

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 24 March 2015

CASE NO.: 2014-FRS-00073

In the Matter of:

JOHN MOORE,
Complainant,

v.

**NATIONAL RAILROAD PASSENGER
CORPORATION (AMTRAK),**
Respondent.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

John Moore, pro se

Robert D. Corl, Esq., National Railroad Passenger Corporation, Washington, DC
for the Respondent

DECISION AND ORDER

I. STATEMENT OF THE CASE

This case arises from a complaint filed by John Moore (the “Complainant” or “Moore”) with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) against National Railroad Passenger Corporation (Amtrak) (the “Respondent” or “Amtrak”) under the employee protection provisions of the Federal Rail Safety Act (the “FRSA” or the “Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007).

The FRSA complaint filed with OSHA alleged that Amtrak unlawfully retaliated against Moore for reporting a workplace injury. On March 12, 2014, the Secretary of Labor (“Secretary”), acting through his agent, the Regional Administrator for OSHA, found that there was no reasonable cause to find Amtrak retaliated against Moore for reporting an injury. On March 24, 2014, Moore objected to the Secretary’s finding and requested a *de novo* hearing before the Office of Administrative Law Judges (“OALJ”).

A hearing was held before me in Boston, Massachusetts over two trial days: October 15, 2014 and November 3, 2014. At the hearing, the parties were afforded the opportunity to present evidence and arguments. Formal papers were admitted into evidence as Administrative Law Judge Exhibits (“ALJX”) 1-12, and the parties’ documentary evidence was admitted as Complainant’s Exhibits (“CX”) 1-5, 7-13, and 15 and Respondent’s Exhibits (“RX”) 3-6 and 8-15. Testimony was heard from Moore; Michael Poole, Amtrak’s assistant division engineer for the electric traction department in Massachusetts and Rhode Island; Jared Sheldon, Dan Meehan, and Daniel Rockett, current Amtrak employees who were in Moore’s basic training class; Elijah Barclay, a former Amtrak employee who took basic training in February 2009; Gregory Garmon, Sr., an Amtrak employee who worked with Moore in the field; and Mark Wojcik and Timothy McNulty, Amtrak line instructors. The record is now closed, and the parties have submitted post-hearing briefs (“Compl. Br.” and “Resp. Br.” respectively).

II. STIPULATIONS AND ISSUES PRESENTED

The parties have stipulated to the following facts in this matter:

1. Amtrak is a railroad carrier within the definition of 49 U.S.C. § 20109. Respondent’s Pre-trial Statement.
2. Moore engaged in protected activity under the FRSA when he reported a work-related injury. TR 26-27.

The issues before me are: (1) whether Moore's protected activity was a contributing factor in Amtrak's decision to issue him negative performance evaluations and to terminate him; and (2) whether Amtrak would have taken the same adverse action against Moore absent any protected activity.

Based on the record as a whole, I find that Moore's protected activity of filing a work-related injury was a contributing factor in Amtrak's decision to issue him negative performance evaluations and to terminate him. I further find that Amtrak failed to prove that it would have taken the same adverse action in the absence of the protected activity, and thus Moore is entitled to relief under the FRSA.

III. BACKGROUND

Amtrak hired Moore as a lineman trainee in the electric traction department on February 9, 2011. TR 31-2; RX 3. Moore earned about \$23.75 per hour. TR 106. His job duties at Amtrak included "[h]oisting and rigging," which he described as "moving heavy objects . . . running cable, putting tension on cable" and "blueprint reading." TR 34.

Poole was the manager of the department in which Moore was a trainee. TR 156. According to Poole, the training program for the electric traction department is a two-year program, the first six months are probationary, and the first five or six weeks are referred to as basic training. TR 154, 160-161. Moore testified that the first two weeks of basic training consisted of a safety class, which ended with the trainees taking the "AMT2 test." TR 39. The next section of basic training, lasting about four weeks, involved "grounding procedures, how to ground-out circuits and take power." TR 41-42. After the first six weeks, there is a two-week CDL training program. TR 161. Because Moore already had his CDL license, he worked with

Gregory Garmon Sr., a lineman, and Jimmy Thackaberry, a foreman, for two weeks while his classmates were in the CDL training program. TR 44. Moore and his classmates then transitioned to working 1 day in the classroom and 4 days in the field each week. TR 162. Throughout the rest of the probationary period and the two-year training program, trainees are rotated through different groups, so they are exposed to different linemen, different foremen, different tasks, and all the territory, “which is almost 90 miles.” TR 164. Tasks during the daytime involve “a lot of inspection, building cantilevers” and tasks at night involve “a lot of the repair and maintenance work.” TR 164. Moore’s supervisors included foremen John Pesanti, Bob Dorchies, and Kenny Pasquariello. TR 48-49. Poole explained that after the 6 month probationary period ends, the employee, if retained, gets to join the union and moves under the protection of the collective bargaining agreement. TR 171-172.

Moore testified that on four different occasions during basic training his instructors Wojcik and McNulty told him and the rest of his class, “when you hurt yourself as a trainee, you will be automatically terminated.” TR 40. After hearing these statements, Moore believed he would be terminated if he were injured. TR 43. Barclay testified that when he was in basic training at Amtrak in 2009, Gregory Brennan, the “head of the department,” informed him and his classmates that they would be terminated if they reported an injury during their probationary period. TR 278, 288. Garmon Sr. testified that trainees are told if they get hurt on the job during their training period, there is a good chance they will be terminated. TR 316. According to Garmon Sr., it is his impression of Amtrak’s practices that up until at least 2013 Amtrak told trainees they would lose their jobs if they got hurt during the probationary period. TR 334-335. Garmon Sr. heard this when he was hired, and it is his impression that the practice has not changed. TR 336. Sheldon, Meehan and Rockett testified that they never heard managers tell

trainees they would be terminated if they reported an injury. TR 265, 269, 344. Sheldon testified that he did not think he would be fired if he were injured during the probationary period; Meehan testified that he believed he could be terminated for any reason, including suffering an injury; and Rockett testified that, as he understood it, it is not the employer's policy to terminate an employee for suffering an injury. TR 264; 270; 341. Wojcik testified that he does not recall ever telling Moore if he reported an injury during his probationary period he would be terminated. TR 348. McNulty testified that he never told Moore an employee in his probationary period would be terminated if he reported an injury. TR 366-367.

In 2009, Amtrak's Chief Executive Officer, Joe Boardman, sent a letter to employees stating that "[a]ll injuries that occur during work and/or on Amtrak property must be reported." RX 11. The letter explains that clarification of Amtrak policy was needed because "there can be reluctance to report injuries based on past experiences – situations where it has seemed like blame and punishment were the main response when an injury was reported." RX 11. The letter assures employees that Amtrak will not tolerate harassment, intimidation, or retaliation against any employee who reports an injury. RX 11. On January 29, 2010, Boardman sent a special employee advisory to employees, setting out a change in policy. RX 12. Injury ratios would no longer be used in manager evaluations because "the goal and the numbers in some instances may have contributed to a mindset more focused on managing the ratio rather than truly identifying and reducing the risks that cause injuries." RX 12. Barclay testified that he never saw the December 2009 letter sent by the Chief Executive Officer, even though it is dated after he started working at Amtrak. TR 295-297.

Poole testified that Amtrak employees are required to notify their foreman or supervisor immediately when an injury takes place. TR 157. Supervisors are supposed to get an injured

employee any necessary medical attention and to complete necessary paperwork. TR 157. Poole is not evaluated based on the number of injuries reported to him, and if it is determined that a supervisor has hidden an injury or has not handled an injury in a timely manner, the supervisor is typically disciplined immediately. TR 158-159.

In early May 2011, Moore was involved in an automobile accident. Moore testified that while he was driving his truck 5-10 miles per hour, an animal ran out in front of him. TR 57-58; 137. He cut the wheel to the right and hit a telephone pole on the passenger side, smashing the fender. TR 57-58. The truck was totaled as a result of the accident. TR 57-58. He testified that he “did not sustain no injury from that accident” and “was fine.” TR 58.

Moore testified that on May 27, 2011 he injured his shoulder while working for Amtrak on the railroad in Providence, RI. It was the first time he had ever worked in Providence, and he had not yet completed a training on “characteristics,” which “they teach you what the know abouts [sic] is of the railroad.” TR 49-51. At about 4am, Moore, following his supervisor’s instructions, went up a pole in a bucket in order to “take[] the grounds down.” TR 52-53. While in the bucket, he reached out to his left towards the wires. TR 53-54. He “must have pulled too far” as later that night, after getting the grounds down, he got in the truck and noticed his shoulder “felt like a little pull.” TR 54. That night, May 27, 2011, Moore told foreman Dorchies he thought he pulled his shoulder while taking the grounds down. TR 54-55. Fearing he would be terminated, Moore did not file a report of the injury at that time and tried to work through the pain. TR 54-55.

Moore testified that one or two weeks later, he told Samuel Maxwell, the assistant supervisor, that his shoulder still bothered him. TR 55-56. On or about June 5, 2011, because he

“couldn’t bear [the pain]” any longer, Moore told Maxwell he needed to get his shoulder checked out, and Maxwell brought him to the emergency room. TR 56. At the hospital, Moore was given a shot for pain and a prescription for Vicodin, his arm was put in a sling, and he was told not to return to work until he saw an orthopedic doctor. TR 56. Moore testified that he filed an injury report that night. TR 64. In the injury report itself, which is dated June 1, 2011, Moore stated that the injury occurred on May 26, 2011, described the injury as pain in his left shoulder, and explained that it was caused by taking down grounds. RX 9. Moore testified that upon leaving the hospital, he was involved in another car accident. TR 59. He got drowsy, blacked out, ran off the road, and drove through a guardrail. TR 59. When he woke up, he was being put in an ambulance. TR 59. However, he “sustained no injuries from that accident.” TR 59.

Moore testified that during the week after he was discharged from the hospital, while he was out of work, he was called for a meeting with Steve Nazareus and Poole to discuss the injury and how it occurred. TR 62-3; 182. There was no discussion of his job performance at this meeting. TR 64. Poole testified that Moore, during the meeting, “placed himself at three different locations” at the time of the injury and “didn’t know where he was.” TR 184. Garmon Sr. testified that, based on his experience with Amtrak, a trainee who has been working in the field for only a week or two, at night, without physical characteristics, would not know where he is. TR 321. Moore testified that the next day, June 13, 2011, he saw an orthopedic doctor. TR 66. The doctor diagnosed Moore with a strained left shoulder and gave him a note indicating he could return to work on June 14, 2011. TR 66; CX 5. Moore returned to work on June 14. TR 67.

In early July 2011 Moore, while in a training class, was in possession of an iPod. TR 79-81. Moore testified that his instructor told him and his classmates to read the material and to

take a break after they were finished because the instructor was busy dealing with new trainees. TR 79-80. According to Moore, the iPod was turned off. TR 80. Poole was present and was assisting Wojcik. TR 81. Poole said nothing to Moore about the iPod. TR 81-82.

One of Poole's responsibilities was to recommend whether a trainee should be retained after the probationary period ends. TR 163. Recommendations are based on classroom test scores and field performance evaluations. TR 163. Poole was responsible for the field performance evaluation part. TR 163. He did not see the test scores; the field performance evaluations were the only written bases he relied on to make his determination. TR 165. The foremen who worked closely with the trainees filled out the evaluations, the evaluations were handed to Poole, and Poole assigned numerical scores to the evaluations. TR 164-167. Poole reached the numerical score by adding the scores given by the field supervisors in all the categories to create a total score, then dividing the total actual score by the total possible score. TR 214-215. He used 50% as the threshold to determine who would make the cut based on the evaluations. TR 168. Poole believes he started collecting the evaluations from the foremen in June 2011 and made the decision to use the format he described in mid-June. TR 166-168; 215-218. Poole was not required to cut down the class and could have recommended everybody or nobody. TR 220.

Moore testified that he did not receive any performance evaluations from the beginning of his employment in February 2011 through July 2011. TR 61-62. He never received any negative reviews nor had any kind of conversation with anybody regarding need for improvement. TR 60-61. Moore testified that, upon finishing the AMT2 safety course test, he was told by an Amtrak instructor, Mr. Minn, that he scored the highest in this class. TR 39-40. Garmon Sr. told Moore he did good work after working with him for two weeks. TR 46.

Garmon Sr. testified that Moore was “skillful” in disassembling cantilevers; Moore “followed my orders, you know, he did everything I told him, everything, the orders that was passed on to me, I gave to him. John did everything. Never complained or anything;” and Moore did a “very good job at” doing the “new builds.” TR 302-303. Garmon Sr. told Thackaberry that Moore was doing a good job. TR 320. Moore testified that he was never late, was always an hour early to his shift, and signed up for overtime every week. TR 51, 92. Barclay testified that, during his probationary period, which lasted 90 days, management would give trainees feedback regarding areas of improvement. TR 290-291.

On August 1, 2011, Moore was called into a meeting with Poole and Brennan. TR 91. Poole informed Moore he was being terminated and gave Moore a termination letter. TR 91. In the termination letter, Poole writes “[a]t this time, I regret to inform you that your performance to date does not meet the needs of our department. Based on that, your application for employment with Amtrak has been denied.” RX 5. Poole testified that he based his determination to recommend Moore’s termination on the field evaluations and “observations that I had made.” TR 177. Poole gave as an example of one such observation the incident in which he observed Moore with an iPod in class. TR 177. To Poole, Moore was ignoring the instructor’s request to study and gave off the “appearance that he wasn’t invested in what he was doing.” TR 178. This incident, “coupled with comments from numerous people beyond the foremen that most of the time [Moore] seemed out of it when he was working in the field, like he wasn’t focused” gave Poole concern about Moore. TR 178-179. Poole also noted that Moore complained to supervisors about his assignment on several occasions and asked for preferential treatment. TR 179. Poole testified that he was not the ultimate decision-maker in Moore’s termination. He stated: “[I] provided my findings to Mr. Fitter, the division engineer, and he did not have any

objections to the fact that I was going to be terminating Mr. Moore.” TR 187-188. Poole testified that Moore’s reporting his injury was not a factor in the decision to terminate Moore. TR 188. Moore was terminated “just shy” of his 6-month probationary period. TR 124.

Poole testified that “[i]n hindsight,” he “probably should have” said something to Moore about the iPod incident. TR 221. When asked if it is his understanding that, as part of the evaluation process, if a trainee is not doing well in a certain area, he should be given that information before he is terminated, Poole testified, “[t]hat, I can’t answer. Counsel asked me that question when we were at lunch. I don’t know. I would hope, but I don’t know if the foremen discuss these evaluations with the employees before they turned them in.” TR 222. He expects that, if an evaluation includes problems about the individual evaluated, the supervisor will discuss it with the employee, but he “never asked that question specifically.” TR 222.

Moore testified that he was the only one of his classmates who was terminated. TR 84. Poole testified that nobody other than Moore rated below 50% on the evaluations. TR 168. Rockett, who was in Moore’s training class, received low score averages in his performance evaluations (below 60%), but he was not terminated. TR 168-169. Instead, he received a warning that if he did not improve he would lose his job. TR 168-169. Poole does not know of any trainee, other than Moore, who was injured during the probationary period and was not retained. TR 218. He also does not know of any trainee who was injured during the probationary period and was retained, and during his tenure, no one else has been injured during the probationary period. TR 219. Poole testified that Barclay did not report an injury, yet he was terminated after failing a field test twice. *See* TR 179-180.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 20109 of the FRSA prohibits railroad carriers engaged in interstate or foreign commerce or its officers or employees from discharging, demoting, suspending, reprimanding or in any other way discriminating against an employee, in whole or part, for engagement in activity protected by the FRSA. The FRSA whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i). Therefore, complaints under the FRSA are analyzed under the legal burdens of proof outlined in the AIR 21. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

The burden-shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence¹ 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 the unfavorable personnel action.” *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-00009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Cont’l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-00009, slip op. at 6-7 (ARB Jan. 31, 2012)); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-00012, PDF at 5-6 (ARB Oct. 26, 2012).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it “demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the

¹ The “[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black’s Law Dictionary* 1201 (7th ed. 1999)).

protected activity].” 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.104. If the employer does so, no relief may be awarded to the complainant. 42 U.S.C. § 42121(b)(2)(B)(iv). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-00052, PDF at 5 (ARB Jan. 31, 2011) (*quoting Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006)).

A. Protected Activity

Protected activity under the FRSA includes reporting a work-related injury or illness. 49 U.S.C. § 20109(a)(4). Moore contends that while working for Amtrak he overextended his shoulder when he reached for wires, and that he engaged in protected activity when he reported this work-related injury to his supervisors. Compl. Br. at 5, 10.

As stated above, Respondent stipulated to protected activity at the hearing and that stipulation was accepted. TR 26-27. However, Respondent now argues, in its post-hearing brief, that Moore’s reporting of his injury does not constitute protected activity. Resp. Br. at 5. Respondent provides no argument as to why it should be relieved from its trial stipulation, and I am surprised by its attempt to boldly ignore even the existence of the stipulation. In dealing with stipulations, the Supreme Court has stated:

Litigants, we have long recognized, “[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established.” *H. Hackfeld & Co. v. United States*, [197 U.S. 442, 447](#) (1905). This entitlement is the bookend to a party’s undertaking to be bound by the factual stipulations it submits. ... As a leading legal reference summarizes: “[Factual stipulations are] binding and conclusive ..., and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, ... or to maintain a contention contrary to the agreed statement, ... or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated.” 83 C.J.S., Stipulations § 93 (2000) (footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint “stipulation [entered] at the outset of th[e] litigation.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 226 (2000). ... [F]actual stipulations are “formal concessions... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case.” 2 K. Broun, *McCormick on Evidence* § 254, p. 181 (6th ed. 2006) (footnote omitted). *See also*, e.g., *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1881) (“The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.”).

Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 676-678 (2010) (citation omitted)(footnotes omitted). By stipulating to protected activity at trial, the Respondent took the issue off the table and Moore was relieved from presenting any evidence on the issue. To now unravel the stipulation, without even a modicum of justification, is Respondent’s attempt to play a game of “gotcha” where Moore would be severely prejudiced because he rightfully relied on counsel’s trial stipulation. I will not countenance such gamesmanship and I find that, based upon Respondent’s trial stipulation, Moore has established that he engaged in protected activity.²

While confident in my ruling, for completeness of the record, I will discuss below whether the evidence presented independently establishes that Moore engaged in protected activity.

Respondent appears to argue that Moore’s reporting is not protected activity because (1) Moore failed to demonstrate the injury was in fact work-related and (2) Moore’s report was not made in good faith because he did not genuinely believe the injury was work-related at the time he reported it. *See* Resp. Br. at 11. Respondent points out that Moore was involved in an automobile accident on his own time, away from company property in his personal vehicle, a

² Query whether the Respondent’s counsel would have attempted such aberrant conduct if Moore had been represented by counsel? Facing a *pro se* adversary should not be a license to depart from normal and customary practice with regard to trial stipulations.

few weeks before his purported work-related injury occurred. *Id.* Respondent suggests that Moore's injury may have been caused by his automobile accident instead of his work. *See id.*

Respondent's first argument fails because Complainant is not required to demonstrate that the injury he reported was in fact work-related. A complainant is required to show only that his report was made in good faith. *See* 49 U.S.C. § 20109 (a)(4). A report of a work-related injury is made in good faith, and therefore protected under the FRSA, if the plaintiff actually believed, at the time he reported the injury, that it was work related. *Davis v. Union Pac. R.R. Co.*, No. 12-cv-273, 2014 WL 3499228, at *7 (W.D.La. July 14, 2014). The belief must also be objectively reasonable. *Koziara v. BNSF Ry. Co.*, No. 13-CV-834-JDP, 2015 WL 137272, at *6- (W.D. Wis. Jan. 9, 2015).

In its post-hearing brief, Respondent attacks Moore's credibility, claiming that Moore did not genuinely believe his injury was work-related at the time he made the report. Resp. Br. at 11. According to Respondent, Moore, when asked about his automobile accident, gave conflicting testimony at the deposition and trial as to how fast he was going. *Id.* At the hearing, Moore estimated he was driving 5-10 mph at the time of his automobile accident, while in his deposition he estimated he was driving 2 mph. *Id.* Respondent also points out that Moore's truck was totaled as a result of the accident, which "would seem to indicate he was going significantly faster than he alleged when he totaled his truck," and Moore "thrice contradicted himself as to the location of the injury" when inquiries were made as to where the injury occurred. *Id.*

I find that Moore was credible as a witness. The discrepancy between the speed he estimated at his hearing and the speed he estimated at his deposition is not significant enough to undermine his credibility. Furthermore, he provided a persuasive explanation as to why he did not consistently identify the location of his injury to Poole when asked: as a trainee with only a

few months on the job working on the tracks at night, he did not know exactly where he was at the time of the injury. This is supported by the testimony of Garmon Sr., who explained that, based on his experience, a trainee would have difficulty ascertaining his exact location in such circumstances. *See* TR 321. The injury report Moore filed on June 1, 2011 is also evidence of his subjective belief; in the report, he described his injury as pain in his left shoulder, and explained that it was caused by taking down grounds while working at Amtrak. *See* RX 9. I find that this evidence establishes Moore genuinely believed the injury was work-related.

I also find that Moore's belief was reasonable. Moore credibly testified that he did not suffer any injuries from the automobile accident and that after reaching out to his left for wires while working for Amtrak, he felt a "pull" in his shoulder. *See* TR 54, 58. Moore's doctor diagnosed him with a strained left shoulder. CX 5. Amtrak has not submitted any medical evidence contradicting Moore's testimony that the injury was work-related rather than caused by the automobile accident. Amtrak itself treated the injury as work-related when Moore reported it. *See* Resp. Br. at 3, 5, 11. For these reasons, the evidence establishes that Moore's injury report was made in good faith. Therefore, Moore has demonstrated that he engaged in protected activity by reporting his work-related injury to his supervisors.

B. Adverse Action

Moore contends that he suffered unfavorable personnel action because he received negative performance evaluations following his injury report, where prior to the injury he received none, and ultimately was terminated from his employment at Amtrak. Compl. Br. at 10-11. Respondent does not contest in its post-hearing brief that there is adverse action in this case. In light of the absence of disagreement on this issue, I will consider Amtrak to have

conceded that both the negative performance evaluations and the termination constitute adverse action in this case.

In the alternative, after reviewing the evidence, I find that both the negative performance evaluations and the termination constitute adverse action. Discharge is identified in the statute as prohibited discrimination. 49 U.S.C. § 20109. The termination letter and Poole's and Moore's testimony demonstrate that Moore was discharged by Amtrak. *See* RX 5; TR 84, 177.

The regulations include "intimidating," "threatening," and "disciplining" actions as prohibited discrimination. 49 C.F.R. § 1982.102(b)(1). Adverse actions can also include an employment action that "would dissuade a reasonable employee from engaging in protected activity." *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-18 (ARB Dec. 21, 2012) (citing *Menendez v. Halliburton*, ARB Nos. 09-002, -003; ALJ No. 2007-SOX-2005 (ARB Sept. 13, 2011)). I find that the negative performance evaluations would dissuade a reasonable employee from engaging in protected activity. Poole testified that the field evaluations of trainees constitute part of the basis for determining whether or not to recommend a trainee for continued employment after the probationary period ends. TR 163. Negative performance evaluations therefore increase the chances of a trainee's termination. Since a trainee could face termination at the end of his probationary period if his performance evaluations are negative, it stands to reason that a reasonable employee would be deterred from filing an injury report if there is a prospect that it will result in negative performance evaluations.

C. Employer Knowledge

Amtrak argues that Moore has failed to prove the employer had knowledge of the protected activity.³ Resp. Br. at 13. It is undisputed that Poole, who scored the performance evaluations and made the recommendation to terminate Moore, knew of Moore's report. Respondent argues that Complainant has nevertheless failed to establish employer knowledge because, even though Poole treated the injury as work-related, Poole had reason to believe the injury was not in fact work-related. *Id.*

Employer's argument is unpersuasive. An employer cannot avoid liability merely by alleging that it did not believe the report was made in good faith. In *Davis*, 2014 WL 3499228, at *7-8, the court found this argument unpersuasive because it would immunize employers simply by alleging facts to show they thought the employee might be lying or otherwise acting in bad faith. The court noted that the FRSA is intended to be protective of employees, and concluded that the statute would be far less protective if the employer could avoid liability in this way.

Respondent also argues that Complainant has failed to establish employer knowledge because although Poole knew of the report, Poole was not the ultimate decision-maker. Resp. Br. at 12. Rather, Fitter was the ultimate decision-maker, and no evidence has been offered to show Fitter knew of the protected activity. *Id.* Employer's argument fails because Poole participated in the decision-making process. The Administrative Review Board in *Rudolph v. Nat'l R.R.*

³ Amtrak argues that, in light of Moore's failure to establish employer knowledge, from a fundamental standpoint, Moore's injury report could not have been a contributing factor in any of these decisions. There are only three elements of a FRSA whistleblower case (protected activity, adverse action, and causation); the final decision maker's "knowledge" is a factor to consider in the causation analysis but is not always a dispositive factor. *Hamilton v. CSX Transp., Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013). *But see Araujo*, 708 F.3d at 157 (listing (1) protected activity, (2) employer knowledge, (3) adverse action, and (4) causation as elements of a FRSA case). In any event, as discussed above, the evidence establishes that the employer had knowledge of the protected activity.

Passenger Corp., ARB No. 11-037, ALJ No. 2009-FRS-015 (ARB March 29, 2013) explained:

proof that an employee's protected activity contributed to the adverse action does not necessarily rest on the decision-maker's knowledge alone. It may be established through a wide range of circumstantial evidence, including the acts or knowledge of a combination of individuals involved in the decision-making process.

Complainant need not prove that the decision-maker responsible for the adverse action knew of the protected activity if it can be established that those advising the decision-maker knew. *Id.* Indeed, Poole's recommendation to terminate Moore directly led to Moore's termination; Fitter merely acquiesced to Poole's decision. *See* TR 187-188. Thus, the evidence establishes that the decision-maker had knowledge of the protected activity.

D. Contributing Factor

A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco*, ARB No. 10-114, PDF at 6 (*quoting Williams*, ARB No. 09-092 at 5). In establishing the contributing factor element, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Araujo*, 708 F.3d at 158 (*quoting Marana v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)). A complainant is not required to show retaliatory animus or motive to prove that his protected activity contributed to employer's adverse action. *DeFrancesco*, ARB No. 10-114, PDF at 6; *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, PDF at 7 (ARB May 31, 2013).

A complainant can connect his protected activity to the adverse action directly or indirectly through circumstantial evidence. *Williams*, ARB No. 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7. Direct evidence "conclusively links the protected activity and the

adverse action and does not rely upon inference.” *Williams*, ARB No. 09-092, PDF at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-00028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer’s suspension of employee who reported job-related injury “violated the direct language of the FRSA”). A complainant may also rely upon circumstantial evidence, which:

may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, and a change in the employer’s attitude toward a complainant after he or she engages in protected activity.

DeFrancesco, ARB No. 10-114, PDF at 7; *see also Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, PDF at 13 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-00003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed “as a whole to properly gauge the context of the adverse action in question.” *Bobreski*, ARB No. 09-057, PDF at 13-14. This is because “a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction.” *Bechtel*, ARB No. 09-057 at 13 (*quoting Sylvester v. SOS Children’s Vill. Ill., Inc.*, 453 F.3d 900, 903 (7th Cir. 2006)).

In support of his position that his injury report was a contributing factor in the adverse action, Moore directs me to his testimony that on numerous occasions he was told by his instructors employees would be terminated if they reported an injury. Compl. Br. at 12. I find that Moore’s testimony is credible. Barclay similarly testified that when he was in basic training he was told trainees would be terminated if they reported an injury, and Garmon Sr. also testified that trainees are told there is a good chance they will be fired if they report an injury. *See* TR 278, 288, 316. Although the other trainees from Moore’s class testified that they never heard

such warnings from management, they are all still employed by Amtrak and may fear retaliation if they speak up. Therefore, their testimony on this issue will be given little weight. The instructors' testimony, that they did not make or do not remember making the statements, will be given little weight for the same reason. I find that the instructors' conduct in Moore's classroom evinces antagonism or hostility toward reporting an injury.

However, setting aside the statements allegedly made by Moore's instructors, the other circumstantial evidence in this case is sufficient to sustain Moore's burden. First, the temporal proximity between the protected activity and the adverse action supports a finding that the protected activity contributed to the adverse action. Moore first informed a supervisor of his work-related injury on May 27, 2011. TR 54-55. He filed a written report of the injury with his employer on June 1, 2011 (although he testified that it may have been June 5th). RX 9; *see* TR 64. The earliest dated negative performance evaluation in the record is June 6, 2011, a mere 5 days after Moore's June 1st report (and only one day if the report was filed on June 5th instead). *See* RX 14. The termination itself took place on August 1, 2011, only two months after Moore's report. *See* RX 5.

In addition, there is strong evidence indicating that Amtrak's stated reasons for terminating Moore are pretextual. Poole testified that he based his recommendation to terminate Moore on negative performance evaluations by supervisors who worked closely with Moore in the field. TR 177. Although Moore had been working in the field by April, all of the performance evaluations in evidence are dated after Moore reported his work-related injury in June. *See* RX 14. Poole's purportedly objective method of determining which trainees to recommend for termination—50% score on the field evaluations as the cutoff—is actually arbitrary, as he testified that he could have recommended all trainees for retention and he did not

decide to use the method until mid-June, after Moore had reported his injury. *See* TR 166-168; 215-218, 220.

Moreover, no evaluations, warnings, or other negative feedback about his job performance were communicated to Moore until the day he was terminated. Poole testified that he personally observed unsatisfactory behavior from Moore during his training (namely, witnessing Moore with his iPod out in class despite receiving instruction from his supervisor to study), and this formed part of the basis for terminating Moore. TR 177-178. However, Poole admitted that he said nothing to Moore about this and that he should have said something to Moore (if he truly were concerned with what he observed). *See* TR 221-222.

Considering these indicators of pretext, combined with the close temporal proximity between the adverse action and the protected activity, I find that Moore has proven by a preponderance of evidence that his protected activity of reporting an injury contributed to the adverse action. Accordingly, the burden shifts to Amtrak to establish that it would have taken the same action absent the protected activity.

E. Respondent's Affirmative Defense

Once a complainant has shown that his protected activity was a contributing factor to the adverse employment action, the respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-00023 (ARB July 7, 2008); *see also* 49 U.S.C. § 20109(d)(2)(a)(i). The clear and convincing standard is a higher burden than a preponderance of the evidence and the respondent must conclusively demonstrate “that the thing to be proved is highly probable or reasonably certain.”

DeFrancesco, ARB No. 10-114 at 8; *Williams*, ARB 09-092 at 5; *Araujo*, 708 F.3d at 159. A respondent's burden to prove the affirmative defense under the FRSA is purposely a high one. *Hutton*, ARB No. 11-091 at 13; *see also Araujo*, 708 F.3d at 159-60 (noting the burden shifting analysis is intended to be protective of plaintiff-employees and is a "tough standard" for employers to meet).

Amtrak alleges that it had a lawful and valid reason for terminating Moore: poor work performance and Moore's "lack of interest [and] engagement in the program." Resp. Br. at 6. In support of its position that it would have terminated Moore for these reasons even if Moore had not reported an injury, Amtrak states that (1) Moore's performance evaluations had always been low; (2) Moore's lack of interest, engagement in the program and reliability were factored into the evaluations which eventually led to the decision to terminate; and (3) the 180 day probationary period provides Amtrak with a very narrow window of opportunity to terminate substandard employees and such employees can be terminated for any reason in accordance with their collective bargaining agreement. *Id.*

In further support of its position that it would have taken the adverse action even if Moore had not reported an injury, Amtrak argues that "it makes no sense for an Amtrak manager to take adverse action against an employee who has reported an injury." *Id.* at 14. According to Amtrak, it has a policy prohibiting such retaliation, Amtrak's President and CEO removed injury ratios as a performance metric so that managers would have no incentive to keep injury numbers down through harassment or intimidation, and managers can be disciplined for retaliating against injured employees. *Id.* at 13-14. Additionally, Amtrak asserts that other similarly situated employees have been terminated who have not reported injuries, and another employee from

Moore's class (Rockett) came close to termination because of his scores, even though he did not report any injury. *Id.* at 5-6. Amtrak identifies Barclay as an example of a similarly situated employee who has been terminated despite not reporting an injury. *Id.*

Respondent has provided insufficient evidence to carry its burden in this case. As discussed above, the evaluations documenting poor work performance and Poole's observations of Moore's lack of interest or engagement in the program actually are indicative of pretext rather than that Moore was terminated for the reasons proffered by Amtrak. To reiterate, the negative performance evaluations all were dated after Moore's injury report and concerns about Moore's job performance or lack of interest and engagement were never communicated to Moore before his termination. Allegations of poor work performance and disengagement—that Moore was a “substandard employee”—simply are not based in fact here.⁴ Moreover, Respondent is not aided by the fact that the collective bargaining agreement provides that the employer can terminate an employee for any reason during the probationary period. Respondent is required to prove not what it "could have" done, but rather what it "would have" done. *Cain v. BNSF Ry. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-19 (ARB Sept. 18, 2014).

⁴ For example, Moore testified that he was never late, was always an hour early to his shifts, and signed up for overtime every week. The time records provided by Amtrak do not contradict Moore's testimony. *See* RX 15. In their field evaluations, Moore's evaluators noted that his attendance was good. One evaluator noted that Moore was “very punctual (usually early),” another noted that “John is always on time,” and a third noted that “John's attendance for the most part is good, but could use some improvement” without explaining more. RX 14. Poole testified that Moore's attendance “was not an issue . . . [n]o one ever indicated to me that he was an attendance problem.” TR 199.

However, the evaluations themselves are not consistent with this evidence. In each of his 5 evaluations, Moore was rated a 3 (“satisfactory”) in attendance out of a possible score of 5. RX 14. Other trainees were sometimes rated higher than 3 in attendance, despite explanatory notes from evaluators similar to Moore's or no notes at all. *See id.* Poole testified that an employee who comes in early should get rated a 4, and if an employee is early regularly and helps off the clock he should get a 5. TR 199.

Poole admitted that had Moore been rated higher than a 3 in attendance, his overall score may have exceeded 50% and he would have been retained, if Moore “was, in fact, early.” TR 201. Poole never checked Moore's attendance records to verify that the ratings were accurate. *See* TR 198.

Respondent's argument, that "it makes no sense for an Amtrak manager to take adverse action against an employee who has reported an injury," is also unpersuasive. The existence of a company policy prohibiting retaliation for reporting injuries does not mean that company officials never retaliate against employees for reporting injuries. Amtrak may not be enforcing its policy adequately.

Finally, Amtrak's evidence fails to show that it has treated a similarly situated employee in a similar way. Contrary to Amtrak's position, Barclay was not similarly situated to Moore. He was terminated after failing a field test twice, not for negative performance evaluations that were never communicated to him. *See* TR 179-180. Rockett may have received performance evaluations similar to Moore's. However, unlike Moore, Rockett was not terminated, and unlike Moore, Rockett was informed that he needed to improve his performance or he would face termination. *See* TR 168-169. If anything, Rockett's example demonstrates that an employee similarly situated to Moore was treated very differently.

For the foregoing reasons Amtrak has failed to establish by clear and convincing evidence that it would have taken the same adverse action against Moore absent his protected activity of reporting an injury. Therefore, Moore is entitled to relief under the FRSA.

V. REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). To be made whole, Moore is entitled to have his personnel record expunged of the negative performance evaluations scored by Poole. I find that Moore is also entitled to reinstatement; back pay, with interest; damages for emotional distress; and punitive damages, for the reasons discussed below.

A. Reinstatement

Moore, in his post-hearing brief, states that he is seeking reinstatement with the same seniority status that he would have had but for the discrimination. Compl. Br. at 14. The FRSA provides for reinstatement with the same seniority status that the employee would have, but for the discrimination. 49 U.S.C. § 20109(e)(2)(A). Amtrak has not argued or presented any evidence that reinstatement in this case is impossible or impractical. *See Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-24 (ARB May 31, 2013). Therefore, reinstatement is ordered with the same compensation, terms, conditions, and privileges of the Complainant's employment.

B. Back pay

In addition to reinstatement, Moore seeks lost wages with interest. Compl. Br. at 14. The FRSA provides for back pay with interest. 49 U.S.C. § 20109(e)(2)(B). Although the calculation of back pay must be reasonable and based on the evidence, the determination of back wages does not require "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 11-12, n.12 (ARB May 30, 1997).

Moore testified that he earned about \$23.75 per hour at Amtrak. TR 106. Amtrak does not contest this amount in its post-hearing brief nor has it presented any evidence contradicting Moore's testimony. Moore testified that he would get "the regular lineman's rate" when he completed the two-year course, but he did not specify what that rate would be. *Id.* Therefore, I find that Moore has established he is entitled to back wages at \$23.75 per hour but no more than that hourly rate.

When asked if he worked more than 40 hours per week, Moore testified that he put his name on the overtime list every week, and although he was granted overtime "a few times," he

was denied it “quite a few times,” adding that “[w]hen you’re a trainee, you’re not going to get that much overtime.” TR 107. Amtrak presented time records indicating that Moore worked a 40 hour per week schedule during his period of employment. *See* RX 15. Amtrak has presented no evidence that Moore would have been offered less overtime than he had already been receiving had he continued to work for Amtrak. Upon review of the time records provided by Amtrak, it appears that, in 25 weeks working for Amtrak, Moore worked 34.5 overtime hours in total. *See id.* Moore worked 1.38 overtime hours per week on average and was paid at an overtime rate of \$35.63 (\$23.75 X 1.5), resulting in \$49.17 (1.38 average overtime hours X \$35.63) in average weekly overtime pay.

In light of the foregoing discussion, the amount of back pay will be determined by using a weekly pay rate of \$950 (40 hours X \$23.75 hourly rate). To determine what Moore is entitled to in lost overtime pay, \$49.17 in average weekly overtime pay will be multiplied by the number of weeks Moore would have worked for Amtrak had he not been terminated on August 1, 2011. The following table demonstrates that Moore suffered lost wages, from the date of his termination (8/1/2011) to the present, in the amount of \$188,843.13.

2011	22 remaining weeks X \$950	=	\$20,900
2012	52 weeks X \$950	=	\$49,400
2013	52 weeks X \$950	=	\$49,400
2014	52 weeks X \$950	=	\$49,400
2015	11 weeks X \$950	=	\$10,450
Overtime	189 weeks X \$49.17	=	\$9,293.13
Total		=	\$188,843.13

Moore testified that he has been unemployed since Amtrak terminated him. TR 100. An unlawfully discharged employee has the burden of mitigating his or her damages by seeking suitable employment. *Abdur-Rahman v. DeKalb County*, ARB Nos. 12-064, -067, ALJ Nos. 2006-WPC-2 and 3 (ARB Oct. 9, 2014) (citing *Parrish v. Immanuel Med. Ctr.*, 92 F.3d 727, 735 (8th Cir. 1996)). The respondent has the burden of establishing that the back pay award should be reduced because the complainant did not exercise diligence in seeking and obtaining other employment. *See id.* (citing *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000)). Moore testified that, after his termination, he inquired about other positions at Amtrak with Prince Reid, special assistant to the deputy general manager in Boston, and Sue Allen, human resources official. TR 97-100; 152. He was informed that a mechanical/electrical job was available but he would need to pass a test. *Id.* However, Moore failed the test and did not get the job. *Id.* He stated that he has been sending out his resume, applying for jobs, attending job fairs, and having interviews, but “[n]o one is hiring me.” *Id.* at 100-104. Moore presented documentation of his work search since his termination, including cover letters submitted, responses from employers, and phone records showing calls to Amtrak’s Prince Reid and Human Resources. CX 11; CX 15. Respondent does not argue in its post-hearing brief that Moore failed to mitigate damages nor has Amtrak presented any evidence demonstrating that Moore’s job search was inadequate. Therefore, no amount will be deducted due to failure to mitigate damages.

Moore testified that he did not collect unemployment insurance benefits but he did settle with Amtrak in lieu of unemployment benefits for \$28,000. TR 108. Amtrak does not argue in its post-hearing brief that this amount should be deducted from the total amount of back pay awarded. The nature of the settlement agreement Moore mentioned is not clear, and Amtrak did

not provide any information on the matter. I am not making a finding that Amtrak and Moore settled in lieu of unemployment benefits for \$28,000. However, for the purposes of determining whether the amount will impact Moore's back pay award, the amount will be analyzed like unemployment benefits. As unemployment compensation is not deductible from back pay, I decline to deduct this amount from the back pay award. *See Cain*, ARB No. 13-006.

C. Damages for Emotional Distress

Moore also seeks compensatory damages. The FRSA provides for "compensatory damages, including compensation for any special damages sustained as a result of the discrimination" under 49 U.S.C. § 20109(e)(2)(C). Compensatory damages include damages for emotional distress. *Barati v. Metro-North R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 152 (D. Conn. 2013). A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7 (ARB Aug. 21, 2011). A complainant's credible testimony alone is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007).

Moore presented credible testimony that he suffered severe emotional distress as a result of his termination by Amtrak. Moore testified that after he left the termination meeting, "I was crying so hard, I couldn't hardly see to make it home. And when I got home, I sat up all night and my little daughter come up and hug me, and said, daddy, it'll be all right." TR 94. He testified that the financial hardship resulting from his termination caused conflicts between him and his fiancé "because I wasn't bringing no money in, and I was trying, with a daughter at the time in private school, you know, to try to give her the best education that we could. It was

tough.” TR 109-110. He testified that “every day, I would think about the loss of my job, losing my job, because I couldn’t understand why.” TR 112. At times, he

would sit around and cry. My daughter would see that I was very sad. I was very angry. You know, I’m a person that, at times, I love going to church and serving God, and, you know, at the time, I just totally just – I was arguing with my fiancé all of the time. It brought up numerous of arguments.

TR 112. He saw a physician once a week because “at the time, my daughter was young and I didn’t want to be around her with these anger attacks and, you know, emotionally, just stressed out to the point where sometimes you just want to give up.” TR 114. He received treatment from Dr. Subhash Mukherjee, a psychiatrist, “because of what Amtrak had done to me and how much, you know, damage that it caused me, and my financial hardship.” TR 110.

Moore’s testimony as to emotional distress is corroborated by medical evidence. Moore presented progress records from Dr. Mukherjee, dated from 11/23/2012 to 10/20/2014. CX 9. In the records, Dr. Mukherjee documents his treatment for Moore’s depression and anxiety, which he relates to Moore’s feelings of unfair treatment by Amtrak and financial difficulties resulting from the loss of his job at Amtrak. *Id.* Dr. Mukherjee notes that, as a result of the stress, Moore had problems with sleep, energy, and concentration. *Id.* The financial difficulties strained Moore’s relationship with his girlfriend, made him afraid to attend Christmas gatherings because he could not afford to buy gifts, and made him feel dependent on others. *Id.* According to Dr. Mukherjee, Moore came to have a “low sense of self” and felt “helpless.” *Id.* Dr. Mukherjee recommended for Moore continued pain medication, medication for depression and anxiety, counseling, and a supportive environment. *Id.*

Considering that Moore’s testimony as to emotional distress was supported with evidence of psychological treatment and ultimately Moore was terminated, and after a review of other

whistleblower decisions awarding damages for emotional distress,⁵ I find that Moore is entitled to \$100,000 in emotional distress damages.

D. Punitive Damages

Moore seeks punitive damages in an amount not to exceed \$250,000. Compl. Br. at 14. Punitive damages up to \$250,000 are authorized under the FRSA to punish unlawful conduct and to deter its repetition. 49 U.S.C. § 20109(e)(3); *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law." *Cain*, ARB No. 13-006 (*quoting Youngermann*, ARB No. 11-0566, slip op. at 6). In analyzing the amount of damages awarded, the focus is on the employer's conduct and "whether it is of the sort that calls for deterrence and punishment." *Id.* The

⁵*See, e.g., Fink v. R&L Transfer, Inc.*, ARB No. 13-018, ALJ No. 2012-STA-6 (ARB Mar. 19, 2014) (\$100,000 in compensatory damages where ALJ found that the respondent's termination of the complainant's employment had a significant emotional impact on the complainant in the effect it had on his dignity and self-esteem, his ability to support his family, and his vulnerable economic position); *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009) (\$100,000 in compensatory damages where complainant testified that his termination took his confidence away, he was upset that he could no longer provide for his family, he and his family sought counseling, he was treated by a doctor for depression and anxiety, and his testimony was found credible, unrefuted and corroborated by his wife's testimony); *Anderson v. Amtrak*, 2009-FRS-00003 (ALJ Aug. 26, 2010) (awarding \$60,000 in compensatory damages where complainant was terminated); *cf. Griebel v. Union Pac. R.R. Co.*, 2011-FRS-00011 (ALJ Mar. 18, 2014), *aff'd* ARB No. 12-038 (ARB Mar. 18, 2014) (awarding \$5,000 in compensatory damages where no evidence of medical or psychological treatment and no evidence of sleeplessness, anxiety, extreme stress, depression, marital strain, loss of self-esteem, excessive fatigue, or a nervous breakdown); *Bailey v. Consolidated Rail Corp.*, 2012-FRS-00012 (ALJ Dec. 31, 2012), *aff'd* ARB Nos. 13-030, -033 (ARB Apr. 22, 2013), *aff'd* Civ. No. 13-3740 (6th Cir. 2014) (unpublished) (awarding \$4,000 where there was credible testimony of emotional distress without any evidence of psychological treatment and the emotional distress was not entirely due to the unlawful retaliation); *Kruse v. Norfolk S. Ry., Co.*, 2011-FRS-00022 (ALJ June 22, 2012), *aff'd* ARB Nos. 12-081, -106 (ARB Jan. 28, 2014) (awarding \$4,000 in emotional damages as a result of 30-day suspension).

Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

The evidence establishes that punitive damages are warranted in this case. Several of Amtrak's management employees were involved in intimidating employees to prevent them from reporting injuries or retaliating against them for reporting. For the reasons laid out above, I credit Moore's testimony that he was told on numerous occasions by his instructors that employees would be terminated if they reported an injury. Amtrak also meted out the most severe adverse action in retaliation for Moore's injury report: termination. *See Cain*, ARB No. 13-006 (in affirming the ALJ's finding that punitive damages were warranted, the ARB noted that "[t]here were a number of employees involved with the investigation of [the complainant's] charges relating to his protected filing of the accident and injuries report and the subsequent adverse employment actions," the ALJ found that two managers warned the complainant not to file a second report, and the respondent meted out the most severe adverse action: termination of employment).

Garmon Sr.'s testimony, as well as the CEO's letters from 2009 and 2010, indicate that Amtrak had a history of managers' intimidating employees into not reporting injuries, and Moore's and Barclay's testimony demonstrate that, despite a policy clarification at the end of 2009, these practices continued at Amtrak. As a result of the managers' warnings, Moore feared the consequences of reporting an injury and, instead of filing a report immediately, worked through the pain until it was more than he could bear. Moore's fears of retaliation were substantiated when he was terminated ostensibly for poor performance despite not once receiving a warning or negative feedback about his performance until his termination. I find that

Respondent's conduct demonstrates reckless or callous disregard for Moore's rights, as well as intentional violations of federal law.

In determining the amount of punitive damages to award, I have reviewed several decisions in which punitive damages were awarded in amounts ranging from \$1000 to \$250,000. Considering the severity of the adverse action in this case, I find that an amount greater than \$1000 is appropriate. *See Vernace v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS 0018 (ALJ Sept. 23, 2011), *aff'd* ARB No. 12-003 (ARB Dec. 21, 2012) (\$1000 in punitive damages because the complainant was not terminated or demoted, and lost only two days' pay or vacation time).

However, I do not find Amtrak's conduct in this case to be as egregious as the employers' conduct in decisions in which more extensive punitive damages amounts were awarded. It appears that more extensive punitive damages have been awarded where the ALJ has found egregious and systematic deterrents against the protected activity in question and where substantial punitive damages were necessary to deter company conduct in the future. *See Amtrak*, 2009-FRS-0003 at 27 (awarding \$100,000 in punitive damages where employer did not have any procedures in place to ensure compliance with federal anti-retaliation laws); *Griebel v. Union Pac. R.R. Co.*, 2011-FRS-00011 (ALJ Jan. 31, 2014), *aff'd* ARB No. 13-038 (ARB Mar. 18, 2014) (awarding \$100,000 in punitive damages where employer discouraged the filing of an injury reports and did not give appropriate consideration to employees' rights under the FRSA); *Barati*, 939 F. Supp. 2d 143 (reducing jury verdict of \$1,000,000 in punitive damages to the statutory maximum of \$250,000 where defendant's conduct was found to be highly reprehensible and the defendant acted in reckless disregard of complainant's safety and FRSA rights).

Recently, in *Raye v. Pan Am Rys., Inc.*, 2013-FRS-0008 (ALJ June 25, 2014), I awarded \$250,000 in punitive damages where the employer responded to the complainant's FRSA complaint by charging the complainant with serious and terminal offenses and responding to all injury reports with an adversarial process, blaming employees for their injuries. Here, there is no evidence that Amtrak, as an institution, uses similar processes to systematically discourage protected activity. Amtrak also submitted evidence that it has made policy changes to address a workplace culture that discouraged employees from reporting on the job injuries: the 2010 notice indicating that Amtrak removed injury ratios as a factor in managerial evaluations. Given these circumstances, I find that this case is distinguishable from *Raye*. However, I am still troubled by the fact that Moore was told that he would be terminated if he suffered an injury, notwithstanding the 2010 Corporate memo clarifying Amtrak's procedure. I am also bothered by the Respondent's attempts in making its adverse actions appear justified. In the best light, Moore was terminated because he received an average evaluation score below 50 based upon written evaluations completed after he engaged in protected activity, even though he was in the field training several months prior. Additionally, the tipping factor for Moore's substandard score was the unsubstantiated "satisfactory" scores Moore received on attendance from his evaluators. *See* fn 4, *supra*. Poole could have easily used objective evidence—attendance records maintained by Amtrak (RX 15)—to verify the veracity of the evaluator's score on attendance. Poole's decision to ignore such evidence speaks volumes to the Respondent's true intent. Given the actual attendance records of Moore, he should have scored a 4 or 5 on attendance which, in turn, would have placed him above the arbitrary cut off established by Poole. *See* fn 4, *supra*. The actions of the Respondent would certainly deter an employee from making an injury report and shows a significant disregard of Moore's rights under the FRSA.

Additionally, given the emotion distress discussed *supra*, the Respondent's conduct caused substantial harm to Moore.

While I do not find that the circumstances of this case as egregious as those in *Raye*, I find that a significant punitive damages award is necessary to deter such Company conduct in the future. Based on the facts of this case, Moore is entitled to \$85,000 in punitive damages.

E. Attorney Fees

Moore states in his post-hearing brief that he seeks reasonable attorney fees under the FRSA and reimbursement for costs expended. Compl. Br. at 14. Moore, however, was not represented by counsel in the proceeding before me. He has also not submitted any evidence of litigation costs expended. Although Moore is not entitled to attorney's fees, he may submit a petition for costs expended before the Office of Administrative Law Judges within 20 days of receipt of this Decision and Order. Respondent's counsel has 20 days from receipt of the petition to file any response.

ORDER

For the foregoing reasons, I find that Moore has established that Amtrak retaliated against him in violation of the Federal Rail Safety Act for reporting a work-related injury. Accordingly, it is hereby ORDERED:

1. Amtrak shall expunge John Moore's personnel file of any negative performance evaluations scored by Michael Poole;
2. Amtrak shall pay Moore back wages in the amount of \$188,843.13, with interest;
3. Amtrak shall pay Moore compensatory damages in the amount of \$100,000 for his emotional distress as the result of his negative performance evaluations and his termination;
4. Amtrak shall pay punitive damages in the amount of \$85,000; and

5. Respondent shall pay the Complainant's reasonable litigation costs. The Complainant shall file an application for reimbursement of litigation costs within **20 days** of the date on which this order is issued. Should the Respondent object to any costs requested in the application, the parties shall discuss and attempt to informally resolve the objection. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested costs, the Respondent's objection shall be filed not later than **20 days** following service of the Complainant's application. **Any objection must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Complainant prior to the filing of the objection.**

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“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 for Occupational Safety and Health. *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).