant as a consequence of the disqualification is not compensable.

As evidence that Complainant was not actually emotionally distressed by his new position, Complainant did not bid for any other jobs, even when he was told the disqualification was removed. Additionally, Complainant earns more in his current position than he did previously and is closer to his home and estranged family. Therefore, I find that any emotional stress experienced by Complainant was caused by family issues unrelated to the disqualification, to include monetary problems leading him to file for personal bankruptcy and marital problems leading to a less than amicable divorce proceeding in which his wife moved out of the house with his 9-year-old son and 16-year-old step-daughter in July 2013.

There is also no mention of work stress in Complainant’s medical records contemporaneous and subsequent to the EIC disqualification. Complainant received no medical treatment between June 30, 2010 and August 21, 2013. (Tr. 531). Complainant discussed his family issues with a mental health provider, but made no mention to his therapist of any work-related stress. In fact, Complainant only told Dr. Buffington that his marital difficulties were affecting his sleep and his ability to concentrate. At most, Complainant’s only source of distress at work was his poor relationship with Tony Hardy as early as 2010, and the problems Complainant had working for him. (Tr. 536).

The burden is squarely on Complainant to provide convincing evidence he suffered an emotional impact sufficient to warrant monetary compensation. He has presented no documentary evidence or credible third-party testimony of emotional injury relating to his disqualification. Accordingly, I must find Complainant’s testimony about the emotional impact the EIC disqualification had on him to be credible in order to award him the amount sought. I do not. On this point, I find Complainant’s lack of candor regarding his bankruptcy filing significant and find it calls into question his entire testimony on emotional distress damages. Furthermore, Complainant’s testimony regarding the alleged physical symptoms of his emotional distress is inconsistent and therefore not credible. Complainant testified the EIC disqualification caused him stomachaches, headaches, and loss of sleep, but in his deposition, Complainant testified that he had no physical symptoms as a result of the retaliation. (Tr. 272-73).

An award for emotional distress is not compelled by a finding of discrimination in and of itself and there is no requirement to award a minimum amount for emotional distress in discrimination cases. On the evidence before me, I find Complainant has not established by a preponderance of the evidence entitlement to emotional distress damages.

Punitive Damages. Punitive damages may be awarded under the FRSA where there has been 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 8-9 (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The *Smith* court explained that the purpose of punitive damages is to punish the defendant for outrageous conduct and to deter future violations. *Id.*, slip op. at 8. It further explained that “[t]he focus is on the character of the tortfeasor’s conduct – i.e., whether it is of

the sort that calls for deterrence and punishment over and above that produced by compensatory awards.” *Id.*; see *White v. The Osage Tribal Council*, ARB No. 96-137, ALJ No. 95-SDW-1, slip op. at 8 (Aug. 8, 1997) (overturning ALJ award of \$60,000 in punitive damages because Board fully expected future compliance).

Complainant submits in his post-trial brief that he is entitled to punitive damages because CN “didn’t even bother to talk to Holmquist before disqualifying him. Instead, he rubberstamped the recommendation of a supervisor against whom numerous safety complainants have been filed.” (Comp. Br. at 33). Furthermore, Complainant argues “CN has not changed despite OSHA having awarded \$175,000 in punitive damages in a little over the last year to plaintiff employees who alleged that CN retaliated against them for engaging in FRSA-protected activity.” (Comp. Br. at 34). Accordingly, Complainant asserts that the Court should award \$250,000 against CN for punitive damages. I disagree.

Punitive damages are not warranted because CN did not callously disregard Complainant’s rights or intentionally violate federal law; act reprehensibly; or have a corporate policy encouraging non-compliance with the FRSA. The evidence demonstrably shows that CN disqualified Complainant from holding any position that would require him to obtain track authority, not just piloting a rail grinder, out of a legitimate safety concern that could potentially affect the health and welfare of the general public. Despite his training and experience to do so, Complainant told his supervisor that he did not feel safe, comfortable or qualified to obtain track authority for a rail grinding train. He was then informed by his supervisor that another employee would perform the assignment. Because Complainant said he did not feel safe, comfortable or qualified to obtain track authority piloting a rail grinder, Respondent took the safer course of action and disqualified Complainant from holding any position that would require him to obtain track authority. Although the ARB determined that CN did not meet its burden to show that it would have taken the same adverse action in the absence of protected activity, the evidence shows that CN’s actions were prompted by genuine safety concerns.

Even assuming, *arguendo*, that CN did not disqualify Complainant for sincere or legitimate safety concerns, I do not find that CN’s behavior rises to the level of reprehensibility that would justify an award for punitive damages. “The ‘degree of reprehensibility’ factor is ‘perhaps the most important indicium of the reasonableness of a punitive damages award.’” *Barati v. Metro-N. R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 146 (D. Conn. 2013) (citing *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996)). As stated above, Complainant was disqualified rather than terminated, and in fact was moved to a higher paid position located closer to his family. Additionally, CN subsequently withdrew the disqualification. See *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, 13-033, ALJ No. 2012-FRS-12 (ARB Apr. 22, 2013). Accordingly, CN’s actions were not so reprehensible that punitive damages are warranted.

Additionally, an important factor to consider when weighing whether punitive damages are necessary to deter future violations is whether the illegal conduct reflects a corporate policy. *Ferguson*, ARB No. 10-075, slip op. at 8-9. A corporate policy that reflects illegal conduct may justify a finding that punitive damages are necessary for deterrence. See *Bailey*, ARB Nos. 13-030, -033, slip op. at 4 (J. Corchado concurring) (noting the converse, that a “corporate policy”

of trying to comply with whistleblower laws “may” justify denying punitive damages under an affirmative defense analysis). Similarly, the ARB has held that an employer may avoid liability for punitive damages “where it has made a ‘good faith effort’ to comply with anti-discrimination provisions.” *Youngermann v. United Parcel Service, Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, PDF at 7 (Feb. 27, 2013) (applying the good faith effort standard to a claim arising under the Surface Transportation Assistance Act).

The evidence does not suggest an insensitive disregard for Complainant’s rights under the FRSA or a corporate policy to violate the FRSA. Further, CN’s non-retaliation policy, as testified to by several of the witnesses and reflected in Respondent’s exhibits, is affirmative evidence of a corporate policy of intended conformity with the rules set forth in FRSA and demonstrates a good faith effort to comply with them.¹¹ In fact, Complainant’s post-trial brief appears to admit that CN does not have a policy of retaliation for protected activities when he stated, “CN did not disqualify at least one other employee who refused to act as an EIC for a rail grinding train.” (Comp. Br. at 33). Consequently, I find that punitive damages are not warranted.

ORDER

Accordingly, it is hereby **ORDERED** that the punitive damages and damages for emotional distress sought by Complainant are **DENIED**.¹²

SO ORDERED.

STEPHEN R. HENLEY
Chief Administrative Law Judge

¹¹ See e.g., RX 14; Tr. 46, 47, 129, 232, 233, 410.

¹² Complainant’s counsel may submit a petition for reimbursement of attorney’s fees and costs within forty-five (45) days of final decision in this matter, to include any and all appellate review.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Board within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).