



**Issue Date: 30 November 2018**

CASE NO.: 2016-FRS-00062

*In the Matter of:*

TRAVIS KLINGER,  
Complainant,

v.

BNSF RAILROAD CO.,  
Respondent.

#### DECISION AND ORDER

This matter arises under the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, and the implementing regulations found at 29 C.F.R. § 1982. On October 12, 2016, Judge William King issued an order that the matter be submitted for decision on the record without a formal hearing.<sup>1</sup> The record closed on March 1, 2017. Judge King left this office and transferred to a different federal agency in September 2017 before issuing a decision in this matter. On November 24, 2017, the District Chief Judge assigned the matter to me for issuance of a written decision on the record. On November 30, 2017, I issued an order notifying the parties that the matter had been assigned to me and there was no objection.

The record consists of the following information: Complainant Exhibits (“CX”) 1 to 37, Respondent Exhibits (“RX”) A to TT, Complainant’s Closing Brief, which I marked as ALJX-1, and Respondent’s Closing Brief, which I marked as ALJX-2.

Complainant contends that he was treated differently by Respondent, and ultimately disciplined, for reporting a work-related injury. After he reported the injury, Respondent automatically enrolled him in a program that monitored his medical condition and treatment that was not required for workers who were off duty for non-work related conditions. Complainant was told that the program was voluntary, but when he did not comply with the requests from the program, he was referred to the general manager who then required Complainant to provide the information or face discipline. Complainant eventually provided a release for his medical records, but it was outside the timeframe established by the general manager and, even though Respondent had received the requested information, it disciplined Complainant and assessed a Level S 30 day record suspension based upon his failure to timely respond to the request from the general manager.

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<sup>1</sup> That same order dismissed all allegations under 49 U.S.C. § 20109(c)(1). RX C.

Respondent does not dispute that Complainant engaged in protected activity and suffered an adverse action, but contends that Complainant cannot show by a preponderance of the evidence that his reporting of a work-related injury contributed to the discipline. According to Respondent, Complainant would have suffered the same discipline in spite of the protected activity because he failed to comply with a direct order from the general manager. Respondent asserts that clear and convincing evidence demonstrates that even if Complainant proved his case, it would have taken the same action.

For the reasons discussed below, I disagree with Respondent's assessment of the matter and find that Complainant engaged in protected activity which contributed to the adverse action he suffered from Respondent. I further find that Respondent has not shown by clear and convincing evidence it would have taken the same action in the absence of the protected activity. Therefore, I grant Complainant the relief he requested in this matter.

## **I. ISSUES IN DISPUTE**

The matter presents the following disputed issues:

- 1) Has Complainant demonstrated by a preponderance of the evidence that reporting a work-related shoulder injury in August 2015 was a contributing factor in the suspension he suffered in November 2015?
- 2) If Complainant has met his burden, then has Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity?
- 3) If Complainant prevails, is he entitled to an order: 1) rescinding the Level S discipline; 2) terminating the practice of automatic enrollment in the medical program; 3) for punitive damages in the amount of \$250,000; and 4) for attorney fees and costs.

## **II. FACTUAL FINDINGS**

1. Complainant gave a deposition on October 6, 2016. CX 36, RX H. He has worked at Respondent since 2005 and worked in the Southwest Division since June 2013. *Id.* at 4, 9, 66. He lives with his fiancée and her son. His fiancée was pregnant and they were expecting a baby the same week as his deposition. *Id.* at 6, 8. On August 9, 2015, Complainant injured his shoulder while at work in the Alhambra yard, track 1123, in the Southwest Division. CX 36 at 87-88; CX 1, 2; RX P. Complainant went to the doctor after reporting the injury to his supervisor Jason Wade. *See* RX Q.<sup>2</sup> Complainant was taken off work by his doctor and has not lost any wages as a result of his injury or the discipline in this matter. CX 36 at 16, 21-22.

2. Dr. Gregory Evangelista, who was Complainant's treating doctor, submitted a signed letter dated August 13, 2015, taking Complainant off duty for the shoulder injury until September

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<sup>2</sup> The Medical Environmental Health Department ("MEH") opened a case file on Complainant on August 10, 2015, and closed the case on June 21, 2016, after Complainant returned to work. RX Q at 1. The MEH department estimated Complainant's disability would end on November 16, 2015, but noted he had delayed recovery, that he was non-responsive to the MEH, had a delayed surgical procedure, was represented, and had poor response to treatment. RX Q at 2. The MEH followed up with Complainant's supervisors (Costello and Brady) on June 21, 2016, who had no concerns with his return to work status after Complainant notified the MEH that his doctor released him to full duty. *Id.* at 2-3.

25, 2015. CX 5; RX S. The letter included a two-page medical evaluation report of Complainant dated August 13, 2015. CX 5; RX S. Dr. Evangelista provided Complainant with another off duty note dated September 10, 2015, taking Complainant off work until October 8, 2015, when he would be re-evaluated. CX 8; RX TT. Dr. Evangelista extended Complainant's off work status for four weeks on October 8, 2015. CX 12. On November 5, 2015, Dr. Evangelista gave Complainant another off duty note until December 8, 2015. CX 16.

3. Respondent approved Complainant's on-the-job injury leave on August 14, 2015, but noted that he must obtain an extension before the return date or be subject to the consequences outlined in the collective bargaining agreement. RX T. On September 11, 2015, Leslie Keener, Director of Administration for Respondent, granted Complainant's medical leave extension until October 9, 2015. CX 9. The letter notes it is Complainant's responsibility to provide a physician statement and to obtain an extension of leave if needed. To obtain the extension, a new physician statement supporting the extension is required; leave extensions are usually granted for 60 days. On October 9, 2015, Ms. Keener similarly extended Complainant's medical leave until November 6, 2015. CX 13. On November 6, 2015, she granted the extension to December 8, 2015. CX 17.

4. On his February 10, 2005 employment application, *see* RX G, Complainant checked two boxes: the first, "I understand that it is the policy of Respondent to help rehabilitate its injured employees so that they can return to gainful employment. I agree that in the event I am injured while employed by Respondent or disabled for any reason that I will cooperate with the doctors and vocational agencies designated by the Company so they can help me return to gainful employment"; and, the second, "I agree on behalf of myself, my heirs and personal representatives, that in the event of any claim or litigation involving this Company in which my mental or physical condition is in issue, any physician, surgeon, hospital, clinic, Veteran's Administration or other person or agencies may furnish to this Company any facts or records concerning same, whether derived from confidential relations or otherwise, and freely testify in any court to the same and I expressly waive the benefits and ANY state or federal law where under such information is considered wholly or partially privileged." RX G at 3.

5. Complainant's employment history with the company was provided, including his prior discipline and prior injury record. RX I. He was disciplined in August 2006, RX J, July 2007, RX K, September 2008 (attendance), RX L, September 2009 (attendance), RX M, and July 2013 (Complainant disputes that this should be on his record), RX N; *see* CX 36 at 58-62. Respondent also assessed Complainant a standard formal reprimand with a one-year review period from November 24, 2014, related to attendance in August, September, and October 2014. RX O.<sup>3</sup> Complainant also reported a work-related safety issue on a Safety Issue Resolution Process ("SIRP") form on August 6, 2015, which Respondent acknowledged receiving on August 7, 2015. CX 3, 23. The parties did not contend that the prior discipline and prior injury reports should be considered as protected activities or adverse actions in this matter. They also did not otherwise argue the relevance of the information. I gave the prior discipline and prior injury reports little weight when evaluating the issues decided here.

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<sup>3</sup> Complainant's complaint to OSHA, RX A, and OSHA's findings, RX B, are part of the record. However, since the hearing here is *de novo*, I gave them no weight. 29 C.F.R. § 1982.107(b).

## Letters and Other Contact from BNSF

6. After reporting a work-related injury, Complainant was automatically enrolled by Respondent in its Medical Care Management Program, which at the time was administered by Kevin Vaudt, the Medical Field Manager in the Southwest Division. CX 4 at 6, 24, 25. Mr. Vaudt contacted Complainant by telephone on August 10, 2015, and sent letters to him dated August 11, August 19, September 11, October 1, and November 11, 2015. CX 4, 6, 10, 11, 18; RX JJ at 2; RX II at 3; RX Q at 6. Mr. Vaudt first said he had no contact with Complainant during the same period, but acknowledged that Complainant signed a medical release on November 12, 2015, and he received Complainant's medical records on November 18, 2015. He later changed his testimony and said he spoke to Complainant on November 8 and 9 when Complainant called him. RX II at 2.

7. The August 11, 2015, from Mr. Vaudt was sent from the BNSF Medical and Environmental Health Department ("MEH"), and stated in part:

As a follow up to our most recent conversation by phone, I wanted to take this opportunity to write to you regarding the BNSF Medical Management programs. As a member of the MEH department, I will assist you in a variety of ways as you recover from your medical condition.

Sometimes all that means is helping you obtain medical evaluation and treatment or even helping to ask questions of your physician regarding your conditions, treatment plan and expected recovery. You may have return to work concerns that we can address and when appropriate, coordinate a transitional work opportunity. Following your future treatment, I will work with you, your treatment providers, and your supervisor to plan your return to full duty work.

So that I can readily assist you please have your doctor provide me with the following information after each of your medical visits related to your injury:

- Diagnosis
- Treatment plan-medications, therapy or diagnostic testing
- Work restrictions if any and for how long
- Expected timeframe for your ability to return to regular duty

So that your co-pays or deductibles can be covered related to medical care associated with your work injury please provide the following to your injury providers:

...

I also work closely with other BNSF MEH programs. I am the local Wellness Manager for the Southwest Division and would be happy to point you to resources that may assist in your recovery. If you would like to explore the Wellness programs on the BNSF website you can go to [www.bnsf.com/wellness](http://www.bnsf.com/wellness). Also, I work closely with the BNSF Employee

Assistance Programs. At times our employees may need help in coping with the worry or concern that may accompany recovery from injury or illness. The BNSF Employee Assistance Manager for the Southwest Division is Eugenia Vasquez and she can be reached at [phone number].

As information since you are requiring time away from work due to your injury you should be aware that all employees are required to obtain an authorized medical leave of absence from their supervisor for time away from work, whether for on-duty or off-duty injury (subject to applicable collective bargaining agreement). Should you need assistance with this process, please let me know. Time away from work will count under the Family Medical Leave Act (FMLA). For additional information regarding FMLA, please contact the Human Resource Department at [phone number].

If at any time you have any questions related to your medical care, time away from work or need assistance with communicating with BNSF Railway please call me so we can work together to make your time away less stressful. Look forward to helping you.

CX 4; RX R.

8. Mr. Vaudt sent another letter to Complainant, certified return receipt mail, on August 19, 2015, which stated the following:

Wanted to follow up with you to see if you have been successful in scheduling your physical therapy and if you need any assistance. Please let me know if you have had any difficulty or if you have started, please let me know how you are doing?

Also, I have not been able to receive the medical information from Cara Carroll, RN from your evaluation on August 10th. I'm enclosing an Authorization for Use and Disclosure of Medical Health Information, might you please sign and send back to me in the enclosed self-addressed envelope. Please give me a call, look forward to catching up with you and discussing your progress. If you have any questions related to the request for the medical authorization please let me know. Thanks.

CX 6 at 10; RX U.

9. On September 9, 2015, Mr. Vaudt also sent a letter directly to Complainant's treating doctor on behalf of Respondent seeking an update about Complainant's condition, including whether he could participate in a transitional work assignment and what if any functional limitations Complainant might have. CX 7; RX W.

10. Mr. Vaudt sent Complainant a letter dated September 11, 2015,<sup>4</sup> stating the following:

I'm writing to you today to follow up with you as to your progress and recovery. As an employee of the BNSF Railway and someone that is currently away from work due to a medical condition, you are eligible for the Transitional Work Program. TWP is a 2 week early return to work program that helps employees transition back to regular duty. As you continue to progress and your full duty time frame is identified please alert me before your release so that we can explore this option. As you continue to recover it is important that you continue to communicate with me so that we can explore your options and I can offer these types of services to you. Please call me so we can discuss. I look forward to helping you.

CX 10; RX V.

11. On October 1, 2015, Mr. Vaudt sent the following letter to Complainant:

Over the course of the last 7 weeks I have attempted to reach out to you so that I may offer assistance with your medical care and return to work. As I explained in my letter to you on August 11, 2015 please have your doctor provide the following information:

- Current Diagnosis
- Current treatment plan including any diagnostic testing, physical therapy, medications, etc.
- Current physical ability with any restrictions
- Prognosis for return to regular duty and a time frame of expected return to regular duty

As I also explained to you in my letter of September 11, 2015 the BNSF Railway has an early return to work program called Transitional Work that allows an employee to return to work 2 weeks prior to returning to regular duties. So that I may best assist you, please have your doctor provide the above information within 10 days of the first attempt to deliver this letter. If you are interested in the MEH assistance to return to work but need help obtaining medical information, please sign the Authorization for Use and Disclosure of Medical Health Information that I have provided you in my letter of August 19, 2015 and return to my attention. If you have any questions please call me. Thanks.

CX 11. The letter was copied to Leslie Keener. CX 11 at 16. Mr. Vaudt included an authorization for release of records if he wanted the return to work program. RX X.

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<sup>4</sup> The letter is contained in both sets of exhibits but appears to have been changed. The date appears to be September 11, but it could also be September 21. At his deposition, Complainant was shown a letter that he thought was dated September 1, but had been altered. CX 36 at 102. It was unclear if it was the same letter as the deposition exhibits were not in evidence.

12. On October 14, 2015, Steve Curtright, who was the General Manager of the Southwest Division, sent Complainant a certified letter. CX 14. Mr. Curtright wrote, “However, open communication and the sharing of information is very important to facilitating optimal care, treatment and timely return to full duty for employees who have experience [sic] personal injuries.” Mr. Curtright said that he “understood from our medical and environmental health (MEH) group that [Complainant] had not voluntarily provided them with the requested medical information” and that Respondent now required that he provide the medical information within 10 days of the first attempt at service of the letter. *Id.* The letter noted that, “Complainant’s failure to provide the information will be considered as misconduct and may be handled as a disciplinary matter for failure to comply with instructions.” *Id.* at 21.

13. Complainant was sent a notice of investigation dated November 2, 2015, “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misconduct when you allegedly failed to comply with instructions specifically, when you were notified to contact Medical Care Manager Kevin Vaudt on numerous occasions, most recently in a certified letter from General Manager’s Office dated October 14, 2015, requiring information from your Physician.” CX 15; RX BB. Complainant signed a medical release on November 11, 2015, authorizing Kevin Vaudt to obtain information from Evangelista Orthopedic Care. CX 19; RX CC; RX DD at 80.

14. On November 11, 2015, Mr. Vaudt sent the following letter to Complainant:

As a follow up to our conversation I am enclosing my letters sent to you as you have requested. As per our agreement, please update me with the results of your arthrogram and consult with the doctor. In order to understand your fitness for duty and to provide you with return to work options please have your doctor provide me the following information:

- Current Diagnosis with supporting documentation which includes MRI’s, CT Scans, EMG studies, etc.
- Treatment plan which includes any medications, physical therapy or surgery
- Current safe functional ability and restrictions, if any
- Prognosis for recovery and expected return to work full time frame.

I look forward to hearing from you and the results of your doctor follow up. If you are in need of assistance with the coordination of your care please let me know. If you have any questions as to the request for your fitness for duty information please call me directly.

CX 18.

15. Respondent held an investigation on November 23, 2015, and as a result assessed Complainant a Level S 30 Day record Suspension for misconduct related to failing to comply with instructions from Mr. Curtright to contact Mr. Vaudt about physician information. CX 21; RX FF. The discipline included a three year review period starting December 15, 2015, noting that any rules violation during that three year period could result in further discipline. CX 21; RX FF.

16. Complainant was initially “turned off” from contacting Mr. Vaudt because Mr. Vaudt was asking for information directly from the doctor and he had not given a release. CX 36 at 98-100. Complainant said Mr. Vaudt told him in November 2015 that, while he could not say for sure, it would look better and would go a lot smoother and maybe they would go easier on him at the investigation if he signed the release. *Id.* at 108-09. Complainant felt threatened, which is why he signed the release on November 11, 2015. *Id.* at 107-09. Mr. Vaudt never called Complainant again after getting the release. *Id.* at 110. Since he returned to work in May 2016, he looks over his shoulder and feels like he has a target on his back; he said supervisors have treated him differently and are not as friendly, joking, and engaging as they were before the injury. *Id.* at 111, 113-14. He feels threatened and doesn’t feel safe working at Respondent and plans to transfer to a different division. *Id.* at 28. The program is supposed to be voluntary, but he believes he was punished for not participating. *Id.* at 126.

17. Complainant takes medication for anxiety and the whole situation with Respondent stressed him out to “no end.” CX 36 at 6, 85. Complainant said his co-workers feel like he was wrongly treated and that he will be terminated if he messes up, but management never said that to him. *Id.* at 26-28. While he was off on his injury leave, his then superintendent, Jeff Costello, continually called him and wanted him to conduct a re-enactment of the injury, which he considered interfering with his treatment. *Id.* at 49. Mr. Vaudt called him repeatedly, and even though he told Complainant to call him if needed assistance, Mr. Vaudt also contacted his doctor repeatedly and sent them requests for information. *Id.* at 49, 83, 99-102. He thought Mr. Vaudt contacting his provider without his knowledge or consent was “very shady.” *Id.* at 99. Complainant had never met Mr. Curtright, who he understood to be the boss of all the superintendents, and he was not his daily supervisor. *Id.* at 52. The letter and the punishment were the only interactions that Complainant had with Mr. Curtright. *Id.* Complainant described a tragedy that involved the drowning of his young nephew that occurred after his return to work, but said that Mr. Costello would not help him get time off but instead made him go through his union to get leave for the family emergency. *Id.* at 115-16.

#### Deposition of Kevin Vaudt

18. Kevin Vaudt gave a deposition on October 7, 2016.<sup>5</sup> CX 37, RX F. He has a Bachelor of Science degree in vocational rehabilitation and a master’s degree in business, but no medical training. RX F at 63. He has worked for Respondent since 1996 and been in his current position as a field manager for the Southwest Division of the MEH since 2005. RX DD at 25; RX F at 6. Mr. Vaudt is also the regional director for the medical department, where he supervises other field managers. RX F at 6. The medical care manager is a contractor who provides medical case management and is tasked with helping employees through their medical care and transition back into the work force. *Id.* at 7-8. The employee assistance manager manages people mental health and their drug and alcohol issues and is an actual BNSF employee. *Id.* The field manager helps a worker transition back to work in either transitional or regular work, not the medical care manager. *Id.* at 8.

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<sup>5</sup> Mr. Vaudt’s deposition referenced exhibits that were not attached to the deposition transcript. There were also multiple objections made during the deposition, but none were significant or affected the weight of the opinion and testimony offered by Mr. Vaudt. All objections made during the deposition are overruled.

19. Mr. Vaudt explained that there is little difference between medical care management and return to work management but that return to work helps the employee plan their return to work following a medical condition or issue. RX F at 29-30. The Medical Care Management program does not direct medical care, but helps the employee if needed to coordinate care or provide assistance finding a doctor. *Id.* at 30. The medical care management program is a voluntary program but employees who are injured on the job are automatically enrolled in the program. *Id.* at 31. Participation in the program requires the employee to sign a medical release because part of being in the program helps Respondent understand what's happening with the employee and how it can help the employee transition back to work. *Id.* Respondent also wants to obtain the medical records and have a direct dialogue with the provider in order to discuss return to work programs. *Id.* at 32-33. Mr. Vaudt said there were transitional programs available when Complainant was off, but without more information about his restrictions, there could be no details for such a program because it would be designed around the restrictions. RX F at 62-63.

20. Mr. Vaudt said that if he contacts the medical provider directly, they may give medical information without an authorization and then he would not need a release from the employee; he can ask for the information and whether the doctor gives it or not depends on whether they have a signed release. RX F at 34. The program requires the employee to have a doctor provide diagnosis, objective test results, prognosis, restrictions, and treatment plan information directly to the medical field manager. *Id.* at 35. If the employee does not provide the requested information, the employee can be disqualified from the program and return to the program later once the information is provided. *Id.* at 36-37. The employee is required to participate in an evaluation by BNSF if they decide to conduct one but they are not required to participate in a transitional work program. *Id.* at 34-35.

21. Mr. Vaudt said, however, if a manager were to ask the status of an injured worker who had not participated in the program, then it may be handled differently including having the manager contact the employee. RX F at 37. The manager would write a letter and ask for the employee to participate in the program and for the requested information. *Id.* At that point, it becomes an issue between the manager and the employee. *Id.* If the employee participates and provided medical information then Mr. Vaudt said he could vouch for the employee and there would be no negative repercussions. *Id.* at 38.

22. Mr. Vaudt has never met Complainant personally, and last had contact with him in April 2016 by telephone for 10-15 minutes to discuss his rehabilitation and progress returning to work. RX F at 12-13, 65. Complainant was positive and thought he would return to work soon, but they did not talk about the specifics of his condition. *Id.* Complainant returned to work in May 2016. *Id.* Mr. Vaudt spoke to Complainant by telephone in March 2016 which lasted about 10 minutes, and he had the impression that Complainant wanted to return to work. *Id.* at 15. Prior to that, Mr. Vaudt last had contact with Complainant's doctors in November 2015 when he requested medical information after complainant signed a medical release. *Id.* at 18-19, 38. Complainant was not copied on the request for medical records. *Id.* at 20.

23. Mr. Vaudt was first notified of Complainant's injury from the injury help desk and an electronic file was created and given him a day or so after the injury. RX F at 38. Mr. Vaudt initially contacted Complainant by phone and was told about the emergency room visit and that he was pending an MRI. *Id.* at 40. Complainant told Mr. Vaudt that he would give a copy of the emergency records to him to attach to his file, but it was not mandatory for Complainant to provide

the records. *Id.* at 41. Mr. Vaudt asked to be kept informed by what was going on. *Id.* at 40-41. Throughout his time off from work due to the injury, Complainant submitted letters from his doctor keeping him off work. *Id.* at 51-53.

24. Mr. Vaudt said Mr. Curtright asked him for a status update about when Complainant could be expected to return to work and Mr. Vaudt told him that he did not have current information about why Complainant was not able to participate in the program. RX F at 55-56. Mr. Vaudt said Complainant's unavailability was beyond a reasonable duration according to The Presley Reed National Guidelines, which are national disability guidelines and are part of the medical system at BNSF. *Id.* at 56. Mr. Vaudt used Complainant's diagnosis of shoulder pain to determine under the guidelines that 42 days (or September 25) was the average time off work. *Id.* at 56-57. Because Complainant had not updated Mr. Vaudt about his medical diagnosis or treatment, he could not support a longer time off work beyond the guidelines. *Id.* at 56.

25. According to Mr. Vaudt, every employee who is off-duty due to a medical condition are asked the same questions upon stating they are ready to return to work. RX F at 57-58. However, on August 4, 2011, in *Haney v. BNSF*, which is an unrelated case, Mr. Vaudt said at a deposition that it was not typical or in the normal course of his duties to do medical case management for an employee who was off duty from illness or off-duty injury, but he had done it. *Id.* at 58-59; CX 28. Mr. Vaudt said he was more involved with the off-duty medical review process as of 2016. RX F at 59. Mr. Vaudt said that the same information was sought when he testified in *Haney*, but it was through a different department back then and it was not accurate to say that employees with an off-duty injury or illness unrelated to work were left alone to get care until it was time to do return to work documents. *Id.* at 59-62. In the *Haney* deposition, Mr. Vaudt said off-duty and on-duty injuries were handled by different departments; on duty injuries were handled by the administrative department through the general manager who managed the leave of absence. CX 28 at 48. In *Haney*, Mr. Vaudt said he sends information to every employee with an on-duty injury, but not to all who are off work due to a non-work-related condition. *Id.* at 49.

Stephan Curtright

26. Stephan Curtright provided an affidavit signed on February 24, 2017. RX Y. Mr. Curtright was hired by Respondent in 1979 and worked there until he retired in mid-2016. RX Y at 1. From May 2013 until his retirement, he was the General Manager for transportation in the Southwest Division, where he oversaw the entire operation of the division, including employees such as Complainant. *Id.* Mr. Curtright was certified every year on the code of conduct and trained on policies and procedures regarding prohibited retaliation, including the anti-retaliation provision of the FRSA. RX Y at 3.

27. In October 2015, Mr. Vaudt informed Mr. Curtright that Complainant had not responded to several requests for information from his doctors including his diagnosis, treatment plan, the approximate length of time his treatment would continue, and his current functional level and restrictions. RX Y at 1-2. Mr. Curtright had a letter drafted for his signature dated October 14, 2015, stating that the information was needed for manpower planning responsibilities. At the time of the letter, Complainant had been gone for more than two months, which was not supported by the information that had been received from the doctor. *Id.* at 2; RX Z. The letter required Complainant to submit a diagnosis of his medical condition for which he was being treated, a treatment plan or treatment being received, an approximate length of time that this treatment will

continue, and his current functional level with current functional restrictions. *Id.* at 2; RX Z. He could sign a medical release form for all of his treatment providers or provide the information within 10 days of the date of the first attempted delivery of this letter. Failure to provide the information would be considered misconduct and handled as a disciplinary matter for failure to comply with instructions. *Id.* Complainant did not respond to the letter, so he authorized Ms. Keener to send Complainant a notice of investigation dated November 2, 2015. RX Y at 1; RX BB.

28. The investigation was held on November 23, 2015. Mr. Curtright did not attend the investigation, but reviewed the transcript and exhibits afterward and found that Complainant had violated General Code of Operating Rules (“GCOR”) 1.2.7, furnishing information, 1.6, conduct, and 1.13, reporting and complying with instructions.<sup>6</sup> RX Y at 2; CX 21; RX FF. Complainant admitted receiving the letter, and even though he said he asked his doctor to send the requested information, Complainant did not ensure that it was received within the time requested. RX Y at 2. Complainant was assessed a level S serious 30 day record suspension, which was the standard discipline for failure to comply with instructions, and is the same discipline assessed for other failures to comply with instructions during his time as the general manager whether related to medical issues or not. *Id.*

29. Mr. Curtright said he did not discipline Complainant because he reported a work-related injury but because of his failure to comply with instructions that he had been given on numerous occasions to provide the requested information to plan for his return to work and for manpower issues arising while he was out. RX Y at 2-3. Even if Complainant had not reported a work-related injury, he “would have assessed the same discipline if [Complainant] had failed to comply with instructions to provide requested, necessary, non-health information.” *Id.*

#### Discipline Hearing

30. A transcript of the investigative hearing held on November 23, 2015, was provided in evidence.<sup>7</sup> RX DD. The hearing was conducted by James Orr, Superintendent of Operations for the Gallup Subdivision. The purpose of the hearing concerned Complainant’s alleged misconduct by failing to comply with instructions, specifically that he had been told to contact Kevin Vaudt, the Medical Care Manager, on numerous occasions, most recently in a certified letter from the General Manager’s Office dated October 14, 2015, requiring information from his physician. *Id.* at 2, 74-75. The investigation occurred even though Complainant was still on approved medical leave until December 8, 2015. *Id.* at 4-5. Complainant was charged with violations of GCOR 1.2.7, 1.13, and 1.6.<sup>8</sup>

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<sup>6</sup> GCOR 1.2.7: Employee must not withhold information or fail to give all the factors to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations. RX DD at 10. GCOR 1.13: Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issues by managers of various departments when the instructions apply to their duties. *Id.* at 10-11. GCOR 1.6: Employees must not be 1) careless of the safety of themselves or others, 2) negligent, 3) insubordinate, 4) dishonest, 5) immoral, 6) quarrelsome or discourteous, 7) any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated. *Id.* at 11.

<sup>7</sup> See RX AA (Article 13, Investigations and Discipline, which outlines the discipline process followed for Complainant in this matter).

<sup>8</sup> See note 6.

31. Clint Brady, Divisions Trainmaster, Phoenix Subdivision, testified at the hearing. RX DD at 11. According to Mr. Brady, Complainant should have used due diligence and followed up with Mr. Vaudt after requesting the information from his doctor on October 21, 2015, and Mr. Vaudt obtaining the records on November 19, 2015. *Id.* at 50-51.

32. Complainant notified his doctor to send the requested records on October 21, but the doctor's office forgot to send them. RX DD at 28. Complainant submitted a letter dated November 19, 2015, from physician assistant Amanda Damiris on behalf of Dr. Gregory Evangelista at Evangelista Orthopedic Clinic stating that Complainant had asked to have the records sent on October 21, 2015, but that the front office receptionist forgot to do so. CX 22, RX DD at 31, 79. Complainant argued the letter said he had to ask his doctor to send the information within 10 days and he did so. RX DD at 29-30.

33. Mr. Vaudt testified by phone at the investigative hearing. RX DD at 25. Complainant received the letter from Mr. Curtright on October 17, with return receipt requested, but he did not receive any information from Complainant required by the 10-day window. *Id.* at 26, 76. Complainant did not tell Mr. Vaudt that he had requested that the records be sent and did not otherwise ask Mr. Vaudt if he had received the information. *Id.* at 31, 47. According to Mr. Vaudt, it was Complainant's responsibility to make sure that he received the information. *Id.* at 32. Respondent received Complainant's medical records on November 18, 2015, after Complainant signed a medical release form on November 11, 2015. *Id.* at 32-34, 48, 80. Mr. Vaudt later said that Complainant called him on November 8 and 9, 2015, about getting the medical records. *Id.* at 46-47. Complainant thought because he had an attorney, he would not have to comply with the letters which was "his misunderstanding." *Id.* at 46-47.

34. Complainant also testified at the investigative hearing. RX DD at 35. He did not know that Respondent had not received the information until he got notice of the investigation. *Id.* at 35-36. After requesting the information from his doctor on October 21, 2015, he did not follow up with the doctor's office to make sure the information was sent. *Id.* at 60. Once he learned of the investigation, he called Mr. Vaudt who told him that he did not have the records. *Id.* at 37. Even after the notice of investigation, it was almost an additional 10 days before he signed the release for the records. *Id.* at 39. Once he realized his doctor had not sent the information, he signed the release and the doctor sent the information. *Id.* at 41, 61-62.

35. Complainant appealed the suspension on January 27, 2016, RX II, which Mr. Curtright denied on February 12, 2016, RX JJ. The appeal letter states that all of the offices for the Respondent's management (Curtright, Keener and Vaudt) are within 30 feet of each other, and that they were all aware of the information about Complainant, particularly that he was on medical leave when they held the investigation hearing. RX II at 2. The appeal notes that Mr. Vaudt changed his testimony about not hearing from Complainant from the time he requested the medical office send information to Mr. Vaudt and actually receiving the records, but later said he talked to Complainant on November 8 and 9. RX II at 2; RX DD at 46-47. Complainant appealed the denial of the appeal on April 12, 2016, RX KK, which was denied on June 7, 2016, RX LL.

Glenn Bay

36. Glenn Bay gave a deposition on December 14, 2016. CX 35, RX QQ. Mr. Bay has worked for Respondent as a conductor in the Southwest Division since 1973 but was on disability at

the time of the deposition. CX 35 at 4-5. He was the secretary for his local union and had served as union chairman for 18 years. *Id.* at 20-21. At the time of his deposition, he had been off work since January 2011 on a disability annuity, but had missed work in four to five month increments over the years for various operations that were not work related. *Id.* at 5, 12. The last time he took off work for an off-duty injury or illness was in the mid-90s when he broke his heel at home. *Id.* at 12. He took a medical leave of absence in August 2011 and attempted to return to work in January 2012 but wasn't able to and the process he described was the same every time. *Id.* at 14-15.

37. Mr. Bay reviewed a letter from Ms. Keener to Complainant, and said he never had to provide the same information; he was required only to have a medical leave of absence for the current leave. CX 35 at 6. He had to let work know about how long he would be off, but did not have to provide information about his physical situation, illness or injury; he never had to give his supervisor medical information just how long he would be off. *Id.* at 7. Mr. Bay never received a letter similar to the letter from Mr. Curtright sent to Complainant saying he had to provide information or be subject to discipline. *Id.* at 8-9. When he was ready to return to work, he had to provide a return to work form that he had to ask for because it was not sent to him. *Id.* at 9-10. Mr. Bay's doctor had to fill out a portion of a form saying he could return to work at 100% and he was able to return (he could "mark up"). *Id.* at 10-11. If Respondent had showed him off work to a certain date, then he had to let them know before that date that he was extending the leave. *Id.* at 15. Mr. Bay was off on a medical leave extension from October 31, 2011 to January 16, 2012. CX 29. Upon review of his form to return to work in December 2011, he agreed that the form asked for a medical diagnosis and treatment for his non-work-related condition but he did not think he had to complete it under threat of discipline. CX 35 at 18-19, 22.

Dan Clark

38. Dan Clark gave a deposition on December 13, 2016. CX 34. He has worked at Respondent as a conductor since 2004 in the Southwest Division, and has taken time off for an injury or illness that did not occur at work. *Id.* at 4-5. He was off work from December 2013 to June 2014 and other times for sinus surgery, knee surgery, and a broken foot. *Id.* at 5. When he took time off for sinus surgery, Mr. Clark had to update the railroad every 30 days (but it could have been 60 days) to extend the medical leave of absence by having his doctor send a note with the approximate time frame he would be off work. *Id.* at 6-7. He received a letter from Ms. Keener about what he needed to do to keep his medical leave of absence active, similar to the letters she sent to Complainant. *Id.* at 8. However, while he was off recuperating, Mr. Clark never received any letters from the general manager telling him to provide specific information about his condition, diagnosis, treatment plan, current functional level, and length that treatment would continue, and he never received a letter saying he would be subject to discipline for not providing the information. *Id.* at 8-9. Mr. Clark never received any letters from the company demanding information other than that necessary to extend the leave of absence. *Id.* at 9. In order to return to work, he had to provide a general form to his doctor about his condition and return to work. *Id.* at 10-11.

Kevin Arnold

39. Kevin Arnold gave a deposition on December 13, 2016. CX 33, RX RR. He has worked for Respondent since 1998 and currently worked as a conductor in the Southwest Division. CX 33 at 4. In 2004, Mr. Arnold fractured his wrist off-duty and had to take six to eight weeks off work. *Id.* at 5. He had to obtain a medical leave of absence from the trainmaster by

taking his medical note to him, which covered him the whole time he was off work. *Id.* at 5-6. When he was ready to return to work, he got a doctor's note releasing him to work. *Id.* at 6-7. Mr. Arnold never received a letter from the general manager or anyone else at the railroad telling him to provide information to Mr. Vaudt and he was never told that he had to provide information to Mr. Vaudt or a field manager or face discipline. *Id.* at 7-8. Mr. Arnold and his doctor filled out a form and he returned to work without any issues. *Id.* at 8, 10. Respondent requested Mr. Arnold's medical information from his last office visit with his doctor (Dr. Flint) on June 6, 2014, after receiving the medical status form saying he could return to full duty as of May 30, 2014. RX SS.

#### Curtis Schipper

40. Curtis Schipper gave a deposition on December 13, 2016. CX 32, RX NN. He has worked for Respondent since 1980 and is currently a locomotive engineer in the Southwest Division. CX 32 at 4-5. He has taken time off for illness or injury that did not occur at work, most recently in January 2016 for abdominal surgery. *Id.* at 5-6. He also took time off in February 2006 for four and a half months for hip replacement surgery. *Id.* at 6. For the most recent 2016 non-work-related leave, he got a medical leave by sending a picture of the doctor's note to his superintendent, who then did the rest, and he extended the leave the same way. *Id.* at 6, 8. He did not recall receiving a letter from Leslie Keener about providing information to Respondent for a medical leave. *Id.* at 7. When he returned to work, Mr. Schipper's doctor prepared a return to work form that included any restrictions, which he sent to Ms. Keener. *Id.* at 9. Mr. Schipper did not receive a letter from the general manager asking for information or he would be subject to discipline if he did not provide it either time he was off work. *Id.* at 9-12.

41. Mr. Schipper recalled signing a partial release, but the company got medical information that he did not release to them about sleep apnea and now the company requires him to update them that he is complying with treatment, which is likely to be a career long requirement. *Id.* at 17-20. Mr. Schipper completed a return to work medical status form for Non-Work Related conditions on February 17, 2016. RX OO; *see* MM for policy and form. Respondent sent a letter dated September 11, 2015, requesting a physician statement and stating that a medical leave of absence must be secured from his supervisor providing a physician statement that indicates the employee cannot perform service and an estimated duration of the leave. CX 30, RX PP. However, the letter in evidence is not addressed to anyone and Mr. Schipper's name is not on the letter. *Id.*

#### BNSF Medical Care Management Program and Manager Guidelines

42. Respondent's website notes that the Medical Care Management Program is available to "all on-the-job injured employees of BNSF" to "progress a safe return to gainful employment." Medical Care Managers are available to coordinate medical treatment during recovery and help facilitate return to work. CX 24 at 33-34; CX 27. "The program is designed to promote early return to work from an on-the-job injury, which diminishes the stress to both our employees and their family members during recover to full physical and vocational capabilities." CX 24 at 34. Respondent has field medical programs that include Respondent's Medical Case Management Program that is "designed and implemented to provide services to injured/ill employees whether injured on or off the job that are specific to the needs of the employee with the goal of Return to Work [sic]." RX D at 118. Respondent also offers Injury Care Management which includes "maintain[ing] regular contact with the employee to insure recovery is progressing and to minimize the effects of the injury and maximize options for returning to work." RX E at 120.

43. According to the program, enrollment and continuance in the program must meet certain criteria:

An employee is automatically enrolled in the Medical Care Management Program once they report an injury to their supervisor. In order to remain in the program the employee must:

1. Actively and responsibly participate your physician recommended medical care.
2. Sign and return the “Medical Release of Information Form”.
3. Participate in second opinions medical evaluations.
4. Participate in transitional work plans when medically approved.
5. Provide medical verification of disability by having your treating physician provide medical information that includes diagnosis, objective test results, prognosis, restrictions, and recommended treatment plan to your local area Medical Care Manager.

If an injured worker does not comply with any of the above five-enrollment criterion, the employee will be disqualified from the program. The must [sic] provide medical information to MEH that includes:

- Current (within the past 30 days) of the medical condition(s) being treating for
- Treatment plan or treatment being received
- Approximate length of time of treatment
- Current functional level – along with current functional restrictions.

This information is used to inform appropriate personnel as to expected return to work dates for manpower planning purposes, to safely integrate employees back into the workplace at optimal times consistent with national injury guidelines and to allow BNSF to identify vocational/developmental opportunities to assist employees in locating alternative work.

CX 24 at 35; CX 27.

44. Respondent has a separate document entitled, “Guidelines for Supervisors Contacting Injured Employees, *A Challenging Part of Your Job*,” which noted that a supervisor can play a “big role in helping injured and ill employees get their lives back to normal as soon as possible.” CX 25 at 36. The guidance noted that interacting with injured employees can be challenging and difficult in “our adverse environment of FEOLA,” and that “there are many forces outside of our company that work to alienate our employees.” CX 25 at 36. The guidelines included questions and talking points for contacting and interacting with injured employees. CX 25.<sup>9</sup>

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<sup>9</sup> Respondent has additional policies: BNSF Policy for Employee Performance Accountability, which includes a discussion of the discipline process and defines serious violations, RX EE at 5; BNSF 2015 Code of Conduct, RX GG; BNSF Corporate Policy Equal Employment Opportunity, Anti-Discrimination and Harassment, RX HH; and a Return to Work from Off-Duty Medical Condition protocol, which states that those who have been off work due to a medical condition that may adversely affect their ability to work safely must be reviewed for fitness for duty by the MEH, RX MM. The exhibit included a Medical Status Form for Non-Work Related Medical Conditions. RX MM at 2.

45. Respondent also has Guidelines for BSNF Injury/Medical Care Management, Days Away From Work and Transitional Work (Restricted) Days Management, which discusses monitoring of employees who have been injured on the job. CX 26. The guidelines include that,

Cases where employees appear to be uncooperative should be immediately referred to Reporting Officer for review by the Interdepartmental Group (I/G). An employee may be considered uncooperative if they do not provide detail of all aspects of circumstances their injury [sic], do not communicate with supervisors or medical care managers, or do not cooperate in recommended return to work plan.

CX 26 at 39. The guidelines also state that, “Employees who do not progress towards recovery in expected time period as defined by estimated disability duration (EDD) will be identified and escalated to Medical team for handling with I/G subcommittee.” *Id.*

### III. ANALYSIS AND CONCLUSIONS OF LAW

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's protected activity. 49 U.S.C. § 20109(a).<sup>10</sup> The FRSA specifically protects an employee from retaliation if the retaliation is “in whole or in part” due to the employee’s “lawful, good faith” effort, “to notify, or attempt to notify, the railroad carrier . . . of a work-related personal injury or work-related illness of an employee.” 49 U.S.C.A. § 20109(a)(4).<sup>11</sup> The FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. *See* 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C.A. § 42121(b). Whistleblower standards are meant to be interpreted expansively; they are remedial statutes warranting broad interpretation and application. *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002 and 09-003, OALJ No. 2007-SOX-0005, slip op. at 15 (ARB Sept. 13, 2011).

In order to prevail on an FRSA claim, a complainant must demonstrate by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action (adverse action); and (3) the protected activity was a contributing factor in the unfavorable personnel action.<sup>12</sup> 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b); 29 C.F.R. § 1982.109(a);

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<sup>10</sup> The parties agree that Respondent is a railroad carrier engaged in interstate commerce and that Complainant was an employee of Respondent. There is no dispute that this matter is subject to jurisdiction under the FRSA. ALJX-2 at 14, n.4; ALJX-1 at 5.

<sup>11</sup> It also protects an employee from retaliation “for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.” 49 U.S.C.A. § 20109(c)(2). This section is not at issue here.

<sup>12</sup> While employer knowledge of the protected activity has sometimes been listed as a separate element in FRSA claims, the FRSA and its implementing regulations do not include employer knowledge as an explicit requirement at the substantive portion of the proceedings. *See* 49 U.S.C. § 20109(b)(2)(B) (incorporated by 49 U.S.C. § 31105(b)(1); 29 C.F.R. § 1982.109(a). Therefore, “an employer’s knowledge of protected activity is not a separate element, but instead forms part of the causation analysis.” *Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-6, slip op. at 8, n.34 (ARB Jan. 10, 2018), citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-3, slip op. at 13, 16 (ARB June 24, 2011).

*Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 789 (8th Cir. 2014).<sup>13</sup>

The burden then shifts to the respondent, which, in order to avoid liability, must demonstrate “by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior.” 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b); *Araujo*, 708 F.3d at 157; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039; ALJ Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014). Clear and convincing evidence is evidence that shows “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) (“*DeFrancesco IP*”) (citing *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)). “For employers, this is a tough standard, and not by accident.” *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

#### A. Complainant’s Burden

##### 1. Protected Activity and Adverse Action

As previously noted, the parties do not dispute that Complainant engaged in protected activity within the meaning of the FRSA when he reported a work-related injury in August 2015.<sup>14</sup> They also do not dispute that Complainant suffered an adverse action when Respondent imposed a Level S 30 day paper suspension in November 2015 for allegedly failing to abide instructions from the general manager to provide medical information about his work-related injury while he was off work. Based upon my review of the record and the agreement of the parties, I find that Complainant engaged in protected activity and suffered an adverse action within the meaning of the FRSA.

##### 2. Contributing Factor

The crux of the disagreement in this matter relates to whether Complainant has shown that the protected activity of reporting his work-related injury in August 2015 was a contributing factor in any manner to the adverse action suspension that occurred in November 2015. Complainant argues that the protected activity conduct cannot be separated from the adverse action. Respondent strongly avers that it did not, and even if it did, asserts that clear and convincing evidence

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<sup>13</sup> The Ninth Circuit recently affirmed that there are two distinct levels of review for FRSA matters, the prima facie showing necessary for OSHA to investigate a claim and the substantive portion of the claim. In order for OSHA to investigate, a complainant must *raise an inference* that the protected activity contributed to the adverse action, while in the substantive portion, a complainant *must prove* by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action. *Rookaird v. BNSF Railway Co.*, Nos. 16-35786, 16-35931, 16-36062; No. 16-35787, 2018 WL 5831631, slip op at 19-20 (9th Cir. Nov. 8, 2018). “Showing that the circumstances are sufficient to raise the inference of x is a lower bar than proving x by a preponderance of the evidence.” *Id.* at 19.

<sup>14</sup> Complainant also reported a work-related safety issue on a Safety Issue Resolution Process (“SIRP”) form on August 6, 2015, which Respondent acknowledged receiving on August 7, 2015. CX 3, 23; *see* F.F. ¶ 5. The SIRP reporting would likely have been considered protected activity. However, both parties focused only upon the injury complaint as protected. There were no allegations that the SIRP reporting was at issue in this matter. The same is true for the reports of prior discipline and prior injuries. *See* F.F. ¶ 5. Neither party argued they were relevant to the issues in this matter.

demonstrates that it would have taken the same adverse action in the absence of the protected activity.

Under the FRSA, a complainant must prove “as a fact and by a preponderance of the evidence” that protected activity was a contributing factor in the unfavorable personnel actions taken by the employer. *Palmer v. Canadian Nat’l Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip op. at 16 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017). 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.” *Williams*, ARB No. 09-092, slip op. at 6; *Blackie v. Smith Transport, Inc.*, ARB No. 11-054, OALJ No. 2009-STA-00043, slip op. at 9 (ARB Nov. 29, 2012). The ALJ must be persuaded that it is more likely than not that the protected activity played any role in the adverse action, and the ALJ may consider any relevant, admissible evidence in making this determination. *Palmer*, ARB No. 16-035, slip op. at 17-18, 52. The ARB has emphasized that the standard is low and “broad and forgiving”: The protected activity need only play some role, and even an “[in]significant” or “[in]substantial” role suffices. *Id.* at 53 (citations omitted). In addition, an employee need not prove retaliatory animus, motivation or intent, to prove that the protected activity contributed to the adverse employment action at issue. *Rookaird*, Nos. 16-35786, 16-35931, 16-36062; No. 16-35787, slip op. at 21-22; *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017) (quoting *Kuduk*, 768 F.3d at 791); *Rathburn v. The Beltway Company of Chicago*, ARB No. 16-036 (ARB Dec. 8, 2017).

A complainant may establish that the protected activity was a contributing factor by direct or circumstantial evidence. *Blackie*, ARB No. 11-054, slip op. at 9. Circumstantial evidence may include temporal proximity, 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 the complainant after he or she engages in protected activity. *Id.*, citing *Chyde O. Carter, Jr. v. BNSF Railway*, ARB Case Nos. 14-089, 15-016, 15-022 (ARB June 21, 2016) citing *DeFrancesco II*, ARB No. 13-057, slip op. at 7; *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 12 (ARB Sept. 30, 2011). Proving causation through circumstantial evidence “requires that each piece of evidence be examined with all the other evidence to determine if it supports or detracts from the employee’s claim that his protected activity was a contributing factor.” *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010-AIR-1, slip op. at 11-12 (ARB Nov. 5, 2013). An ALJ must consider the circumstantial evidence as a whole and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17-18 (ARB Aug. 29, 2014).

Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis, and in some instances alone can suffice to show contribution. *Bobreski*, ARB No. 09-057 at 13; *Bechtel*, ARB No. 09-052 at 13 & n.69; see *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009). Generally, “the closer the temporal proximity, the greater the causal connection there is to the alleged retaliation.” *Blackie*, ARB No. 11-054, slip op. at 9, citing *Franchini v. Argonne Nat’l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept 26, 2012) (“Temporal proximity is an important part of a case based on circumstantial evidence, often the ‘most persuasive factor,’” quoting *Beliveau v. U.S. Dep’t of Labor*, 170 F.3d 83, 87 (1st Cir. 1999)). However, temporal proximity is not always dispositive and “where the protected activity and the adverse action are separated by an intervening event that independently could have caused the

adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.” *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005). When evaluating the temporal proximity of a complainant's protected activity and the adverse employment action taken against the complainant, an administrative law judge must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. *Kuduk*, 768 F.3d at 792.

When the protected activity itself triggers the adverse action or investigation that leads to it, the protected activity is inextricably intertwined with the adverse action. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, OALJ No. 2009-FRS-9, slip op. at 7-8 (ARB Feb. 29, 2012) (“*DeFrancesco P*”); *see also Hutton v. Union Pacific Railroad Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20, slip op. at 6-7, 9-11 (ARB May 31, 2013) (clear, direct chain of events from protected activity to adverse action shows contribution). “[T]he ARB has repeatedly found that protected activity and employment actions are inextricably intertwined where the . . . the employment action cannot be explained without discussing the protected activity.” *Citationshares Management*, ARB No. 12-029, slip op. at 12; *see also Palmer*, ARB No. 16-035, slip op. at 58-59. Moreover, courts have rejected causation based on a “chain-of-events” principle, and the ARB has never held that protected conduct may be a contributing factor whenever it is part of a chain of causally-related events leading to the adverse action and has not adopted a “pure but-for” causation standard in analyzing whether protected activity was a factor in an adverse personnel action. *DeFrancesco II*, ARB No. 13-057, slip op. at 6-7; *see BNSF Ry. Co. v. United States DOL Admin. Review Bd.*, 867 F.3d 942, 946 N.2 (8th Cir. 2017) (“contributing factor” is a lenient causation standard, an FRSA plaintiff must still prove that his injury report “not only was a ‘but for’ cause of his injury, but was the proximate cause as well”; ARB does not endorse chain of events causation theory).

After thoroughly reviewing the record, I find that Complainant’s reporting of his work-related injury contributed to the suspension given to him by Respondent for ostensibly not responding to the general manager’s request for information. As discussed below, I find Complainant more credible than Mr. Vaudt and Mr. Curtright. I also find that Respondent did not show by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

a. Credibility Determinations

Credibility “involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963). In deciding this matter, the administrative law judge (“ALJ”) is entitled to weigh the evidence, draw inferences from it, and assess the credibility of witnesses. 29 C.F.R. § 18.12; *Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STA-15, slip op. at 8 (ARB Aug. 1, 2002). In weighing the testimony of witnesses, the ALJ may consider the relationship of the witnesses to the parties, the witnesses’ interest in the outcome of the proceedings, the witnesses’ demeanor while testifying, the witnesses’ opportunity to observe or acquire knowledge about the subject matter of the witnesses’ testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Ass’t Sec’y & Mailloux v. R & B Transportation, LLC*, ARB No. 07-084, ALJ No. 2006-STA-12, slip op. at 9 (ARB June 16, 2009); *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003 -AIR-038, slip op. at 4 (ARB Jan. 31, 2006). The judge is not bound to believe or disbelieve the entirety of a witness’

testimony, but may choose to believe only certain portions of it. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3d Cir. 1975).

The main witnesses where credibility was a crucial factor in deciding this matter were Complainant, Mr. Vaudt, and Mr. Curtright. On the whole, I found Complainant to be more credible than Mr. Vaudt and Mr. Curtright. Complainant was forthright in his explanation of what occurred. I believed his account of the events and the steps he took during his medical leave and in response to the repeated pressure from Respondent to participate in the medical program. He was also candid in his anger that Mr. Vaudt was attempting to get private confidential medical information without his consent and that his irritation with how Mr. Vaudt was acting contributed to his unwillingness to participate in the voluntary program. Complainant's testimony was not without issue, however. He was hostile at times during questioning at his deposition and overly flip at times when responding to the questioning, but overall his indignation was arguably justified for being disciplined for something he felt was unjustified. *See, e.g.* CX 36 at 41-45, 52-55, 75. However, overall, Complainant's answers and the information he provided was consistent throughout and corroborated by other evidence in the record. For example, he said he asked his doctor to send his information within the 10 days allocated by Mr. Curtright. The doctor confirmed this occurred, but his medical staff forgot to send it. His testimony about what occurred and his perspective on the events was more believable than those of Mr. Vaudt. I found Complainant overall credible and gave his testimony substantial weight.

I was not as impressed with the testimony from Mr. Vaudt and Mr. Curtright. Mr. Vaudt appeared to be downplaying his role in what occurred and I did not find it credible when he said that Mr. Curtright just happened to ask about Complainant's status and that is when obtaining the medical records was taken out of his hands, which also contradicted Mr. Curtright's testimony that Mr. Vaudt contacted Mr. Curtright about Complainant's unwillingness to participate in the program. I thought Mr. Vaudt misled Complainant by saying things would go better if Complainant cooperated, when in fact Mr. Vaudt just wanted to get the information, and once it was received, he left Complainant to fend for himself in the discipline process. There was no evidence that Mr. Vaudt argued or even suggested that Respondent show leniency to Complainant for signing the medical release. It was particularly unbelievable in light of the fact that Ms. Keener had already approved the leave for Complainant and had knowledge from his medical provider that he would be able to return to work in December 2015. Mr. Vaudt also gave shifting explanations for the nature of the medical programs, and I did not find his explanation for the difference in his testimony at this hearing with that in the *Haney* matter to be persuasive.

Moreover, a close examination of the Mr. Vaudt's testimony showed that he was not forthcoming or truthful about the program, his motivation for seeking the information, and his role in the program. The communications he sent to Complainant seeking his medical information did not state that it was voluntary that Complainant provide the information, but the tone of each letter was that he was required to provide the information. Respondent's website notes that the program is voluntary, but you would not have known that from Mr. Vaudt's communications. Mr. Vaudt attempted to explain the voluntary nature of the program, but his testimony belied his true motive which was to obtain Complainant's medical information regardless of how. Mr. Vaudt also did not follow the company procedure and protocols for injured workers who do not voluntarily participate in the program, and he did not explain why he chose to approach the general manager over using the process that he said was in place for non-participating injured workers. Since Complainant did not willing participate, Mr. Vaudt ratcheted up the pressure up by contacting the general manager.

Interestingly, Mr. Vaudt did not contact Mr. Curtright again after receiving Complainant's medical records. Once he had the medical information, Mr. Vaudt contacted Complainant's supervisors (Costello and Brady) about Complainant's ability to return to work. If Mr. Curtright were really so concerned about manpower and staffing needs, it would have made sense for him to be involved throughout. Neither Mr. Vaudt nor Mr. Curtright explained why they did not follow the company protocols when an employee did not participate in the program. When compared to Complainant, I gave Mr. Vaudt's testimony less weight than I did that of Complainant. Overall, I found Mr. Vaudt's testimony to be entitled to little weight.

The same was true for Mr. Curtright. I did not find his testimony to be compelling, truthful, or persuasive. I did not find it truthful that his interest and involvement in contacting Complainant was because the office needed to account for manpower. It appeared that Mr. Curtright worked in consultation with Mr. Vaudt to obtain the Complainant's medical records. Mr. Curtright never acknowledged that the information was supposed to be voluntarily given, and twisted what had been a request by Mr. Vaudt to voluntarily obtain information from Complainant, into his failing to follow directions from Mr. Vaudt. Both Mr. Curtright and Mr. Vaudt's conduct was contrary to the policy and direction from the program. Until the point that Mr. Curtright sent his letter, Complainant had only been asked to voluntarily provide information. Complainant said he had never met Mr. Curtright, who was the supervisor of all the superintendents, and he had no contact with him other than the investigation and discipline. There was no evidence that Mr. Curtright was monitoring Complainant's leave and Mr. Vaudt and Mr. Curtright gave conflicting stories about how Mr. Curtright became involved in obtaining the medical information. Mr. Curtright said he was concerned about staffing needs, but that seemed like a false and pretextual explanation that was not developed in the record particularly since, once the medical information was received, there was no evidence that Mr. Curtright continued to be concerned about staffing needs or Complainant's return to work. There was no evidence that Mr. Curtright was the direct and daily supervisor, and he was not someone that Complainant or the other worker-witnesses said they had to provide information to when on medical leave.

Ms. Keener apparently drafted the letter for Mr. Curtright to send to Complainant, but there was no explanation for why she did not say she had already approved Complainant's leave extension based upon the information submitted. The record does not have any evidence from Ms. Keener, which is interesting considering she should have asked Complainant for more information if she was not satisfied that his medical leave should be extended.

Even though Complainant provided the information, and gave a reasonable explanation for the delay (the doctor's office did not send it as they said they would), Mr. Curtright still moved forward with the discipline. There was no evidence that Mr. Vaudt asked for leniency like he said he would. I found the explanation for the discipline to be pretextual and offered only because Complainant was not providing information that he had been told was voluntary. Mr. Curtright appeared heavy handed in his handling of the matter.

Furthermore, both Mr. Curtright and Mr. Vaudt said Complainant's leave was longer than average for a shoulder injury, but this was never communicated to Complainant and I was not convinced that was the reason they were singling Complainant out for attention. The contemporary notes from the MEH state that Complainant was out until November 2015, but Mr. Vaudt and Mr. Curtright said that the recovery time for the shoulder should have been in September 2015. Mr. Vaudt never directly told Complainant he was required to submit the information, but the letters

were soft and gave Complainant the option to do so. For example, in Mr. Vaudt's October 1 letter, the last letter sent to Complainant before Mr. Curtright's discipline letter, Mr. Vaudt stated:

So that I may best assist you, please have your doctor provide the above information within 10 days of the first attempt to deliver this letter. If you are interested in the MEH assistance to return to work but need help obtaining medical information, please sign the Authorization for Use and Disclosure of Medical Health Information that I have provided you in my letter of August 19, 2015 and return to my attention. If you have any questions please call me.

*See* F.F. ¶ 11. Complainant did not respond to Mr. Vaudt, which both Mr. Vaudt and Mr. Curtright appeared to find particularly aggravating while ignoring that providing information was allegedly not required and supposed to be voluntary. Mr. Curtright ignored the voluntary nature of the program and interjected his view into the process, which ultimately led to Complainant's discipline. Mr. Curtright's testimony was not as believable as Complainant's. On the whole, I gave Mr. Curtright's testimony less weight than Complainant.

There were additional witnesses who provided testimony. The witnesses were union members and union officers, which might suggest there was bias and a reason to discount the testimony. However, I found each of the witnesses, Mr. Arnold, Mr. Bay, Mr. Clark, and Mr. Schipper, to be credible, truthful and believable. Some of the anecdotal information provided involved off-duty injuries that were 10 years old such as offered by Mr. Bay, and it was not as helpful as it might have been from someone with more recent non-work related injury time off. However, the other witnesses provided more recent accounts of being off duty for non-work related injuries and that they were not contacted in the same manner that Mr. Vaudt and Mr. Curtright contacted Complainant. I did not find any motive on their part to favor or disfavor Complainant or Respondent, but found that they provided forthright answers to the questions presented to them. Their individual experiences when seeking medical and non-medical leave were instructive and persuasive when considering how differently and more aggressively Respondent treated Complainant in this matter because of his work-related injury. I gave each of their testimony substantial weight.

b. Analysis of Contribution

Complainant has established well beyond a preponderance of the evidence that reporting his work-related injury contributed to the adverse action. The protected activity here is inextricably intertwined with Respondent's confused notion that it enrolled Complainant in what it describes as a voluntary program, but in application and practice is a mandatory program. As the ARB explained, Complainant's discipline cannot be explained or discussed without mentioning his protected activity. *Citationshares Management*, ARB No. 12-029, slip op. at 12. Indeed, not only did Respondent contact Complainant multiple times seeking "voluntary" information, when he was not forthcoming and did not voluntarily participate in the program, Mr. Vaudt reported him to the general manager of the Southwest Division. Mr. Vaudt did not follow the protocol of the medical program for injured workers who do not participate, but instead contends that it was happenstance that Mr. Curtright just happened to seek information from him about Complainant. Mr. Vaudt and Mr. Curtright contradicted each other on this point, which I did not find credible. Mr. Vaudt enlisted Mr. Curtright to force Complainant to comply with what Respondent states is a voluntary program but

in practice requires mandatory participation. Mr. Vaudt also never told Complainant that his failure to provide the information or participate in the voluntary program could lead to discipline. Not once did Mr. Vaudt seek assistance from Complainant's daily supervisors to find out what was going on with Complainant. The supervisors who were charged with extending the medical leave never told Complainant that his paperwork was deficient to extend his medical leave. Ms. Keener approved the leave without asking for more information.

Workers who were off duty for non-work-related injury reasons were treated differently and are not monitored in the same manner as those who report work-related injuries. I believed the testimony of Mr. Bay, Mr. Clark, Mr. Schipper, and Mr. Arnold about their experiences and how they simply sent a doctor's note to the trainmaster or supervisor when they were taking off for medical reasons. They had an easier time when returning to work as well. Mr. Schipper said he sent a picture of his note asking for leave to his trainmaster who then handled the process of obtaining medical leave for him. I found their testimony compelling and truthful. Complainant was treated markedly different for having reported a work-related injury. He was ultimately disciplined because he would not follow the elaborate mandated program established for workers injured at work under the guise of providing voluntary assistance, but in application serves to harass and harangue injured workers during their recovery period until they provide confidential medical information related to an injury. The non-work injured witnesses only had to provide a note from the doctor stating how long they would be off work and unless the medical leave was extended, did not require any more information from them. Complainant requested leave with a medical note and copy of a medical record showing he was off work until September 25, 2015, which is what non-work-related injury people submitted. Respondent should not have required more from him because he was injured at work. If he was in a voluntary program and did not participate, Respondent should have followed its protocol and taken him out of the program, not disciplined him.

Complainant described how he believed Mr. Vaudt was overreaching, particularly when Mr. Vaudt contacted his medical provider seeking medical information without his consent and without his knowledge. I found the testimony from Complainant to be convincing on this point. Mr. Vaudt admitted that he contacts the doctors of injured workers directly without their knowledge or consent because sometimes he gets information and sometimes he does not.<sup>15</sup> It is interesting to note that when Mr. Vaudt contacted Complainant's treating doctor, Mr. Vaudt did not provide a copy of the form filled out by Complainant 10 years before and tell the doctor that Complainant waived, for example, his right to keep his medical records private. Instead, Mr. Vaudt explained that sometimes medical providers give him information without a medical release. I found that testimony particularly revealing about the motives and intentions of Respondent in the context of work-related injuries. Mr. Vaudt did not contact the medical providers for other employees who were out on non-work-related medical leave.

Respondent offered a form completed by Complainant when he started his job in 2005, from which it appears I am supposed to infer that Complainant agreed to waive all privacy matters related to this work-related medical treatment, which somehow explains and excuses Mr. Vaudt's actions, but it was never clear to me why. If the program is voluntary, but Respondent believes it is otherwise entitled to the information regardless of Complainant's view, then why pretend that this

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<sup>15</sup> Respondent did not explain how its conduct comports with patient privacy rules. *See* The Health Insurance Portability and Accountability Act of 1996 (HIPAA), enacted by Pub.L. 104-191, 42 U.S.C. § 1320d, and enacting regulations at 45 C.F.R. § 160.100 *et seq.*

allegedly voluntary program is somehow for the benefit of the employee? When Complainant decided not to participate in the program, Respondent's literature said that he would be disenrolled in the program until he decided to participate. In practice, the exact opposite happened. Respondent increased the pressure on Complainant to provide medical documentation about his injury and treatment, and when he did not, Respondent contacted his medical provider on its own seeking medical information. When Respondent was unsuccessful there, it turned up the pressure by threatening punishment for failing to provide the information and enlisted the power of the general manager to see it to fruition. It was clear that Respondent intended to get the private medical records and information one way or another, regardless of whether Complainant willing complied or not. Mr. Vaudt said he told Mr. Curtright that Complainant was out longer than the average for a shoulder injury, but he neglected to mention that Respondent had approved his medical leave and its extension on multiple occasions. Ms. Keener drafted a letter on behalf of Mr. Curtright even though she had approved his medical leave already. Complainant ended up having shoulder surgery and staying off work until May 2016.

I do not accept that Complainant committed misconduct because he did not timely provide confidential information in response to the letter from Mr. Curtright which was inaccurate about what had transpired. The entire premise of the investigative hearing was incorrect. Respondent disciplined him based upon the letter from Mr. Curtright, which did not accurately reflect what had occurred up to the point of the letter. Mr. Curtright disciplined Complainant even though it had never been made clear to Complainant that Mr. Vaudt's requests were not voluntary as the program states, but in fact mandatory. Mr. Vaudt had never ordered Complainant to provide anything or required Complainant to contact him. The facts established here that Complainant was on medical leave approved by Respondent that was extended multiple times, yet Respondent still required that he turn over his private medical records or face discipline.

c. Respondent's Argument against Contribution

Respondent argues there was no pretext in how it handled Complainant's medical leave, there was no disparate treatment between Complainant who was on work-related medical leave and those who were on non-work-related injury leave, and there was no evidence he was treated differently. ALJX-16-18. Respondent argues that the Ninth Circuit requires that to establish disparate treatment, a plaintiff must provide evidence that he is similarly situated in all material respects with employees allegedly receiving more favorable treatment. ALJX-2 at 18 citing *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). Respondent further asserts that it did not provide shifting explanations for the discipline and there was no change in hostility, antagonism, or attitude towards Complainant. ALJX-2 at 18. Respondent finally argues that there was no temporal proximity, and even if there were, the intervening event is sufficient to independently cause the discipline. ALJX-2 at 17.

Respondent has overstated the requirements for contribution at this stage and relies upon cases that are distinguishable and do not apply to our factual situation. The ARB has cautioned against applying the more stringent standards found in Title VII cases to whistleblower matters because the safety issues and abusive practices present in hazard-laden, regulated industries, as well as a broad range of other actions, may qualify as unfavorable personnel actions under whistleblower statutes that may not qualify in Title VII claims. *Williams v. American Airlines, Inc.*, ARB No. 09-018, OALJ No. 2007-AIR-4, slip op. at 12-15 (ARB Dec. 29, 2010); *Vernace v. PATH*, ARB No. 12-003, OALJ No. 2010-FRS-018, slip op. at 3 (ARB Dec. 21, 2012). Respondent has not shown how the

Title VII standard applies to this FRSA matter, but even if it did, Respondent has not shown that current employees of Respondent who report on the job injuries and take medical leave are not similarly situated in all material respects to current employees who take medical leave for non-work related medical reasons.<sup>16</sup>

Respondent further argues that in order to prevail on the contribution portion of the analysis, Complainant must show discriminatory animus toward the protected conduct. ALJX-2 at 16; *see Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 136 S.Ct. 2507 (2015); *Kuduk*, 768 F.3d at 791; *Kozjara v. BNSF Ry. Co.*, 840 F.3d 873 (7th Cir. 2016), *cert denied*, 137 S. Ct. 1449 (2017) (finding no contributing factor where there was no evidence of the usual forms of employment retaliation, like animus). ALJX-2 at 16. Respondent argues that Complainant has no direct evidence that his discipline was motivated by animus toward the injury report itself, separate and apart from his failure to cooperate with the medical department, and that he also lacks any circumstantial evidence of retaliation. *Id.* Respondent's arguments are misplaced and are not persuasive.

The ARB has not articulated that a complainant must prove discriminatory animus or a retaliatory motive to show contribution. 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." *Palmer*, ARB No. 16-035, slip op. at 52-53. A close scrutiny of the ARB standard articulated in *Palmer* shows it is consistent with the intentional retaliation prompted by the employee engaging in protected activity standard outlined in *Kuduk*.<sup>17</sup> In *Kuduk*, the court found that there were separate reasons unrelated to the protected activity for the adverse actions because there was a wholly new unrelated incident that precipitated that complainant's firing, which is not present here. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 787-89 (8th Cir. 2014). The intervening act that Respondent attempts to assert here results directly from the reporting of the injury—there is no break and no intervening act. When there are intervening events that might explain the adverse action, the question "is whether the intervening events . . . negate a finding that [the complainant's] protected activity was a contributing factor in [the respondent's] adverse action." *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 21 (ARB Mar. 29, 2013) ("*Rudolph P*"); *see also Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082; slip op. at 4 n.20 (ARB June 21, 2016) (not all connection via a chain of events establishes contribution). Here, I do not find any intervening event sufficient to negate contribution. Mr. Curtright was only involved in the case because Complainant reported a work-related injury and took time off work for the same injury, but

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<sup>16</sup> *Moran* involved a claim for disparate treatment under Title VII, where some primarily white major league baseball players sued for the same benefits granted to certain African-American players that were not given to them. *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006). The court said that players were not "similarly situated" in all material respects under Title VII because the benefits plans given to the African American players was based upon their time in the Negro Leagues and not their employment relationship with major league baseball. *Id.* at 754-755. Here, the workers are all similarly situated but are treated differently depending on whether they are injured on the job or off the job. Even if the Title VII standard applied, I would find that the employees were similarly situated in all material respects.

<sup>17</sup> The Ninth Circuit recently cited *Kuduk* for the proposition that, "[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Rookaird*, Nos. 16-35786, 16-35931, 16-36062; No. 16-35787, slip op. at 21-22 quoting *Kuduk*, 768 F.3d at 791. The court further stated, "The employee's prima facie showing ""does not require that the employee conclusively demonstrate the employer's retaliatory motive."" *Id.* citing *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010). The Ninth Circuit cited *Kuduk* without comment and without examining any of the ARB cases or indicating that any deference was due to the Department of Labor. This brief reference to *Kuduk* was not central to the decision in *Rookaird* and was not the focus of the analysis and had no bearing on the ruling.

did not provide a complete release of his medical files. I do not find that the failure to comply with Mr. Curtright's letter was an intervening act sufficient to sever the connection between the protected activity and the discipline.

Similarly, the ARB has not adopted a chain of causation or but for analysis to show contribution, but even if it had, Complainant would have met those standards as well. In *Kozjara*, the court found unrelated reasons for the termination separate from the injury report; the complainant was fired for stealing and showed no connection between his termination and the protected activity. *Kozjara*, 840 F.3d at 877-78. *Kozjara* explained that there must be some proximate causation between the protected activity and the adverse action, which was not present in that matter, but I find is present in the current case. In this matter, Complainant did not participate in a voluntary program related to his work-related injury. There was no separation and there was no independent or intervening cause. Respondent took exception to his unwillingness to participate in the program, and even though it had already approved his work-related injury medical leave and had a process for those who did not participate, it chose to discipline him for failing to comply with a letter from the general manager seeking the very medical information related to his work injury that they told him he did not have to voluntarily provide. Thus, I find that there was proximate causation because it was the reporting of the injury and unwillingness to voluntarily give over his medical records that brought the discipline. *Kozjara* requires a connection between the protected activity and the adverse action consistent with the ARB precedent, which the evidence established here. Respondent confabulates the facts here; Complainant was not required to participate in the medical program or even cooperate, yet Respondent disciplined him for his failure to participate and comply with the company program.

d. Conclusion Contribution

The showing required to prove contribution is slight, and any contribution that tends to affect in any way the outcome of the decision is sufficient to carry the burden. *Palmer*, ARB No. 16-035, slip op. at 52-53. There is no doubt in my mind that Complainant's reporting of a work-related injury contributed to the adverse action implemented by Respondent. Respondent's arguments to the contrary, or even its characterization of independent, intervening causes, are simply not supported on this record. Therefore, I find that Complainant's reporting of a work-related shoulder injury was a contributing factor in his discipline.

B. Respondent's Case -- Affirmative Defense

As explained below, Respondent has not shown by clear and convincing evidence that it would have given Complainant the same suspension in the absence of the protected activity.

To avoid liability where a complainant has established that his or her protected activity was a contributing factor in an unfavorable personnel action, the employer must show by clear and convincing evidence that it would have taken the same personnel action absent the protected activity. 49 U.S.C. § 20109(d)(2)(A)(i); 49 U.S.C. § 42121(b); 29 C.F.R. § 1979.109(b)(1). It is not enough to show that the employee's conduct constituted a legitimate independent reason justifying the adverse personnel action, or that the respondent *could have* taken the personnel action in the absence of the protected activity. See *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (ARB Apr. 25, 2014); *Pattenaude v. Tri-Am Transport, LLC*, ARB No. 15-007, ALJ No. 2013-STA-37, slip op. at 15-16 (ARB Jan. 12, 2017). Instead, the employer

must show that it *would have* taken the same adverse action absent the protected activity through either direct or circumstantial evidence. *Speegle*, ARB No. 13-074, slip op. at 11. The employer can meet its burden through direct or circumstantial evidence; circumstantial evidence can include evidence of the temporal proximity between the non-protected conduct and the adverse actions, the employee's work record, statements contained in relevant office policies, evidence of other similarly situated employees who suffered the same fate, and the proportional relationship between the adverse actions and the bases for the actions. *Id.*

Respondent argues that Complainant must show that it acted with intent to retaliate, not whether its enforcement of its rules was correct. ALJX-2 at 16 citing *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012) (“A showing that the employer made a mistaken and unreasonable determination that an employee violated company rules does not prove that the employer was motivated by a known disability.”) Respondent does not carry the burden of defending and justifying its disciplinary decisions as courts do not sit as a sort of “super-personnel department” evaluating the wisdom of business decisions. *See Scoria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *see also Kuduk*, 768 F.3d at 792 (citing *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 898 (8th Cir. 2002)). The FRSA is implicated only when the reasons for an adverse action include one of the enumerated protected activities. To determine whether an employer would have taken the same action regardless of protected activity, the ARB considers “the existence of extrinsic factors that the employer can clearly and convincingly prove would independently lead to the employer's decision to take the personnel action at issue.” ALJX-2 at 19 citing *DeFrancesco II*, ARB No. 13-057, slip op. at 8.

Respondent attempts to parse this case into nothing more than an act of insubordination by a disgruntled employee. However, I do not agree with Respondent's interpretation of the case and find that Respondent took the action against Complainant precisely because he reported the work-related injury. Respondent contends that had Complainant simply followed the direction of the general manager and signed a medical release, or simply provided his medical records voluntarily, then it would not have been forced to take the actions that it did—establishing an investigative panel and ultimately suspending him from work. I find that Mr. Vaudt and Mr. Curtright acted together to get information that the company was not entitled to have without Complainant's consent and then, working together, disciplined him for not providing the information. Respondent is not trying to simply justify a disciplinary decision against an insubordinate employee, but the facts demonstrate a calculated plan to force Complainant into providing his confidential medical records or face discipline. Respondent forced Complainant to comply under threat of punishment and then in fact continued to punish him even though he provided the information it sought. Mr. Vaudt played the role of concerned and empathetic helper until he received the requested information and then had no further contact with Complainant. Mr. Vaudt told Complainant that the discipline process would go much easier on him if he cooperated and signed the release, but there is no indication that Mr. Vaudt ever communicated that representation to Mr. Curtright. As soon as Mr. Vaudt received the requested information, he left Complainant to fend for himself in the investigative process.

Respondent appears to contend that it is entitled to have workplace policies that are not subject to review. This may be true in the abstract and in a general sense, but when the workplace policy impinges on the Complainant's legally protected rights, Respondent is misguided in its view. This case is not about reviewing a violation of a company policy, but about misconduct directly related to protected activity. Complainant did not want to participate in what Respondent said was a voluntary program. Without his voluntary compliance, Respondent was not entitled to his

confidential medical records, and, according to Mr. Vaudt, he should have been disenrolled in the program until such time as he decided to participate. In practice, however, it was anything but voluntary. Under the guise of a legitimate managerial inquiry, Respondent pressured Complainant to provide his medical information even though it did not ask him for that information when it extended his medical leave.

Respondent did not establish a legitimate reason for Mr. Curtright to be involved in the process. Its explanation was pretextual at best, and certainly does not rise to the level of clear and convincing evidence that it would have disciplined Complainant anyway. On this record, not only did Respondent not show clear and convincing evidence, but even applying a lower standard of proof, I was not convinced. I did not believe Mr. Curtright's and Mr. Vaudt's explanations for their conduct. To contend, as Mr. Vaudt and Mr. Curtright did, that the only reason they suspended Complainant was because he did not comply with a direct order from the general manager belies what occurred in this matter. I do not find Mr. Curtright credible on this point and do not believe his explanation that he would have taken the same action independent of the medical leave. There would have been no reason for Mr. Curtright to take any action against Complainant but for the work-related injury. There was some evidence that Complainant had some work-related issues in the past, but there was no compelling information that he was otherwise on the supervisory radar in the absence of his injury. The explanation offered by both Mr. Vaudt and Mr. Curtright seemed pretextual and offered to justify what was an otherwise impermissible, retaliatory action.

I was also unmoved by Respondent's evidence of the reason and rationale for the MEH program. While the program looks good on paper, Respondent's heavy-handed implementation leaves much to be desired. I noted that none of the correspondence from Mr. Vaudt states that the program is voluntary, which by itself is misleading and provides misinformation. The fact remains that Respondent wants personal medical information from its employees that suffer work-related injuries beyond that which is needed to approve a medical leave of absence. Respondent's actions in this case demonstrate that it would do anything including sending unsolicited and unapproved requests to doctors or disciplining its employees to get that information. Respondent treated workers who were not injured on the job markedly different than those employees injured at work. I believed Mr. Bay, Arnold, Clark and Schipper that they did not have to jump through the same hoops and were not harassed and harangued in the same way as Mr. Vaudt did with Complainant and his medical providers. The general manager was not involved and did not seek their confidential medical records. The nature of the violation here is more than de-minimis and more than a simple misunderstanding or miscommunication. I find Respondent's conduct here to be egregious and harassing of its employees who suffer work-related injuries. Respondent offered nothing persuasive or compelling to persuade me otherwise. Respondent's conduct here was offensive and committed under false pretenses.

The inquiry at this point is whether Respondent has shown clear and convincing evidence that it "would have" disciplined Complainant in the absence of the protected activity. I find unequivocally that Respondent has not shown clear and convincing evidence that it would have. Even if there were a lesser standard on this prong of a preponderance of the evidence, I would not have found Respondent would have disciplined Complainant. I am satisfied that the only reason Respondent punished Complainant was related to his work-related injury and his unwillingness to play along with Respondent's "voluntary" program. I find that Respondent has failed to establish by clear and convincing evidence that it would have taken the same action in the absence of the protected activity.

### C. Damages

Under the FRSA a successful complainant is entitled to be made whole, including reinstatement with the same seniority he or she would have enjoyed absent the discrimination, back pay with interest, compensatory damages, and attorney fees and costs. 49 U.S.C. § 20109(e); 29 C.F.R. § 1982.109(d). Punitive damages up to \$250,000.00 may also be awarded. *Id.*

Complainant requests the following relief: 1) rescind the Level S discipline; 2) order Respondent to terminate the practice of automatic enrollment in the medical program; 3) punitive damages in the amount of \$250,000; and, 4) an award of attorney fees and costs. ALJX-2 at 19-20.

#### 1. Compensatory Damages

Complainant specifically said repeatedly that he was not requesting compensatory damages. Compensatory damages are designed to make the complainant whole for the harm caused by the employer's unlawful act and "are meant to restore the employee to the same position he would have been in if not discriminated against." *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, OALJ No. 2005-STA-00035, slip op. at 8 (ARB Jan. 31, 2018). Compensatory damage awards may compensate for direct pecuniary loss, as well as "such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Id.*

Complainant has not requested any compensatory damages and I will not award any here based upon that representation. On this record, however, there was some evidence that Complainant suffered emotional distress and other entitlement to compensatory damages related to the adverse action, and I would have seriously considered awarding them here had Complainant not unequivocally stated he was not seeking any. Complainant described being stressed out to no end by how he was treated by Respondent, he was taking anxiety medication, felt he had a target on his back after the injury and process, and the managers were treating him differently, including Mr. Costello, for reporting the injury. However, I find that Complainant is not entitled to damages for emotional distress because he specifically said he was not seeking those damages. Complainant did not lose any wages as a result of the suspension.

#### 2. Punitive Damages

The FRSA authorizes punitive damages in an amount not to exceed \$250,000. 49 U.S.C. § 20109(e)(3); 29 C.F.R. § 1982.109(d). Punitive damages punish unlawful conduct and deter its repetition, but plaintiffs seeking punitive damages have a "formidable burden." *BMW v. Gore*, 517 U.S. 559, 568 (1996); *BNSF Ry. Co. v. United States DOL Admin. Review Bd.*, 867 F.3d 942, 949 (8th Cir. 2017) citing *Sturgill v. United Parcel Serv., Inc.*, 512 F.3d 1024, 1035 (8th Cir. 2008). Punitive damages are not awarded as of right and whether to award punitive damages is in the ALJ's discretion. *Raye v. Pan Am Railways, Inc.*, ARB No. 14-074, OALJ No. 2013-FRS-00084, slip op. at 5 (ARB Sept. 8, 2016). In determining whether to award punitive damages and in what amount, the administrative law judge should consider: (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. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) citing *Gore*, 517 U.S. at 575; *D'Hooge v. BNSF Railways*, ARB Case Nos. 15-042; 15-066; OALJ Case No. 2014-FRS-002 (Apr. 25, 2017).

In whistleblower cases, punitive damages are appropriate to punish wanton or reckless conduct and to deter such conduct in the future. *Johnson v. Old Dominion Security*, ALJ Nos. 86-CAA-003, 004, 005 (Sec’y May 29, 1991). The determinative factual question is whether the respondent acted with “reckless or callous disregard for the plaintiff’s rights” or intentionally violated federal law. *Clyde O. Carter, Jr. v. BNSF Railway*, ARB Case Nos. 14-089, 15-016, 15-022 (ARB June 21, 2016); *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013) (quoting *Ferguson v. New Prime Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011)). In addition, egregious or reprehensible conduct is not necessarily required but may serve as evidence of an employer’s intentional or reckless misbehavior. *Raye*, ARB No. 14-074, slip op. at 8. “The ‘degree of reprehensibility’ factor is ‘perhaps the most important indicium of the reasonableness of a punitive damages award.’” *Gore*, 517 U.S. at 575. An employer may avoid punitive damages when it has made a good-faith effort to comply with the law, but the burden of proof to show the affirmative defense of good faith is on the employer. *BNSF Ry. Co.*, 867 F.3d at 947; *Youngermann*, ARB No. 11-056, slip op. at 6. Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. *Gore*, 517 U.S. at 581. Further, “it is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them.” *Youngermann*, ARB No. 11-056, slip op. at 4.

A “statutory limit on punitive damage awards strongly undermines the concerns that underlie the reluctance to award punitive damages where minimal or no compensatory damages have been awarded.” *Raye v. Pan Am Railways, Inc.*, ARB No. 14-074, OALJ No. 2013-FRS-00084 (ARB Sept. 8, 2016), slip op. at 5. When a court or agency awards punitive damages under a statute, “the rigid application of the . . . guideposts is less necessary or appropriate” because, through the statute, “the legislature has spoken explicitly on the proper scope of punitive damages.” *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1056 (9th Cir.2014) (en banc). But the agency must use the guideposts, which are still helpful in evaluating fair notice under this different landscape. *Id.* The Court recognized that, even under *State Farm*, higher ratios may well satisfy due process where “a particularly egregious act has resulted in only a small amount of economic damages.” *Id.* quoting *BMW*, 517 U.S. at 582. Indeed, “there are no rigid benchmarks that a punitive damages award may not surpass.” *Haberman v. The Hartford Ins. Grp.*, 443 F.3d 1257, 1272 (10th Cir.2006); *BNSF Ry. Co.*, 867 F.3d at 947.

I find Respondent’s conduct to be outrageous, reprehensible and untruthful. It has a policy that treats employees injured on the job differently than employees who are off work for non-work related injuries. Respondent’s policies suggest concern and care for injured workers, but in practice are used to bully and harass injured workers while they are recuperating from their injuries. Respondent specifically claims that the program for which Complainant was ultimately punished was a voluntary program, and even had a policy about what was to occur if an individual chose not to participate in the program, yet Respondent did not follow its own program. The two managers charged with implementing the program were not forthcoming in their testimony, did not follow the protocols of the program, and sought confidential medical information without the knowledge and consent of Complainant. I found both Mr. Vaudt and Mr. Curtright’s explanations to be pretextual and purposefully evasive about the true reasons for seeking the medical information. Further, Respondent approved Complainant’s leave for medical reasons, but ignored that fact when it chose to punish Complainant for not providing what it considered to be voluntary information.

Respondent did not care about federal law or worker privacy, and in practice submitted letters to medical providers in the name of the company seeking information for which it had not been given permission to seek because “sometimes they get it.” When the information was not forthcoming, Mr. Vaudt enlisted the authority of the general manager. Ms. Keener drafted the letter for Mr. Curtright after she approved Complainant’s medical leave which underscores the heavy-handed nature of the willful violation. I find the violation here to be intentional, willful, and without regard to the law and company policy. The conduct here deserves to be punished so that Respondent does not commit the same sort of willful violation again. Furthermore, the collusion between Mr. Vaudt and Mr. Curtright was particularly egregious. I did not find their explanations to be credible and, contrary to Respondent’s argument, not in good faith. There was no attempt to follow the law or company policy and they did not respect the injured worker/Complainant’s medical privacy. I find that Complainant did cooperate and did comply with the company requirements that he provide a medical excuse for his condition and then seek supervisor approval to extend the leave if necessary. It was not enough for Respondent, who wanted to read and review his private medical records on its own.

Having determined that the conduct here deserves an award of punitive damages, I recognize that Complainant did not request any compensatory damages and none were awarded. Still, I find the conduct here to be egregious and warranting a sizable award to deter future conduct. Even though no compensatory damages were awarded at Complainant’s request, they could have been based upon the uncontroverted testimony from Complainant about the emotional stress of the situation, and litigation costs will be awarded. The award of punitive damages here serves to punish and deter Respondent from future conduct. As previously noted, the award here considers Respondent’s conduct and that it ignored Complainant’s privacy rights, that its manager routinely sought confidential medical records without consent because sometimes he got them, that Mr. Vaudt and Mr. Curtright did not follow company procedures, and were untruthful and contradicted each other about how Mr. Curtright became involved in obtaining the records. The facts in this matter warrant a higher award due to the conduct of Respondent even without an award of compensatory damages.<sup>18</sup>

I have examined a number of cases where punitive damages were awarded and found the range of awards to be large. The circumstances in this matter are comparable to facts in other FRSA cases where sizeable punitive damages were awarded even though the compensatory and other damage awards were relatively low. In *Raye*, the ALJ awarded \$10,000 in compensatory damages for emotional distress, but \$250,000 for punitive damages. *Raye*, ARB No. 14-074. Complainant had been reprimanded after reporting a work-related ankle injury, and then disciplined after the complainant’s attorney said in the OSHA complaint that the complainant fell but the complainant had testified at the investigative hearing that he stumbled, but did not fall. *Id.* at 2. The second discipline was not sustained. *Id.* The ALJ found that the maximum punitive damages award was warranted because the railroad intentionally violated Raye’s rights under the FRSA, and it was necessary to deter similar conduct the future. *Id.* at 3. Even though the employer did not formally discipline Raye as a result of the investigative hearing and charges, the ALJ determined that the conduct was “of the sort that calls for deterrence and punishment” before awarded \$250,000 in

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<sup>18</sup> I am aware that in *Gore*, the Supreme Court cautioned about extreme ratios in awarding punitive damages. However, the statutory cap on punitive damages addresses that concern. See *Youngermann*, ARB No. 11-056, slip op. at 9 (“To the extent that courts worried about unleashing juries to award limitless punitive damages in cases where no harm had occurred, this concern is eliminated by the imposition of the statutory caps without proof of actual harm.”)

punitive damages. *Id.* at 4.

In *Youngermann*, the complainant refused to haul a loaded trailer that he had been dispatched to haul because the trailer had no working tail lights or side marker lights and because the tractor pulling the trailer had an inoperable low beam headlight. *Youngermann*, ARB No. 11-056 at 2. The ALJ ordered just over \$7,200 in back pay and compensatory damages, as well as \$100,000 in punitive damages. *Id.* at 4. The ALJ found that the employer acted with reckless indifference to the claimant's rights and gave him misinformation about driving the truck that it knew would violate the federal statute. *Id.* at 6-7. In March 2015, Respondent was assessed a punitive damage award of \$25,000 in a case where one manager had made a "snap, personal assumption" that a report was made in bad faith. *D'Hooge v. BNSF Rys.*, ALJ No. 2014-FRS-2, slip op. at 65 (ALJ Mar. 25, 2015). The ARB affirmed the ALJ award of \$25,000 in punitive damages and \$906 in back pay. *D'Hooge*, ARB Case Nos. 15-042; 15-066, at 11-12.

In *Perez v. BNSF Railway Company*, 2014-FRS-00043, slip op. at 37-40 (ALJ Dec. 14, 2016), the ALJ awarded \$60,000 in punitive damages finding they were necessary in furtherance of the goal to punish and deter future misconduct. The ALJ noted that he was "keenly aware" that the complainant was not actually disciplined at the conclusion of the investigation, and BNSF did not terminate or suspend Perez nor did he lose any pay or benefits. *Id.* at 38. Because of that fact, the ALJ determined that the amount of punitive damages should be less than in a case where the adverse action was more severe. *Id.* at 38.

Other matters have awarded punitive damages based on findings of reprehensible conduct, intentional retaliation, and cultivating an atmosphere discouraging filing of injury reports. In *Smith v. Union Pac. R R. Co.*, OALJ No. 2012-FRS-0039, slip op. at 76-77, 79 (ALJ April 22, 2013), the judge awarded approximately \$8,200 in lost wages and compensatory damages, as well as \$25,000 punitive damages against the railroad and \$1,000 against a supervisor after finding the conduct was "egregiously reprehensible." In *Griebel v. Union Pac. R.R. Co.*, OALJ No. 2011-FRS-00011 (ALJ Jan. 31, 2013), *aff'd* ARB No. 13-038 (ARB Mar. 18, 2014), the ARB affirmed \$100,000 in punitive damages where the employer had "a mentality that discourages the filing of an injury report, and meets those that are filed with suspicion and mistrust" and did not give appropriate consideration to employees' rights under the FRSA. *Griebel*, OALJ no. 2011-FRS-00011, slip op. at 35. The ARB also affirmed a punitive damages award against Respondent of \$50,000 in a case where the complainant had been twice fired for protected activity and the ALJ determined that managers were engaged in intentional retaliation. *Carter v. BNSF Railway, Co.*, ARB Nos. 14-089, 15-016, 15-022; OALJ No. 2013-FRS-082, slip op. at 6-9 (ARB June 21, 2016).

In addition, punitive damages were awarded in other matters where the other damages were relatively high, but the conduct was still outrageous to warrant punitive damages. In *Harvey*, the ALJ awarded \$100,000 in punitive damages after finding that the "[r]espondent's policies and culture have created an atmosphere of fear and discouragement surrounding the reporting of injuries and locomotive defects, and this atmosphere has resulted in a chilling effect on employees' decisions to engage in protected activity." *Harvey v. Union Pacific Railroad*, OALJ No. 2011-FRS-00039 at 42-46 (ALJ Feb. 12, 2015). In addition to the punitive damages, the ALJ awarded \$25,000 in compensatory damages for emotional distress. *Id.* at 47. In *Schow*, the ALJ awarded \$150,000 in punitive damages where the railroad punished an employee who reported an injury for failing to report a safety hazard that didn't exist after determining that the railroad's "official policies discourage injury reporting" and "there is a culture of hostility and animus towards injury reporting"

at the railroad. *Schow v. Union Pacific Railroad Company*, 2013-FRS-00043, slip op. at 42-45 (Apr. 15, 2015). In *Schow*, after the complainant was dismissed, the complainant almost lost his house, his credit score dropped, he missed payments on his credit cards, and could not afford his wife's medication. *Id.* at 14. Complainant eventually was returned to work after the superintendent determined that discipline had served its purpose. *Id.* at 15-16. In addition to the punitive damages, the ALJ ordered \$65,661 in back pay, \$1,467 in lost vacation time, \$50,000 in compensatory damages for emotional distress, and \$11,075.20 in compensatory damages for his increased mortgage payments. *Id.* at 45-46.

I also considered cases where punitive damages were not found to be warranted and find that the facts and reasoning for not awarding punitive damages do not apply here. In *Thorstenson v. BNSF Railway Company*, 2015-FRS-00052 (ALJ July 31, 2018), the complainant suffered no harm, but the judge still considered an award of punitive damages ultimately deciding against them: "What saves BNSF from punitive damages is that it eliminated this personnel policy provision before this case went to trial," which eliminated the need for deterrence. *Id.* at 28. In *Holmquist v. Wisconsin Central, Ltd.*, 2014-FRS-00057 (Aug. 3, 2018), the ALJ declined to award punitive because the company did not callously disregard the rights of the complainant or intentionally violate federal law, act reprehensibly, or have a corporate policy encouraging non-compliance with the FRSA. In contrast, as explained above, I do find that Respondent here has acted reprehensibly and callously disregarded the rights of Complainant.

After consideration of the evidence and the arguments of the parties, I find that Respondents' conduct in this case warrants the award of punitive damages, which I award in the amount of \$100,000. Considering the degree of reprehensibility and egregious conduct by Respondent and the need to deter similar conduct in the future, I find that Complainant is entitled to \$100,000 in punitive damages. The facts here are closer to those situations where little compensatory damages were awarded, but large punitive damages were. Respondent's threats of discipline related to obtaining medical records from injured workers has a chilling effect on future reports of injury by Complainant and his co-workers. Complainant did not seek compensatory damages, but I still find that an award of punitive damages is warranted here. I find that \$100,000 is sufficient to deter future conduct without being significantly excessive. *See Youngermann*, ARB No. 11-056, slip op. at 4-5 ("A substantial punitive damage award also serves the public interest by encouraging enforcement of anti-retaliation laws even against respondents with the resources to mount aggressive defenses.").

#### D. Attorney's Fees

The FRSA provides that a successful complainant shall be awarded reasonable attorney's fees and costs. 49 U.S.C. § 20109(e)(2)(C); 29 C.F.R. § 1982.109(d)(l). Complainant has prevailed here, and thus is entitled to attorney's fees and costs. The parties are directed to submit briefing on the amount of fees and costs as ordered below. Counsel should engage in a serious and good faith effort to amicably resolve any dispute concerning the amount of fees requested. *See Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("We emphasize, as we have before, that the determination of fees "should not result in a second major litigation.""). "Ideally, of course, litigants will settle the amount of a fee." *Hensley*, 461 U.S. at 437.

E. Expungement of Complainant's Personnel Record and Further Abatement of the Violation

Complainant requested that Respondent rescind the Level S discipline. The request is granted. Respondent shall remove all references to Complainant's protected activity and his suspension from his personnel records at Respondent. *See Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, OALJ No. 2007-STA-00022, slip op. at 13-14 (ARB Nov. 30, 2009).

Complainant requests that Respondent be ordered to terminate the practice of automatically enrolling employees who report work-related injuries in the MEH program, or, in the alternative, that all injured or ill employees be put in the same program. ALJX-1 at 16. Complainant did not cite any authority for this request. While the ALJ may order other affirmative action to abate the violation, 29 C.F.R. § 1982.109(d)(l), I do not find that warranted here. I found a violation as the program was implemented as to Complainant. The violation was in disciplining Complainant for not fully participating in the program, not for auto-enrolling him in the program. While the program was applied to Complainant in a manner to wear him down and ultimately led to discipline, I do not find a sufficient basis to order the end to auto enrollment or order that all injured or ill employees be put in the same program. It is also not clear that I would have the authority to do so.<sup>19</sup> The FRSA prevents retaliation for certain protected conduct and I find that Respondent violated the FRSA on these facts as applied to this complainant.

Although not requested by Complainant, Respondent shall post this Decision and Order for a minimum of 60 days from the date the Decision and Order is served on Respondents in a place and manner that is usual and customary for employees to gather and review employment related information. The Decision and Order shall be posted in the Southwest Division of Respondent and in other locations at Respondent where it is usual and customary for employees to gather and review employment related information. As the ARB has noted, "it is a standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer. *Shields*, ARB No. 08-021, slip op. at 14.

ORDER

1. Complainant's request for relief under the FRSA is granted.
2. Respondent shall expunge all references to Complainant's protected activity and his suspension from his personnel records at Respondent, as well as from any file or location where that information is otherwise kept.
3. Respondent shall post this Decision and Order for a minimum of 60 days from the date the Decision and Order is served on Respondent in a place and manner that is usual and customary for employees to gather and review employment related information. The Decision and Order shall be posted in the Southwest Division of Respondent and in

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<sup>19</sup> *See Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, OALJ No. 2007-AIR-00007, slip op. at 17 (ARB Mar. 24, 2011), recon. den. (ARB Apr. 13, 2011) (Under AIR21, the ALJ had to determine only whether the company discriminated or retaliated in applying its policies to the complainant; "the Secretary of Labor has the authority, delegated to the ARB, to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order the employer to take affirmative action to abate the violation.").

other locations at Respondent where it is usual and customary for employees to gather and review employment related information.

4. Within 30 days of the date this Decision and Order is served, Respondent shall pay to Complainant punitive damages in the amount of \$100,000.
5. Complainant's counsel is entitled to reasonable attorney's fees and costs for benefits procured on the Complainant's behalf. Complainant's counsel is ordered to serve an initial petition for fees and costs on opposing counsel, but not the court, within 30 days of the date of this Decision and Order is served. All counsel are ordered to initiate a verbal discussion within 14 days after service of the fee petition in an effort to amicably resolve any dispute concerning the amount of fees requested. Counsel must make good faith efforts to resolve the fee dispute before filing the fee petition with me. If counsel are able to agree on the amount of fees and costs to be awarded, they are ordered to promptly memorialize their agreement in writing and to file it with me.

If counsel cannot resolve all their disputes, Complainant's counsel is ordered to file within 30 days of the date the initial fee petition was served a final application for fees and costs that incorporates any changes agreed to during the discussions. Within 21 calendar days after service of the final application, Respondent's counsel shall file any objections to the final fee application. Complainant's counsel may file a reply to any employer opposition 14 days after the opposition is served. No other reply briefs are permitted.

6. The parties are ordered to notify this Office upon the filing of an appeal.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

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, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded. 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. If you e-File your reply brief, only one copy need be uploaded.

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).

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).