



Issue Date: 07 March 2019

OALJ Case No.: 2016-FRS-00017
OSHA Case No.: 7-4120-15-024

In the Matter of:

STEVE NAVARRO,
Complainant,

v.

**RCL WIRING, LP, d/b/a IDAHO &
SEDALIA TRANSPORTATION CO.**
Respondent.

DECISION AND ORDER AWARDING DAMAGES

This matter arises under the employee protection provisions of the Federal Rail Safety Act, as amended, 49 U.S.C. § 20109 (“FRSA” or the “Act”), with implementing regulations at 29 C.F.R. Part 1982. The FRSA prohibits an employer from discriminating against, or taking an unfavorable personnel action against, an employee because the employee reported a work-related injury or engaged in other protected whistleblowing activity. In this case, Complainant contends that Respondent retaliated against him for reporting an injury.

Factual Findings¹

There is little documentary evidence in the record regarding the activity for which Complainant was terminated. The record, instead, contains testimony of multiple individuals outlining the events as they occurred. The credibility of these individuals vary; while some individuals are very credible (having credible demeanors and providing statements that are consistent and supported by facts), others are much less so. Of tantamount importance is the credibility of the Complainant.

On review of the evidence in the record, I find Complainant’s testimony credible. Complainant’s testimony is consistent over time and supported by other testimony in the record.

¹ Exhibits in this matter are abbreviated as follows: “CX” refers to Complainant’s Exhibits; “RX” refers to Respondent’s Exhibits; “ALJX” refers to Administrative Law Judge Exhibits, and “Tr.” refers to the January 2017 Hearing Transcript.

While there are numerous examples of such consistencies in the record, the following are particularly persuasive.

First, Complainant has routinely correctly recalled the events of his injury and his injury reports. Complainant has consistently recalled the date and contents of his injury reports over a period of years. *See* CX 1; RX 12; CX 2; CX 4; *with* Tr. at 274-78, 300-05 *and* RX 35 at 58-60. Claimant also correctly remembered details, such as the timeline by which faxes were sent. *Compare* CX 5, CX 6, CX 7, CX 8, CX 9, CX 10, *and* Tr. at 128-134 *with* Tr. at 307-308.

Second, Complainant's statements regarding the alleged threats he made have been supported by direct eyewitnesses. The two employees who directly heard Complainant make his alleged threats support Complainant's recollection of events. *Compare, e.g.,* CX 28 at 69-73, 76-78 *with* CX 28 130-32 *and* Tr. at 227-29, 339-40.

Third, Complainant's demeanor at the hearing further supports his credibility. I observed significant testimony by Complainant. While I believe that Complainant may have downplayed or provided a more positive spin on some parts of his testimony, I did not find that any of his substantive testimony was not credible.

I must acknowledge, however, that Complainant is a convicted felon. Tr. at 267. Complainant was convicted of passing a bad check in 1997, and he was convicted of driving while intoxicated ("DWI") in 2000. RX at 27; Tr. at 265-69. Complainant admitted that he was an alcoholic, and that since his incarceration he had abstained from alcohol for 17 years. Tr. at 161. Complainant's criminal history does not show significant criminal acts since Complainant became sober. *See* RX 27. As such, while I acknowledge that Complainant was a convicted felon, I do not find that his prior convictions undercut the credibility of his testimony at the hearing.²

Simply put, Complainant's version of events is largely supported by the record, and Complainant's demeanor further bolstered his credibility. While Complainant's accuracy is not absolute, I am convinced that Complainant is credible.

Based on my review of the credibility of all witnesses in the record (including Complainant) and the evidence provided by the parties, I find the events leading up to Complainant's termination transpired as follows.

Complainant began working for Respondent on September 20, 2010, in Sedalia, Missouri. Tr. at 494. He was employed as a "signalman" or "signal shop technician." *Id.* Signal shop technicians wired, repaired, and conducted other work on the railroad signal "cabins" (also known as "bungalows.") Tr. at 68. The cabins are metal containers (typically

² Complainant admitted that he did not include his entire criminal history when applying to work with Respondent. Tr. at 263-64. However, Complainant asserted that he only believed he had to put his most recent criminal history on his application (in this case his most recent DWI). *Id.* at 264-65. I am not convinced this omission is as damning as Respondent suggests. Though Complainant did not report his whole criminal history, he did admit to having committed a crime on his application. Accordingly, I decline to find that this omission undercuts the credibility of Complainant's testimony at the hearing.

shaped like houses) that contain the electronics that control railroad signals and gates. *Id.* at 69-71. Though typically located by the signals and gates they control, the cabins are brought to wiring shops (such as Respondent's) for repairs and other work. *Id.* at 70-72. The signalmen at Respondent's shop were members of a union called the "Brotherhood of Railroad Signalmen" ("BRS" or "the Union"). *Tr.* at 72.

Demand for work on signal cabins waxes and wanes. For the period of work at issue in this matter, Respondent was experiencing high demand. *Tr.* at 157, 531. During this high demand period, Complainant routinely worked overtime. *Id.* at 201, 322, 360, 474. The overtime was typically for hours between the end of the day and beginning of the night shift, and on such overtime workers on both shifts would work at the same time. *Id.* at 202.

The signalmen working in the Sedalia shop were overseen by foremen, who, though not managers, acted as intermediaries between the signalmen and management. The foremen in the Sedalia shop were Mike Sanders (for the day shift) and Zach Smith (for the night shift). *Tr.* at 74, 93. Mr. Sanders was the local chairman of BRS at the time, and Mr. Smith was the vice local chairman. *Id.* The shop had three managers: Brian Beason, Al Anderson, and Dirac Twidwell. *Tr.* at 505. Scott Grass was the Vice President of the signal shop, overseeing the managers, foremen, and signalmen.

The incipient action in this case was an injury suffered by Complainant on February 1, 2014. *Tr.* at 274; CX 1; CX 2. A forklift slipped on ice, and Complainant, moving back to avoid the forklift, did the same. CX 1; CX 2. Complainant "jammed" his right hand, which resulted in "pain in [his] arm, elbow, and shoulder." CX 1 at 2; *see also* CX 2 at 1.

Complainant filed a personal injury report on February 1, 2014. CX 1. In his report, he wrote: "returning to work. See if pain subsides. Do not feel need for medical att[ention] at this time." *Id.* at 2. Complainant continued to work that day, though his pain did not subside. He also signed a medical release. Two days later, Complainant missed work to visit a chiropractor to deal with the continuing pain. RX 10. He was released with no restrictions after his appointment. *Id.* On February 10, 2014, Complainant filed a document withdrawing his consent to release his medical history.

Around this same time, Complainant entered into a brief conversation with Brad Anderson (a signalman) and Holly Brown (an office assistant).³ *Tr.* at 173, 575. Mr. B. Anderson and Ms. Brown were discussing security cameras in the signal shop. *Id.* at 173, 575. After this brief exchange, Mr. Grass confronted Complainant about his statements. *Id.* at 79-80, 575. Mr. Grass explained that any questions or comments about the security cameras should go directly to him. *Id.*

In March 2014, Lucas Robinson began working for Respondent. CX 49 at 11; *Tr.* at 531 (noting Mr. Robinson was still a probationary employee, a status that lasted 90 days, in late May early June). Mr. Robinson was assigned to work the night shift on the cabin that Claimant

³ Ms. Brown's position is never clarified. Mr. Sanders posited that she was an "office lady;" either a receptionist or Mr. Grass's assistant. *Tr.* at 80, 126. While the title of her position is not at issue in this matter, I find that "office assistant" best describes Ms. Brown's job.

worked upon during the day shift. Tr. at 93; CX 28 at 29, 43. Despite their different shifts, the two interacted with each other when taking overtime. Tr. at 201; CX 28 at 29; CX 49 at 13-14. Initially the relationship was cordial.

On April 22, 2014, Complainant approached Mr. Grass to ask whether Respondent would cover copays for the medical bills that he had incurred seeking treatment for his wrist. Tr. at 300; 495. Mr. Grass informed Complainant that he needed to file a second injury report. *Id.* at 75-76, 182-83, 518-20. Claimant filed another report that same day. RX 12; CX 4.

Shortly thereafter in early May, Mr. Grass called Complainant into his office to be disciplined for filing a late injury report. Tr. at 81, 193. Mr. Grass asked Complainant to sign a discipline document. *Id.* at 83, 312. Complainant called the discipline “bullshit” and he refused to sign the document. *Id.* at 136, 193, 312, 528; RX 44 at 45. Mr. Grass also asked Complainant to have his doctor provide a work release document, which Complainant insisted had already been provided. Tr. at 132-34, 305-06; *see also id.* at 86; CX 6; CX 7; CX 8; CX 9; RX 14. Regardless, Complainant requested, and received, another work release form from his physician. *Id.* at 134, 305-06; *see also* CX 9.

On June 2, 2014, Complainant arrived to work at his cabin, and he noticed that a cup full of liquid (presumably water) had been placed over his door. RX 35 at 105; Tr. at 87, 314. It appeared that the cup of water was placed in such a manner that it would fall were Complainant to move a power cord within the cabin. RX 45 at 40-41; CX 26 at 1; *see also* Tr. at 197-99. Complainant reported the matter to Mr. A. Anderson or Mr. Beason. Tr. at 87, 199, 586.

At this same time, relations between Mr. Robinson and Complainant deteriorated. As Complainant and Mr. Robinson worked on the same cabin, Complainant would leave notes to Mr. Robinson regarding the work that had been done during Complainant’s shifts. Tr. at 91, 204. In these notes, Complainant referred to Mr. Robinson as “homie.”⁴ *Id.* Sometime after receiving these notes, Mr. Robinson contacted Mr. Sanders. *Id.* at 91. Mr. Robinson informed Mr. Sanders that he found the term homie offensive. *Id.* Mr. Sanders told Mr. Robinson that he’d talk to Complainant about the issue. *Id.* at 92.

Mr. Sanders informed Complainant of Mr. Robinson’s complaints. Tr. at 92. Complainant informed Mr. Sanders that he would stop referring to Mr. Robinson as homie. *Id.* at 92, 139-41, 204-05. Later, Complainant discussed the issue with Mr. Robinson. *Id.* at 204-05. Shortly thereafter, Mr. Robinson approached Mr. Smith, asserting that Complainant had confronted and intimidated him. CX 13; CX 14. The incident was referred to Mr. Beason, who collected statements from Mr. Robinson, Mr. Smith, and Complainant. CX 13; CX 14; CX 15. Complainant was moved to a different station in the front of the shop, right by the managerial offices. CX 15; Tr. at 206. Complainant was not allowed to bring the tools form his prior station

⁴ Neither party provided a definitive definition of the term homie. Complainant described the term thus: “[Homie] means brother. Where I come from, it is not—it’s a term of endearment that is earned by respect. . . . [Used o]nce you get to know an individual and you have some sort of trust in them. Tr. at 201-02. He stated at the investigative hearing that he used the term homie “[o]nce [Mr. Robinson and I] got comfortable, once, once we worked together and, and got to know each other a little bit more. I felt comfortable with him. It was just, it’s second nature for me. It’s, it’s just like me calling you brother.” CX 28 at 134. I find that, as used by Complainant in this matter, homie is a term of endearment similar to calling a person “brother.”

within him to his new location, and some of his papers had been secreted throughout the signal shop. RX 35 at 121-25; Tr. at 206-09.

On June 11, 2014, at the start of Complainant's shift, Complainant and coworkers Mr. B. Anderson, Derek Lightcap, and Eddie Kline were moving a cabin to another location. CX 28 at 70-71, 76-77, 133; CX 17; CX 26; Tr. at 339-40. During the move, Complainant made a statement about holding a barbeque over the Fourth of July holiday. Though the exact nature of the statement is disputed, it is undisputed that Complainant spoke about inviting coworkers to a barbeque for the holiday. *See* CX 21; CX 26; CX 28 at 76, 130. Moreover, Complainant specifically discussed serving beers,⁵ food, and shooting guns in the air. CX 21; CX 26; CX 28 at 76, 130.

It is unclear precisely how the details of this statement spread. Mr. B. Anderson appears to have recounted the statement to a signalman named Derek Wisker. RX 46 at 1; CX 28 at 58-59. Regardless of how the conversation originally spread, the statement was quickly distorted. A rumor that Complainant had instead stated he wanted to shoot his coworkers at a barbeque ran rampant. *See* CX 28 at 34-35, 58-59; *see also* CX 19 at 1. Upon hearing the rumor among the night shift employees, Mr. Robinson approached Mr. Grass. *See* CX 28 at 34, 37.

Within short order Mr. Grass had a manager (likely Mr. Beason) get written statements regarding the event. *See id.* at 56. Written statements were received from signalman Andrew Darrah, Mr. Robinson and Mr. Smith. *Id.* at 22; CX 48 at 13. Mr. Robinson and Mr. Smith's statements were witnessed by Mr. Twidwell. CX 28 at 22.

The next day, June 12, 2014, additional statements were obtained from Mr. B. Anderson and Norman Don ("Donnie") Tanner. CX 20; CX 21. After obtaining these statements, Complainant was pulled from service and given a trespass warning barring him from returning to the premises. *Id.* at 22. Complainant was not asked to give a statement.

An investigative hearing was set regarding the incident. The investigation as originally dated for late June 2014, but it was later rescheduled to July 8, 2014. CX 23-25. The week prior to the hearing, Mr. Lightcap issued a statement outlining what Complainant had told him regarding the barbeque. CX 26 at 1. Mr. Lightcap also mentioned racial remarks, the water cup, and apparent favoritism in the Sedalia Shop. *Id.*

An investigative hearing was held on July 8, 2014. Multiple witnesses, including Complainant, Mr. Beason, Mr. A. Anderson, Mr. B. Anderson, Mr. Robinson, Mr. Sanders, Mr. Lightcap, Mr. Twidwell, and Mr. Tanner, testified as to the events surrounding Complainant's removal from service. *See* CX 28. The hearing became quite heated at times, with Complainant's union representatives alleging a slew of misconduct in the hearing procedure. *See id.*

⁵ Complainant recalled that he said they would drink "cervezas" in some of his testimony. He appears to use the term, which is Spanish for beer, interchangeably with the English word "beer." Except where directly quoting Complainant, I shall use the word beer in lieu of *cerveza(s)*.

After the investigative hearing, Complainant was given a termination letter. RX 18. Complainant was informed that he had been terminated for violations of “Rule 3.1, 3.5, and 3.6 of the Carrier Rule Book based on your comments concerning the use of a gun and a knife that were heard or observed by co-workers in the workplace and initiation of a verbal altercation with co-worker while working at the Carrier’s Wire Shop in Sedalia, MO.” *Id.* at 1.

Procedural History

On December 4, 2014, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”). CX 67. On December 7, 2015, OSHA issued the Secretary’s findings determining that Respondent had violated the FRSA by its conduct. CX 73. The Respondent appealed that determination to the Office of Administrative Law Judges.

I was assigned this case on January 14, 2016. On January 21, 2016, I issued a Notice of Hearing and Prehearing Order setting this matter to be heard on July 12, 2016. ALJX 1. After receiving a Motion to Compel from Respondent and multiple motions for continuance, this matter was eventually scheduled for hearing for the week of March 6, 2017. ALJX 2; ALJX 3.

At the hearing, I accepted numerous exhibits. *See* Tr. at 13-40. I admitted ALJX 1-5; RX 1-3, 5, 9-22, 24-47, 49-53, 55-73, and 76-77; and CX 1-30, 32-41, 43-52, 55-61, and 63-72 without objection. *Id.* I admitted CX 31, CX 53-54, RX 4, and RX 48 over objections. *Id.* at 14, 17, 29, 35. I sustained objections to CX 42 and did not admit it into the record as evidence. *Id.* at 16. I also deferred ruling on RX 7-8, 23, 48, 54, and 74-75, noting that the exhibits might be relevant for purposes of impeachment. On review of the hearing records, however, these deferred exhibits were not specifically brought up at the hearing, and thus the deferred exhibits are not part of the record. *See generally id.* (containing no testimony that directly involves the deferred exhibits for purposes of impeachment). As such, the evidentiary record post-hearing consisted of: ALJX 1-5; RX 1-5,⁶ 9-22, 24-47, 49-53, and 53-73; and CX 1-41, 43-61,⁷ and 63-72.

On April 11, 2017, Respondent filed RX 78, which contained more detailed medical records of bills submitted in Complainant’s exhibits. On May 25, 2017, I received the Complainant’s closing brief (“C. Br.”) and Respondent’s closing brief (“R. Br.”). On June 30, 2017, I received Complainant’s Motion to Augment the Trial Record (“Motion”). On November 27, 2017, I received Complainant’s Second Motion to Augment the Trial Record (“Second Motion”).

Preliminary Matters

There are currently two outstanding motions and one outstanding exhibit in this matter. The exhibit, RX 78, is related to Complainant’s alleged damages. As is discussed in more detail below, Complainant’s prayer for relief includes medical bills he incurred due to the loss of his insurance coverage. Tr. at 224, 434-35. The exact nature of the medical damages appears irrelevant – the only issue (based on the evidence before me) is whether Complainant’s wife

⁶ Respondent withdrew RX 6 at the hearing. Tr. at 23.

⁷ Complainant withdrew CX 62 at the hearing. Tr. at 13.

actually underwent medical procedures for which she and Complainant were billed. On review of the evidence, I find that Complainant's wife did undergo the billed procedures. Accordingly, I find RX 78 would only be duplicative, and thus I decline to admit RX 78.

Complainant filed two motions requesting augmentation of the trial record. *See* Motion; Second Motion. On review of the motions, I find the reasons for augmentation are not compelling. I believe that the parties had more than adequate time to engage in discovery and develop evidence in this case.⁸ Accordingly, I **DENY** Complainant's Motion and Second Motion. The evidentiary record continues to consist only of those exhibits admitted at the hearing.

Discussion

I. Legal Standard

The Act incorporates by reference the rules and procedures applicable to whistleblower cases brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"). *See* 49 U.S.C. § 20109(d)(2)(A). AIR-21 contains a two-part burden-shifting framework for evaluating whistleblower cases. *Palmer v. Canadian Nat'l Ry.*, No. 16-035, 2016 WL 5868560 at *31 (ARB Sept. 30, 2016) (reissued Jan. 4, 2017).

The first part focuses on the relation between adverse action(s) suffered by an employee and that employee's protected activity. *See id.*; *see also Harp v. Charter Comms., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009). The Complainant bears the burden at this point, and he or she must show, by a preponderance of the evidence that: 1) he or she engaged in protected activity; 2) he or she suffered an adverse action; and 3) the protected activity was a contributing factor in the adverse action. *Palmer*, 2016 WL 5868560 at *9 fn. 74, *31; *Dietz v. Cypress Semiconductor Corp.*, No. 15-017, 2016 WL 1389927 at *4, *4 fn. 24 (ARB Mar. 30, 2016); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 156 (3d Cir. 2013); *Harp*, 558 F.3d at 723 (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475-76 (5th Cir. 2008)); *Heim v. BNSF Ry. Co.*, 849 F.3d 723 (8th Cir. 2017) (quoting *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 789 (8th Cir. 2014)).⁹

Should a Complainant meet this burden, the second part is implicated. The second part, sometimes called the "same action defense," allows the employer to escape liability if it establishes, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. *Palmer*, 2016 WL 5868560 at *31, 36. If employer fails to meet its burden at this point, the claim succeeds.

⁸ I ordered Complainant to respond to Respondent's interrogatories in my ruling on Respondent's Motion to Compel. *See* September 21, 2016 Discovery Order at 10-11.

⁹ The circuit courts list a four prong test, including a knowledge requirement, which the Administrative Review Board ("ARB") has avoided. *See Folger v. Simplex Grinnell, LLC*, No. 15-021, 2016 WL 866116 at *1 fn. 3 (ARB Feb. 18, 2016) (adopting a three prong test). The ARB has specifically explained, for the purposes of the AIR-21 whistleblower framework, that there is no explicit knowledge requirement. *Id.* The ARB noted, however, that the knowledge requirement "might be implicit in the causation requirement." *Id.*

II. Analysis

A. Complainant's Burden

1. Complainant Has Established that He Engaged in Protected Activity

The FRSA broadly defines two types of protected activity: activity regarding reporting or preventing safety issues and activity regarding medical treatment. *See* 49 U.S.C. § 20109(a-c). This matter concerns medical issues. The record clearly reflects that Complainant filed two injury reports regarding the injury he received to his wrist in February 2014. CX 1; CX 4. Under the Act, “a railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment,” nor “discipline, or threaten to discipline¹⁰, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.” 49 U.S.C. § 20109(c)(1-2).

Based on the record and the parties' admissions, I find that Complainant engaged in protected activity by reporting his injury to management.

2. Unfavorable Personnel Action

The parties do not dispute that Complainant was removed from service and then terminated. CX 29; RX 18. While the parties dispute that Complainant's termination was related to his protected activity, no party disputes that termination falls within the “discipline” definition of the Act. 49 U.S.C. § 20109(c)(2).¹¹ The plain language of the act clearly categorizes removal from service and termination as unfavorable personnel actions.

Complainant also accuses Respondent of numerous other acts of retaliation. Complainant specifically alleges 18 retaliatory acts. *See* C. Br. at 3-5. Many of these retaliatory acts are sub-parts of a greater whole (*e.g.*, Complainant's removal from service is separated into two events, the actual removal and the issuance of a trespass warning, both of which occurred simultaneously). Sifting through Complainant's assertions, I list the alleged retaliatory acts below:

- 1) Complainant was knowingly and wrongfully accused of inquiring about security cameras;
- 2) Complainant was twice drug and alcohol tested subsequent to his first injury report;

¹⁰ The Act further explains that discipline “means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.” 49 U.S.C. § 20109(c)(2).

¹¹ Complainant characterizes his termination as a number of retaliatory actions. *See* C. Br. at 4. For the purpose of this proceeding, I find that Complainant's removal from service and termination are two unfavorable personnel actions. I decline to further distinguish those acts into the sub-actions suggested by Complainant.

- 3) Complainant was required to provide a second injury report and was threatened with discipline regarding the timeliness of that report;
- 4) Respondent refused to investigate an incident with a water cup;
- 5) Respondent engaged in a series of activities to perturb Complainant (including moving his workstation and distributing his papers); [and]
- 6) Respondent improperly handled and falsely drummed up complaints regarding Complainant's use of the term homie[.¹²]

C. Br. at 3-4. I address Complainant's contentions that these acts are retaliatory below.

a. Legal Standard

Adverse actions under the Act refer to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Fricka v. Nat'l R.R. Passenger Corp.*, No. 14-047, 2015 WL 9257754 at *3 (ARB Nov. 24, 2015) (citing *Williams v. Am. Airlines, Inc.*, No. 09-018, 2010 WL 553815 at *8 (ARB Dec. 29, 2010)). “[T]ermination, discipline, and/or threatened discipline” are sufficient to establish an adverse action under the Act. *Stallard v. Norfolk S. Ry. Co.*, ARB No. 16-028, 2017 WL 4466937 at *6 (ARB Sep. 29, 2017) (citing *Vernace v. Port Auth. Trans-Hudson Corp.*, No. 12-003, 2012 WL 6849446 at *1 n. 4 (ARB Dec. 21, 2012)). While the triviality of an act is a question of fact, acts that are sufficient to dissuade a reasonable worker from raising a retaliation claim are assuredly non-trivial. See *Fricka*, 2015 WL 9257754 at *3 (internal citations omitted) (noting adverse actions under the FRSA are more expansive than adverse actions under Title VII); *Stallard*, 2017 WL 4466937 at *6 (noting the Title VII standard is higher than that required by the FRSA).

b. Security Camera Inquiry

Complainant asserts that management's accusation that he inquired about the security camera systems was a retaliatory act. C. Br. at 3. Mr. Sanders and Complainant both stated that Mr. Grass aggressively gestured and spoke to Complainant about the security camera conversation. Tr. at 79, 126, 174. Though Mr. Grass denies the conversation was heated, I do not find him to be as credible as Mr. Sanders or Complainant. As such, I find that Mr. Grass did point at and speak aggressively to Complainant in regards to this issue.

On review of the situation, however, I am not convinced that Mr. Grass's actions were sufficient to be an adverse employment action. Simply put, being told to not discuss security cameras with other employees is a trivial action in this case. No discipline was threatened, there is no indication that security camera issues were ever raised again, and the entire event appears

¹² Complainant also includes his removal from service and termination as separate retaliatory acts. See C. Br. at 4-5. As I have already determined that such acts are, by definition, unfavorable personnel actions, there is no need to address them further.

to have lasted no more than a few minutes. Moreover, Mr. Grass did not prohibit Complainant from bringing further questions regarding the security cameras to his office.

Considering all the factors in this matter, I find that Complainant has not established that the security camera incident qualified as an unfavorable personnel action.

c. Drug and Alcohol Testing

Complainant contends that he was specifically singled out for drug and alcohol testing twice in a two month period. C. Br. at 3-4. Complainant noted that he received a drug and alcohol test when he first started working with Respondent in 2010. Tr. at 177. Complainant next explained that he received two drug tests after reporting his injury. *Id.*

Mr. Grass testified, without contradiction, that Respondent has quarterly drug tests. Tr. at 582. The drug tests are performed by a third party company that selects employees at random. *Id.* Mr. Grass admitted that drug tests can be requested on a specific individual, but he states that Complainant was never chosen for such testing. *Id.* at 602-04. Mr. B. Beason confirmed that the list of employees to be tested for drugs and alcohol were submitted by the Respondent's human resources department in Fort Worth, Texas. *Id.* at 711.

I do not find the drug and alcohol testing to be an unfavorable personnel action. The record establishes that the drug and alcohol tests were administered to random individuals chosen by an outside company. Moreover, Complainant provides no evidence to support his contention that he was specifically chosen for the drug and alcohol testing.

A random drug test is not an adverse personnel action. This is particularly true where the participants are chosen at random by a third party company, and where that company reviews the test results. Though Complainant was randomly chosen twice in a short period for such tests, such selection was not an adverse action.

d. Second Injury Report

Complainant asserts that he was threatened with discipline for the late filing of a second injury report, and for insubordination when he cursed and refused to sign a notice of discipline regarding the untimely report. C. Br. at 3-4. The record plainly establishes that Complainant was threatened with discipline regarding his alleged late injury reporting. Tr. at 81, 83-84, 193.¹³ A threat of discipline is sufficient to establish an adverse action under the Act. *Stallard*, 2017 WL 4466937 at *6 (citing *Vernace*, 2012 WL 6849446 at *1 n. 4). Thus as a matter of law, the threat of discipline was an unfavorable personnel action under the Act.

e. Investigation of Water Cup Incident

Complainant argues that Respondent did not investigate a cup of liquid that was placed precariously atop wiring in his cabin, presumably designed to fall on Complainant if jostled. C.

¹³ Mr. Grass does not clarify whether discipline was threatened at the meeting. Mr. Grass merely stated that he didn't discipline Complainant, though he believed he could have. Tr. at 529.

Br. at 4. Complainant's initial assertion is not borne out in the record: it does appear that some investigation regarding the cup of water was undertaken by Respondent's management. *See* Tr. at 625-26. It is unclear whether this investigation was adequate. Mr. Grass did not believe that the managers checked any security tapes or asked anyone on the night shift about the cup. *Id.* at 625.

Under normal circumstances, the failure to adequately investigate the cup of water might have been trivial. However, Complainant and his coworkers worked in areas bedecked with wires. A cup of water rises from a mere prank to potentially something more dangerous in an environment bristling with electricity. The investigation, which was relatively minor, seems inappropriate given the setting. Respondent's signal shop had security cameras. Respondent's managers not only failed to check camera logs (which may or may not have been useful), they also failed to ask other employees about the cup. Tr. at 626. Given the potentially dangerous situation, I find Respondent's lackluster investigation was an unfavorable personnel action.

f. Perturbing Activities

Complainant asserts that Respondent moved his work station, secreted his papers throughout the signal shop, and denied him his tools. C. Br. at 4. Respondent asserts that it did not move his documents, and that it did not wrongfully deny Complainant his tools or move his work station. E. Br. at 16-17.

The record establishes that some of Complainant's papers were moved in his transition to a new workstation. Tr. at 95-97, 153, 209, 338. Moving a person's papers from their workstation to distant places in the signal shop might constitute an unfavorable employment action if carried out by management. This is particularly true when the items moved are employee rule books or other important documents. *See id.* at 208-209. However, there is no evidence in the record showing that Respondent's managers actually moved the documents. Complainant's bald assertions, even under the circumstances of the move, are not sufficient to establish that this adverse action was Respondent's doing. Accordingly, Complainant has not established that this event was an unfavorable personnel action.

Additionally, Complainant was moved to a different work station in June 2014. Complainant was told to leave his tools at his old station. Tr. 206-07. There is nothing untoward about assigning certain tools to certain stations; this type of decision is not inherently unfavorable or non-trivial. Moreover, the parties do not contest that, while Complainant may have preferred certain tools, he was able to retrieve the tools necessary to do his job. Though Complainant had to scavenge some tools after the move, *see id.* at 95-97, 206-09, this did not rise to the level of conduct necessary to constitute an adverse action.

Accordingly, I find that these were not adverse employment actions.

g. "Drummed Up" Homie Complaints

Complainant argues that Respondent "drummed up" the homie complaints by Mr. Robinson. C. Br. at 4. I can find no evidence to support that this was an action by Respondent.

The record clearly establishes that Mr. Robinson brought the complaints on his lonesome without outside prodding. CX 13 at 1; CX 14 at 1; CX 49 at 55-61. If anything, Mr. Robinson alleges he deflected blame on the Respondents regarding the homie complaint. CX 13 at 1; CX 14 at 1.

Accordingly, I find that Respondent did not “drum up” the homie complaints. Respondent’s response to the complaints, to move Complainant to another cabin, is addressed above. *See* Discussion Part II.A.2.g. Complainant has not established that the complaints themselves constituted an adverse action.

h. Potential Unfavorable Personnel Actions

Based on the foregoing, I find that there are four potential unfavorable personnel actions. Those actions are as follows: 1) threatening to discipline Complainant over the second injury report and his response thereto; 2) failing to adequately investigate the water cup incident; 3) removing Complainant from service; and 4) terminating Complainant’s employment.

Respondent argues that, even were the actions taken by Respondent unfavorable, many of them would be untimely under the Act. The Act demands that a Complainant file a complaint with the Secretary of Labor “not later than 180 days after the date on which the alleged [retaliation] occurred.” 49 U.S.C. § 20109(d)(2)(A)(ii).

The statute of limitations under 49 U.S.C. § 20109(d)(2)(A)(ii) does have some latitude based on the situation. The statute of limitations only begins when a complainant “has final, definitive, and unequivocal knowledge of a discrete adverse act[.]” *Williams v. Nat’l R.R. Passenger Corp.*, No. 12-068, 2013 WL 6971139 at *3 (ARB Dec. 19, 2013) (quoting *Cante v. N.Y.C. Dep’t of Educ.*, No. 08-012, 2009 WL 2371238 at *4 (ARB July 31, 2009)). The ARB has also recognized that certain retaliatory actions, such as the creation of a hostile work environment,¹⁴ may span a period of time. *See id.* at *4 (citing *Schlagel v. Dow Corning Corp.*, No. 02-092, 2004 WL 1004875 at *6-7 (ARB Apr. 30, 2004)) (“[a] complaint alleging a hostile work environment is not time-barred if all the acts encompassing the claim are part of the same practice and at least one act comes within the 180-day filing period.”) *Discrete* acts, however, even if related to acts timely filed in other claims, each start “a new clock for filing [claims] alleging that act.” *See Schlagel*, 2004 WL 1004875 at *6 (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 101, 113 (2002)).

In this case, I find that each adverse action alleged by Complainant is a discrete act. The actions, taken as a whole, do not rise to the level of a hostile work environment. I do not find that they, together, show that the workplace was permeated with intimidation, ridicule, and insult sufficient to alter the conditions of Complainant’s employment. Thus, each adverse action must have been alleged in a complaint with 180 days of its occurrence.

¹⁴ The ARB has accepted the Supreme Court’s definition of hostile workplace under Title VII. *See Williams*, 2013 WL 6971139 at *4, *4 fn. 21. “When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ . . . that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’” it is hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

Complainant filed a complaint on December 4, 2014. Using this date, Complainant's removal from service and termination fall within the 180 day period. The investigation and threat of discipline do not. Accordingly, the only unfavorable personnel actions timely before me are Complainant's removal from service and termination.

3. Contributing Factor

For Complainant's case to succeed, he must establish that his protected activity was a contributing factor to his termination. The contributing factor standard is "broad and forgiving." *Deltek, Inc. v. Admin. Review Bd.*, 649 Fed. App'x 320, 329 (4th Cir. 2016) (citing *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014)). While Complainant bears the burden of establishing, by a preponderance of the evidence, that his termination was a contributing factor, he need not establish that it was the only factor in his termination. *Palmer*, 2016 WL 5868560 at *31. Indeed, the ARB has plainly explained that a contributing factor is *any* factor that plays *any* role in Complainant's termination; the protected activity "need only play some role in the adverse action, even an '[in]significant' or '[in]substantial role suffices." *Id.* (brackets in original); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Lockheed Martin Corp. v. Dep't of Labor*, 717 F.3d 1121, 1136 (10th Cir. 2013).

Accordingly, a complainant may satisfy this "rather light burden by showing that her protected activities tended to affect [her] termination in at least some way," whether or not they were a primary or even a significant cause of the termination. *Deltek, Inc.*, 649 Fed. App'x at 329 (quoting *Feldman*, 752 F.3d at 348) (internal quotation marks omitted) (brackets in original). Such determinations may be done through direct or circumstantial evidence. *Palmer*, 2016 WL 5868560 at *32.

In this case, there is no direct evidence of Complainant's termination being predicated in any form on his prior injury reports. The most compelling indirect evidence that Complainant's injury reports were contributing factors in the adverse personnel actions is the temporal proximity between the injury reports and Complainant's adverse actions. "Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation." *Feldman*, 752 F.3d at 348 (citation omitted); *see also Sharkey v. JP Morgan Chase & Co.*, 660 Fed. App'x 65, 67 (2d Cir. 2016) (citing *Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 845 (2d Cir. 2013)) (noting that a "temporal proximity" of less than a month between the protected activity and the unfavorable personnel action could support a prima facie inference that the protected activity was a contributing factor). The closer the temporal proximity, the stronger the inference of a causal connection. *Riess v. Nucor Corp.*, No. 08-137, 2010 WL 4918427 at *4 (ARB Nov. 30, 2010).

There is no mechanical criterion for determining temporal proximity. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009) (citing *Coszalter v. City of Salem*, 320 F.3d 969, 977-78 (9th Cir. 2003)). Close temporal proximity has been found in cases where retaliatory action occurred two weeks to more than three months after a complainant engaged in protected activity. *See id.* (citing *Yartzoff v. Thomasi*, 809 F.2d 1371, 1376 (9th Cir. 1987)) (three months); *Shih-Ping Kao v. Areva Inc.*, No. 16-090, 2018 WL 292767 at *1 fn. 3 (ARB Apr. 30, 2018) (approximately one month); *Pattenaude v. Tri-Am Transp., LLC*, No. 15-007, 2017 WL 512653

(ARB Jan. 12, 2017) (two weeks). Moreover, some intervening events may undercut the temporal proximity argument. *See Cobb v. Fedex Corp. Servs., Inc.*, No. 16-030, 2017 WL 4466938 at *6 (ARB Sept. 29, 2017) (noting a significant gap of time between the protected activity and the adverse action, and that complainant had been promoted during that period).

In this case, Complainant filed his first injury report on February 1, 2014. His second injury report was filed on April 23, 2014. Within two weeks he was threatened with discipline for not timely filing an injury report. *See Factual Findings, supra*. The water cup incident occurred at roughly this same time, and Complainant was later moved to a new work station without proper tools less than a month after the threat of discipline. *Id.* Finally, Complainant's removal from service occurred merely seven weeks after the filing of his second injury report. *Id.* I find that this temporal proximity is sufficient to establish by a preponderance of the evidence that the injury report was a contributing factor to Complainant's adverse action.

Respondent contests that the injury reports played any role in Complainant's discipline. Respondent, instead, asserts that Complainant's removal from service and termination were due to alleged threats he had made to his coworkers. As I address in more detail *infra*, Respondent's handling of Complainant's alleged threats was woefully inadequate and its arguments regarding Complainant's alleged threats are unconvincing. *See Discussion Part II.B.3.b-d, infra*. Moreover, Respondent's reliance on Mr. Robinson taints its actions, as Mr. Robinson is not a credible actor. *Id.* Part II.B.3.a, *infra*. As such, I do not find that Complainant's alleged threats were the sole factor in his termination.

Given the foregoing, Complainant has established that his protected activity was a contributing factor to his adverse action.

4. Complainant Has Met His Burden of Proof

Complainant has established by a preponderance of the evidence that: 1) he engaged in protected activity, Discussion Part II.A.1, *supra*; he suffered unfavorable personnel actions, *id.* Part II.A.2, *supra*; and, 3) his protected activity was a contributing factor in his unfavorable personnel actions, *id.* Part II.A.3, *supra*. Accordingly, Complainant has met his burden of proof. Thus the burden falls on Respondent to establish, by clear and convincing evidence, that it would have taken adverse action against Complainant in the absence of the protected activity.

B. Same Action Defense

Respondent argues that, due to Respondent's zero tolerance policy on violence, Complainant would have been fired regardless of his injury reporting. Specifically, Respondent argues that Complainant's alleged threats and threatening behavior warranted suspension and termination.

1. Threatening Behavior (Homie Conversation)

Mr. Robinson alleged that Complainant confronted him shortly after Mr. Sanders had relayed Mr. Robinson's dissatisfaction with the term "homie" to Complainant. CX 14. Mr. Robinson stated:

I went to Steve's station to get my torch. When I went over there he confronted me about a situation where I was offended about being called "homie." I said yes that I was offended by this. He then asked me if I was forced to say this by management. In fear of further confrontation from Steve Navarro I said yes. He then told me that "good because if it was you, I would settle this outside of work." I felt threatened by this. I then decided to go to Zach Smith my Union Rep. and explained to him what Steve Navarro had said to me. Zach then went to management to explain what had been said

Id. Mr. Robinson provided further detail at his deposition:

I was scared. Like, I had heard of other confrontations that [Complainant] had been in with other employees. That's hearsay; I don't know if they actually happened. And I'd always been told by multiple employees just agree with [Complainant] and move on. And that's exactly what I was doing there. I just didn't want to—I didn't want to start a commotion, and that's exactly what happened anyone.

...

I thought somebody was going to—I—I don't know exactly to—I think to any person that would mean that there's going to be a confrontation outside of work whether it be verbal or physical. That scared me at that point because I'm not a confrontational individual.

CX 49 at 20-22.

Mr. Robinson told Mr. Smith of the alleged incident. Mr. Smith stated:

I was approached by [Mr. Robinson], he stated to me that he was approached or questioned by [Complainant] if he was offended by being called Homie. He then told [Complainant] yes he was offended and then [Complainant] asked him if management was telling him to be offended. [Mr. Robinson] told [Complainant] that it was management that was pushing the issue.

Then [Mr. Robinson] said [Complainant] told him that if he had or was going to management with his problems that he would settle this outside of work.

CX 13. Mr. Smith provided no further information on the allegation.

Complainant contests Mr. Robinson's statements. Complainant issued a statement saying only that he apologized to Mr. Robinson for calling him homie, and that he did not mean any offense. RX 15. At the hearing, Complainant reiterated that he apologized to Mr. Robinson regarding the homie statements and that he didn't say anything regarding settling the matter outside of work. Tr. at 204-05, 247-48. He denied making any threatening statements to Mr. Robinson. *Id.* at 247-48.

Mr. Sanders acted as an intermediary between Mr. Robinson and Complainant. Mr. Sanders went to Complainant to tell him about Mr. Robinson not wanting to be called homie. Tr. at 90. After hearing of Mr. Robinson's discomfort, Mr. Sanders stated that Complainant told him that he did not mean any offense, and that he'd stop using the term homie. Tr. at 90-92. Mr. Sanders also noted that he followed up with Mr. Robinson and that Mr. Robinson did not mention anything about being afraid of Complainant or any conversations about settling the matter outside of work. *Id.* at 141.¹⁵

2. Alleged Threats

a. Complainant's Statement

Respondent did not ask for a statement from Complainant. Complainant has testified at his investigative hearing and at the hearing in this matter as to the contents of his statement. At the investigative hearing, Complainant stated:

This is quoting myself[:] I should invite my friends over, we'll fire off some 9mm shells in the air, drink some cervezas, have a Bar-B-Que, and have a Bar-B-Que.

CX 28 at 1-30. Complainant provided a more general statement at his deposition:

Brian, Derek, and I were pushing the cabin. And I mentioned that maybe we should get together, go to my house, fire off some 9-millimeters, have a barbecue, a little fiesta, that's what my people do.

RX 35 at 128. Complainant further clarified that he was speaking in generalities bringing friends to the mentioned party (*i.e.*, he was not intending any specific individuals). *Id.* at 139.

At the hearing, Complainant reiterated that he had made a statement about firing guns off in the air as part of a 4th of July party. Tr. at 228; 339-40. Complainant added that he specifically stated he'd fire off the shells "in the air." *Id.* at 228. Complainant acknowledged that he had never held a 4th of July party and that he did not own a gun at the time he made the statement. *Id.* at 342-43. He stated, again, that he was speaking in generalities at the time. *Id.* at 346.

¹⁵ Mr. Sanders also recalled telling Mr. Robinson to be careful raising any complaints to management, due to Mr. Robinson's probationary status. Tr. 142-43. Mr. Sanders noted that, as a probationary employee, Mr. Robinson did not have full union protections yet, and Mr. Sanders did not want Mr. Robinson's behavior to negatively affect his employment. *Id.*

b. Eyewitness Statements

The record conclusively establishes that at least two people heard Complainant's statement firsthand. *See* CX 21; CX 26. The recollections of the statement by Mr. B. Anderson, Mr. Lightcap, and Complainant vary. Mr B. Anderson stated:

[Complainant] began talking about how he had so many friends [on the] day and night shift and explained how he wanted to have a bbq at his house and invite them all over for a fiesta and bring out his 9mm and unload it. Then [he] laughed and said in the air of course.

CX 21. Mr. Anderson further clarified that he did not feel threatened and that Complainant never stated that he was going to shoot a gun at people. CX 28 at 73-75 (noting, specifically, that he would have reported the statement if he had felt threatened by it).

Mr. Lightcap, the other witness who was with Complainant when he made the statement, stated:

I have worked with [Complainant] for three years now [and] he has never made me feel threatened. The remark he made [was] "I never knew how many friends I had on days and nights. I would like to have a BBQ and shoot a gun in the air[,]” did not make me feel threatened; I thought he was talking about the upcoming holiday.

CX 26. Mr. Lightcap repeatedly attested that Complainant only spoke of shooting guns in the air. CX 28 at 76-77; RX 45 at 8-9.

c. Non-Eyewitness Statements

Statements regarding the alleged threats were gathered from multiple other employees at the Sedalia shop. These individuals necessarily heard the information either secondhand, *e.g.*, RX 46, or thirdhand, *e.g.*, RX 44. Some of those statements, such as Derek Wisker's, still contain the "in the air" qualifier. Mr. Wisker stated:

I heard from Brian Anderson that Complainant said he had a lot of so called friends here. He also said that he should invite them over for a cookout and unload his 9mm gun (a long pause) in the air of course.

RX 46. Mr. Smith and Mr. Robinson, who heard the statements at least thirdhand,¹⁶ omitted the "in the air" language, instead writing that they had heard Complainant wanted to fire his gun at his coworkers. *See* CX 17; CX 19. At his deposition and at the investigative hearing, Mr. Robinson could not source the rumor: he could only recall that he initially overheard it in an area where the employees would all "smoke and talk" before the night shift. CX 49 at 25; CX 28 at

¹⁶ Mr. Smith mentions overhearing discussion of the statement by a group of employees. *See* CX 28 at 60-62 (Mr. Smith notes that people at the smoking table were discussing it).

34-35.¹⁷ Mr. Smith stated he heard the statement from Mr. Wisker, Mr. Robinson, and others. CX 17; CX 28 at 58-59.

Mr. Robinson would later relay the rumor to Mr. Darrah. CX 49 at 29; RX 31.

d. Statement of Donnie Tanner

After hearing of the alleged threats, Mr. Tanner went to management to provide an additional statement regarding an incident that had occurred at least eight months prior. CX 28 at 84. Mr. Tanner stated:

. . . [O]n more than one occasion [I] have witnessed [Complainant] reach in his pocket and pull a knife¹⁸ out with an open blade and ask other people including myself if we want him to “stick us” or “Do you want me to stick you?” while having a conversation.

CX 20. Mr. Tanner clarified:

“I know [Complainant], and I knew he was joking when he said it, but we’ve got a lot of new employees in there that don’t know Steve and possibly if they would have said it, or if he would have said it to them, or done this to them, they may not have taken it the same way I did, and maybe something else, it would have escalated to something else Or, you would have had an employee lose his job over a joke and it shouldn’t have happened.

CX 28 at 84. Mr. Tanner explained that none of the employees who heard the statement “felt threatened by it because we knew [Complainant] was doing it in a joking manner.” *Id.* at 86. However, he noted he came forward with the statement “[t]o save everybody’s job basically.” *Id.* at 84.

Complainant contests that he ever made a statement regarding a knife while at work. Tr. at 246-47, 356-57. He denies even hearing about allegations regarding a knife until the investigation. *Id.* at 247.

e. Investigation into the Allegations

The alleged threats were initially brought to the attention of Mr. Smith. Mr. Robinson asked Mr. Smith to come with him to management. CX 28 at 58. Mr. Smith had assumed that Mr. Robinson had already informed management at this time, but he was told that management had not yet been made aware of the comment. *Id.* Mr. Grass later stated that Mr. Darrah had been the first employee to bring the statement to his attention. *See, e.g.,* Tr. at 547-50. It is unclear whether Mr. Grass sought out Mr. Robinson regarding the statement sometime before

¹⁷ At one point Mr. Robinson said he heard the rumor from Mr. Smith, but he had previously stated he first told Mr. Smith about the rumor after hearing it from others. *Compare* CX 28 at 37 *with id.* at 43.

¹⁸ Complainant testified without contradiction that he used a pocket “Kershaw knife” with a blade 1-2 inches in length “at most.” Tr. at 246-47.

Mr. Smith learned of the statement. *See* CX 49 at 32 (Mr. Robinson stated that Mr. Grass had spoken to him after he spoke to Mr. Darrah, though he could not recall the “exact fine details” of the conversation).

Shortly thereafter, Respondent’s managers began getting statements. While it appears that Mr. Robinson immediately gave a statement, other witnesses were less willing to come forward. *See, e.g.* CX 28 at 59 (noting Mr. Smith’s reticence to make a statement due to his secondhand knowledge of the events); *id.* at 93 (noting Mr. B. Anderson initially stated he did not feel comfortable making a statement). Of the statements, only one, that of Mr. B. Anderson, was made by an individual who actually heard the statement. Additionally, Mr. Robinson’s statement included language regarding Complainant and Mr. Sanders’ distrust of managers. CX 19. Respondent’s managers did not ask Complainant for a statement. Mr. Grass stated that this was done to avoid further altercations. Tr. at 573-74.

Respondent gathered the statements on June 11, 2014. On June 12, 2014, Mr. Tanner came forward and provided his statement regarding Complainant’s “stick you” comment. Shortly thereafter, Mr. Grass called Respondent’s executive vice-president to discuss the situation. Tr. at 569. They decided to remove Complainant from service. *Id.* A police officer was called, and Respondent’s managers removed Complainant from service and had a police officer issue a trespass warning. *Id.* at 571-73.

Three weeks afterward, Mr. Lightcap wrote a statement regarding what he had heard from Complainant. CX 26; Discussion Part II.B.2.b, *supra*. Mr. Lightcap was not asked to provide a statement – he submitted the statement on his own. RX 45 at 10; CX 28 at 80.

An investigative hearing was held in July 2014. At that hearing, the eyewitnesses to Complainant’s statement reiterated that Complainant had not threatened them or stated that he would fire weapons at his coworkers. CX 28 at 70-74, 77-80. Mr. Smith also described his reluctance to provide a statement to management:

To be honest with you, I would not have liked to have given this statement. I was told by [Mr. Grass], he had come to me with, with this knowledge and asked me if I had heard it, and I had said, yes, I have heard this. And then ten minutes later he came back to me saying that there would other people that wanted me to write this . . . I had told him, I, I didn’t hear it. I heard it secondhand. The only thing I can do is write down what I heard secondhand. Well look, I said, you will have to go to the source to find out it is true. And so, then I did have a couple fellow brothers come to me with issues, and I said, well I’ll write down my secondhand statement, but that’s all it’s going to be.

Id. at 59. He reiterated that the alleged threats were “strictly rumor” to him. *Id.* at 60.

Mr. Tanner also clarified his statement regarding the alleged “stick you” comment, noting that he was not threatened by the statement but knew the statements were mere jokes. *See* CX 28 at 83-85. Other employees, such as Mr. Smith, stated that they had never heard Complainant make any knife comments. *Id.* at 125. Mr. Smith

noted that he had not been approached by any other employees in his capacity as foreman regarding any knife comments. *Id.*

Following the investigation, Complainant was terminated on July 18, 2014. CX 29; Factual Findings, *supra*.

3. Respondent Fails to Establish the Same Action Defense

Respondent's same action defense lacks any grounding in fact. Its arguments are plagued by numerous issues, particularly its reliance on Mr. Robinson's testimony and unsubstantiated rumor. Moreover, the facts, as investigated, plainly show that Complainant did not engage in the conduct for which Respondent said it would have terminated him.

a. Lucas Robinson Is Not Credible

Respondent's determination relies heavily on Mr. Robinson's testimony. Mr. Robinson was no stranger to making false statements. Mr. Robinson's coworkers had experience with Mr. Robinson embellishing stories and lying in the past. *See* CX 28 at 66-67 (noting that Mr. Robinson "could embellish stuff," and recalling an incident where Mr. Robinson lied to a foreman). Mr. Smith had also heard from employees that Mr. Robinson had suggested that he could "get time off" for any person that messed with him. *Id.* at 67-68.

Beyond questions of Mr. Robinson's credibility, the circumstances behind the "bad blood" between Mr. Robinson and Complainant are at least suspicious, if not totally incredible. To lay a foundation for the strange events, Mr. Robinson stated that, prior to leaving the "homie" notes, Complainant would leave notes "telling me do to stuff that I knew with my training and experience that I had received [as a new employee] was not correct[.]" CX 49 at 16.

It is clear that these notes bothered Mr. Robinson. *See* CX 49 at 13-17. When asked why he did not like these notes, Mr. Robinson stated:

[Complainant] is not my boss.

...

I do not like being told what to do, what I could and couldn't do in the cabin. If I got to a point where I got to, you know, a certain point in the cabin when I was told not to do that, and what am I supposed to do, sit there and twiddle my thumbs for the remainder of the shift? That's why I didn't like being told what I could do and what I could not do.

CX 28 at 50-51. Mr. Robinson added that "the fact that somebody who was not my boss was telling me what to do and what not to do" in a cabin that both men shared on different shifts upset him. *Id.* at 52-53.

Mr. Robinson also explained that the notes started to refer to him as “homie.” CX 49 at 58-59 (noting Mr. Robinson was unable to recall exactly when the notes started using homie). Mr. Robinson summarized his offense at being called homie in multiple statements. As he explained at the investigative hearing:

My name’s Lucas. My name is not homie. My name is not Bill. My name is not Mark or dude or man. My name is Lucas. Why I didn’t like that, and another reason too, we are professionals. Homie is a slang term that is very unprofessional and then on top of that, I’m getting told what I need to be doing in the cabin and what I’m not to be doing in the cabin.

CX 28 at 45. Mr. Robinson also noted:

I’m not [Complainant’s] friend or his buddy, I just—you know, I’m Lucas. And I said I don’t like [being called homie].

...

... I don’t – I don’t like the word. I just – I’m not anybody’s friend; I was there to work, do a job.

CX 49 at 17, 75.

The problem with Mr. Robinson’s assertions, however, is that he was typically not called Lucas while at work. Mr. Robinson had a preferred nickname that had even been embroidered on his work jacket¹⁹ in lieu of Lucas. CX 49 at 62. That nickname was “Monster Biscuit.” *Id.*; CX 28 at 48-50.

At the time of Complainant’s termination, Mr. Robinson was 5’ 10” and 400 pounds. CX 49 at 72. Mr. Robinson asserted that Monster Biscuit, a nickname given to him at “signal school,” was not an offensive or derogatory term. CX 28 at 48-49 (noting, specifically, that he had “not looked it up in a dictionary or thesaurus or anything to know if that is a derogatory term.”). The origin of the nickname, or its meaning, was never divulged by Mr. Robinson. Mr. Robinson only noted that the nickname’s source was “rather not appropriate” and that he’d “rather not say it in a professional setting like this.”²⁰ CX 49 at 37-38. Mr. Robinson’s friends still called him Monster Biscuit as of February 2017. *Id.* at 39.

As an initial matter, any statements made by Mr. Robinson regarding his displeasure at being called an “unprofessional” name while at work are not true. Monster Biscuit is not a work

¹⁹ Mr. Robinson refers to this as the orange jacket he wore working for Respondent. CX 49 at 62. It appears to be a safety jacket or vest that was required to be worn while in the signal shop.

²⁰ A cursory search does not reveal “monster biscuit” as a term recognized by any dictionary with which I am familiar. A google search of the term appears to reference a breakfast sandwich served by the Carl’s Jr. fast food restaurant chain. *See Monster Biscuit, CARL’S JR.* (last visited February 22, 2019) https://www.carlsjr.com/menu/nutritional_calculator/monster-biscuitreg.

appropriate name. Professionalism is not a factor, and Mr. Robinson's assertions to the contrary greatly undermine his credibility.

Moreover, I simply cannot understand how Mr. Robinson could view the term homie as offensive when he is routinely called Monster Biscuit at his own insistence. This is particularly true when Mr. Robinson's only explanations for his displeasure with the term was that his name "is Lucas," he was "not anybody's friend," and he "just didn't like being called homie." It strains the imagination to wonder why a large man would not be bothered by the term Monster Biscuit, but would be bothered by the term homie. While there may, perhaps, be another reason why Mr. Robinson disliked the name, such reasoning is not apparent in the record.²¹

Given these facts, I cannot find Mr. Robinson credible. Moreover, as Mr. Robinson's preferred nickname was clearly festooned on his work jacket, Respondent also should have had misgivings regarding Mr. Robinson's statements. Not only was he known for embellishment and untruths, Mr. Robinson's assertions regarding "homie" were simply unbelievable. At the very least, they should have given Respondent's managers pause.

b. Respondent's Investigation Into the Alleged Threats Was Deficient.

As part of its investigation into Complainant's alleged threats, Respondent sought statements from its employees regarding what was said. In doing so, Respondent obtained statements from Mr. B. Anderson, Mr. Robinson, Mr. Darrah (who was informed of the event by Mr. Robinson), and Mr. Smith. *See* CX 17; CX 19; CX 21; RX 31. Respondent also received a statement from Mr. Tanner on unrelated threats. CX 20.

Respondent did not seek out statements from Mr. Lightcap or from Complainant. While Mr. Grass asserted that Respondent did not want to seek a statement from Complainant and potentially trigger further altercations, *see* Tr. at 573, this does not explain why Mr. Lightcap was not asked to give a statement. This is particularly strange given that Mr. A. Anderson had talked with Mr. Lightcap about what he had heard. CX 28 at 99; CX 45 at 10.

Respondent offers no explanation for its refusal to seek a statement from Mr. Lightcap. The failure to include a statement from Mr. Lightcap, a direct eyewitness, is highly suspect.

c. The Investigative Hearing Undercuts Respondent's Assertions

The investigative hearing greatly undermines Respondent's position. No eyewitness to Complainant's statements found them to be threats. Mr. Lightcap and Mr. B. Anderson both stated that Complainant did not even make the threat of which he was accused. *See* Discussion Part II.B.2.b. Rather, their accounts match Complainant's statement that he said they should shoot off guns in the air. *Compare id.* Part II.B.2.b *with id.* Part II.B.2.a. While Mr. B. Anderson notes a pause between the shooting of guns and the qualifier of "in the air," there is no context for

²¹ Mr. Lightcap posited in his deposition that some people may not have liked Complainant because he was "Mexican." CX 45 at 13. This is never explored in detail by either party in this matter, and I have no need to discuss this possibility further.

the nature of the pause or the tone of the response. When compared with Mr. Lightcap and Complainant's statement, the evidence on the whole establishes that Complainant did not make a threat. *The investigative hearing transcript is crystal clear on this point: no eyewitness viewed the statement as a threat.* CX 28 at 74-75 ("I didn't look at it as being a threat."), 76-78 ("[I] did not feel threatened in any way about the statement [Complainant] made.") Thus the record overwhelmingly establishes that Complainant stated he would shoot guns *in the air*, not at his coworkers.

Similarly, the statement by Mr. Tanner also undercuts any assertion that Complainant was making a threat. Beyond waiting many months before reporting the incident (and only after hearing unsubstantiated rumor), Mr. Tanner plainly stated that Complainant was joking and that the statements were not threats. CX 28 at 84-85. While Mr. Tanner states the statement was "inappropriate in a work setting," it is absolutely clear that Mr. Tanner did not view the statement made by Complainant as a threat. CX 28 at 84-85. Moreover, it is not even clear whether Mr. Tanner was telling the truth; Complainant contests the statement, see Discussion Part II.B.2.e, *supra*, and Complainant's coworkers were unaware of any knife incidents, see CX 46 at 28 (Mr. Twidwell); CX 49 at 37 (Mr. Robinson); CX 28 at 125 (Mr. Sanders).

d. Respondent's Assertions Regarding Complainant's Mental Health and Work Relationships Are Unpersuasive

Respondent argues that Complainant's statements should be viewed as threats based on his relationships with his coworkers and his medical records. R. Br. at 25-27. This reasoning is flawed.

As an initial matter, any reliance on Complainant's medical records to justify Respondent's action would be wholly unfounded. The production dates for the medical records on which Respondent relies postdate Complainant's termination. *See, e.g.*, RX 57 (production dated to February 10, 2017). While not every medical record provided has a production date, there is no indication in the record that those medical records were obtained by Respondent prior to Complainant's termination. *See, e.g.*, RX 56 (containing only a single page of paper with no production date included). The record simply does not establish that Respondent had *any* of Complainant's psychological medical records at the time of his termination.

Accordingly, though Complainant may have been depressed or anxious at the time of his termination, Respondent was unaware of this. Respondent cannot argue it would have terminated Complainant in the absence of his protected activity based on documents that post-date the termination. Respondent could use such evidence to argue that Complainant *could* have made a threatening statement, but as the record plainly demonstrates that no such statement was made, see Discussion Part II.B.3.c, that argument is moot.

Respondent also argues that Complainant could not have sincerely meant to invite people over to his home for a barbeque because he was too busy to hold such a party. R. Br. at 25; Tr. at 342-46 (noting Complainant has never held a 4th of July party, and that he did not socialize with his coworkers). Respondent notes that Complainant did not have a gun, and thus he could not have intended to shoot guns off in the air. R. Br. at 25, Tr. at 346.

Whether or not Complainant actually intended to invite people over for a barbeque is of no particular moment. As the record clearly establishes the contents of Complainant's statement. *See* Discussion Part III.B.3.c, *supra*. Even were Complainant merely speaking in generalities, jest, or for some other reason, the eyewitnesses found it not to be threatening. *Id.* Moreover, I am unconvinced that the statement was intended to be malicious or threatening based on its wording and the effect it had on those who actually heard it. Simply put, there is insufficient evidence in the record to support Respondent's assertion that the statement was made in a malicious manner.

Accordingly, Respondent's arguments are unpersuasive.

e. Gun Culture at Respondent's Signal Shop

Another important factor that is largely ignored by Respondent is the gun culture at the Sedalia Signal Shop. It was not uncommon for guns to be a topic of conversation, and conversation about weapons was, by Mr. Grass' admission, not a concern. Tr. at 639. As Mr. Sanders explained:

[Discussion about weapons] is a daily – we live in Missouri. Signalmen are generally athletic people; almost all of us are hunters or fishers or – I would say fifty percent of us hunt, fish, or do both, so it is common. . . . You know it is just very common.

Id. at 116. Talk of shooting guns was particularly common during hunting seasons or around certain holidays, such as the Fourth of July. CX 45 at 44-45.

Mr. Sanders and Mr. Grass also noted that Respondent's employees raffle off guns, bows, and other hunting regalia on a regular basis. *Id.* at 117 (Mr. Sanders states he bought raffle tickets for weapons within at least a month of Complainant's removal from service); *see also id.* at 639. In fact, Respondent even had persons from "Fish and Game" hold a safety meeting to "go over the hunting and fishing rules and stuff." Tr. at 117.

The gun culture at Respondent's signal shop obliterates any notion that the mere discussion of shooting guns, in and of itself, would raise red flags to management.

f. Respondent's Same Action Defense Fails

Respondent's same action defense is simply unsupported by the record. Respondent relies heavily on statements by Mr. Robinson, an individual who is not credible and whose assertions fail to stand up to scrutiny. Discussion Part II.B.3.a, *supra*. The alleged threats reported by second and third-hand witnesses, upon which Respondent relied when removing and terminating Complainant, were nonexistent; Respondent's own investigation plainly establishes that Complainant made no threatening statements. *Id.* Part II.B.3.b-c, *supra*. Further, the gun culture at Respondent's shop only exacerbates the flaws in Respondent's investigation. *Id.* Part II.B.3.e.

Simply put, at every turn the record undermines Respondent's assertions. Instead, the record establishes clearly that Complainant did not make threatening statements. Discussion at Part II.B.3.c, *supra*. Respondent has failed to meet the clear and convincing standard required by the Act to establish the same action defense. Accordingly, Respondent's same action defense fails.

C. Complainant Is Entitled to Damages

Complainant has met his burden of proof, and Employer has failed to rebut Complainant's case by establishing the same action defense. *See* Discussion Part II.A.4, II.B.3.f. Accordingly, Complainant's case succeeds and he is entitled to damages under the Act. 49 U.S.C. § 20109(e). Such damages include compensatory damages and punitive damages. *Id.* § 20109(e)(2)-(3). The regulations specifically explain that an ALJ may issue an order including:

Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of any compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees. . . . The order may also require the respondent to pay punitive damages up to \$250,000.

29 C.F.R. § 1982.109(d)(1). In this case, Complainant seeks damages for lost wages, for medical costs accrued due to the lapse of his insurance, and other damages accrued due to his termination. C. Br. at 34-39. Complainant cannot receive reinstatement, as he has admitted that his wrist injury prevents him from performing the same work with Respondent as he did prior. *See* RX 35 at 20-21 (noting Complainant physically could not work with tools or repair machines due to his wrist injury); Tr. at 373-79 (Complainant admits he could not go back to work due to his wrist injury); *see e.g.* C. Br. at 34-36 (requesting only back pay and no reinstatement).

1. Lost Wages

The issue of lost wages is complicated by the nature of Complainant's work. The parties admit that work at the Sedalia Signal Shop waxed and waned – at the time of Complainant's termination, for example, the Signal Shop was extremely busy. Tr. at 531. These fluctuations in wages are demonstrated clearly in Complainant's W-2 forms. In 2011, Complainant made \$52,684.86 in post-deduction wages. CX 38. This amount dipped to \$47,558.00 in 2012, before more than doubling to \$100,538.59 in 2013. CX 39; CX 40. From January 1, 2014, through June 12, 2014, Complainant had earned \$51,266.51. CX 41.

As Complainant's wages clearly fluctuated, I find his annual earnings are best represented by the average of his total earnings from 2012-2014. This average wage best accounts for the fluctuations in demand experienced by Respondent. Taking the average of these

wages (and noting that Complainant worked 0.45 years in 2014), I find that Complainant's average wage was \$73,127.33 per year in 2014.²²

Having determined Complainant's average wage in 2014 dollars, I must next determine how long Complainant would have been entitled to such wages. The parties agree that, absent Complainant's termination, he would have been furloughed on February 18, 2016.²³ Tr. at 496. Moreover, in early 2016, Complainant's doctor informed him that he would no longer be able to perform his prior job.²⁴ *Id.* at 373.

Given the parties' stipulation and Complainant's testimony, I find that Complainant would have earned wages from June 12, 2014, through February 18, 2016. Applying the average annual wage, Complainant should have earned \$40,461.35 for the rest of his work in 2014, \$73,127.33 for his work in 2015, and \$9,817.09 for his work in 2016. This totals \$123,405.77. However, Complainant engaged in some mitigating work in 2015. He appears to have earned a total of \$9,878.03 that year. *See* CX 55; CX 56; CX 68. Accordingly, as Complainant managed to mitigate his damages slightly in 2015, I reduce the wages owed in 2015 by the amounts mitigated.²⁵

Complainant must also receive interest on these owed amounts. The Secretary has explained, and the ARB has confirmed, that interest on awards under the Act shall be calculated according to the methodology for underpayments in 26 U.S.C. § 6621. *See Laidler v. Grand Trunk W. R.R. Co.*, No. 15-087, 2017 WL 3953476 at *9-10 (ARB Aug. 3, 2017). Moreover, the regulations at 20 C.F.R. § 1982.109(d)(1) explain that such back pay will be compounded daily.

The Applicable Federal Rate for short term quarterly/monthly compounding periods is calculated by the Internal Revenue Service each month. *See INTERNAL REVENUE SERVICE Index of Applicable Federal Rates (AFR) Rulings*, <https://apps.irs.gov/app/picklist/list/federalRates.html> (last visited June 19, 2018). These interest rates can vary significantly depending on the date. *See id.* (compare RR-2018-19 *Applicable Federal Rates* (July 2018) with RR-2017-24 *Applicable Federal Rates* (Dec. 2017)).

To best and most accurately compensate Complainant, I use the average interest rates for each year. I find that using the average yearly rate is a reasonable way to account for the fluctuations in the interest rates over time. Upon determining that value, I round the rate to the nearest full percent, 26 U.S.C. § 6621(b)(3), and then add 3 percent, *id.* § 6621(a)(2). Using these metrics, the interest rate for 2014, 2015, 2016, and 2017 was 3%, and the interest rate for

²² Complainant argues that I should only average the last two years for when he worked for Respondent. *See* C. Br. at 35. I find that limiting Complainant's work in that manner is incorrect, given the cycles of work experienced by Respondent.

²³ It is unclear whether or not Complainant's furlough would have ended as of the hearing date. *See* tr. at 591

²⁴ Complainant was so informed after undergoing surgery on his wrist. Tr. at 373.

²⁵ Complainant asserts that the money he earned from his business, Solace Solutions, does not reflect the additional costs he incurred to start up the business. Tr. at 241-45. Complainant argues that his 2015 earnings should not be mitigated by the total \$6,255.52 that he received from Solace Solutions. *Id.* However, there is no evidence in the record regarding the costs Complainant endured to set up his business, beyond his assertions regarding what he had to procure. As such, I find Employer has established that Complainant's total earnings from Solace Solutions should be discounted from his 2015 wages.

2018 and 2019 was 4%. Compounding the interest owed to Complainant using these values,²⁶ I find that Complainant is entitled to \$136,928.79 in back pay and interest.

2. Medical Costs

Complainant explains that his family incurred additional medical costs due to a lapse in insurance coverage of his wife. Tr. at 400-01. Had Complainant been furloughed in February 18, 2016, his wife would have enjoyed insurance coverage from Respondent. *See id.* at 434-35. In total, Complainant provides medical records showing that his wife entered the Bothwell Regional Health Center on August 22, 2016 and August 31, 2016. CX 53; CX 54. Bothwell Regional Health Center billed Complainant's wife \$3,777.91 for these visits. CX 53; CX 54.

Given the insurance scheme outlined in the record, I find that Complainant's wife would have been covered under his insurance had he been furloughed in February 2016. Accordingly, these medical bills would have been covered by Complainant's work insurance. Complainant is thus entitled to reimbursement for this money. Moreover, Complainant is entitled to interest on this money according to the scheme adopted by the Secretary. *See* Discussion Part II.C.1, *supra*. Accordingly, Complainant is owed a total of \$3,984.33 in medical damages and interest.

Additionally, Complainant requests \$590.00 for medical visits paid to Dr. Gosal after his injury. C. Br. at 36. The records establish that Complainant made \$400.00 in payments starting July 18, 2014. CX 61. His next most recent prior payment was an \$80.00 payment on June 10, 2014. *Id.* On review of the record, I find that Complainant is entitled to \$400.00 in payment for his visits with Dr. Gosal, to the extent they were not already covered by Respondent's insurance. It is clear from the record that Complainant's psychological visits at that date (and afterward) involved issues exacerbated by his termination. *See, e.g.* RX 57 (noting stress due to "legal issues" and Complainant's termination). Accounting for interest as described above, Complainant would be entitled to \$471.35 as reimbursement for payments to Dr. Gosal.

In total, as it does not appear that Complainant has been reimbursed for his visits to Dr. Gosal, Complainant is entitled to \$4,455.68 in medical costs.

3. Other Damages

Complainant argues that he should be reimbursed for money he lost selling his truck, which he alleges he was compelled to sell well under market value. C. Br. at 36. Complainant also requests reimbursement for the amount of money owed on a loan he had taken out. *Id.*

In regards to the sale of Complainant's truck, I note that Complainant has provided no evidence assessing the value of the truck beyond his assertion.²⁷ Absent an actual valuation of

²⁶ To make this calculation I use the basic compound interest formula: $A = P \left(1 + \frac{r}{n}\right)^{nt}$ where P = the principal, r = the interest rate, n = the compounding interval, t = the time period during which interest accrues, and A = the final amount.

²⁷ Complainant at one point mentioned a "Kelly Blue Book" value. RX 35 at 188. No document with such valuation has been entered into evidence. Moreover, Complainant explained that he believed the truck was worth more than the Kelly Blue Book value due to customizations he had made. *Id.*

the vehicle, I cannot determine whether Complainant sold the truck for less than it was objectively worth. As such, I deny Complainant's request for damages vis-à-vis the sale of his truck.

As it pertains to the loan Complainant took out regarding this case, I find that those expenses are not reimbursable. Individuals may take out a loan for various reasons, including paying off crucial expenses at times of insolvency or illiquidity. Complainant has provided no evidence to support the contention that he had to make this financial decision due to Respondents' actions. While Respondent's actions may have had some role in the loan, I cannot find that there is a significant enough connection to lay liability for that loan on Respondent's shoulders.²⁸ This is particularly true when Complainant, himself, characterizes the loan as "just a big—big gamble, you know?" See Tr. at 405.

Accordingly, Complainant is not entitled to damages in regards to the loan he took out.

4. Emotional Damages

While Complainant requests emotional damages for the depression and hardship he suffered, Complainant does not include any specific monetary requests for damage. See C. Br. at 34-39. Moreover, Complainant does not expressly address how his firing exacerbated his other mental issues, or to what extent Complainant's depression worsened due to his firing. *Id.* There is credible testimony of emotional distress and mental anguish caused by his removal from service and termination. Tr. at 475-80. Complainant's psychiatric treatment records also establish Complainant's depression was at least exacerbated by his termination. RX 57 (noting exacerbation of issues due to Complainant's termination and pending legal issues); RX 58 (noting Complainant's depression and feelings of helplessness particularly after Complainant's termination).

Despite the evidence of exacerbation, I essentially have no evidence on which to base a valuation of Complainant's emotional damages and suffering. Even absent a specific valuation of damages, however, I find that Complainant has shown he suffered more than minimal emotional distress and mental anguish, and that he should receive compensation as a result. Accordingly, I find that Complainant has established entitlement to emotional damages in the amount of \$5,000.00.

5. Punitive Damages

Complainant requests significant punitive damages. C. Br. at 39-40. Under certain circumstances, the Act permits an ALJ to award punitive damages to an aggrieved Complainant. 49 U.S.C. § 20109(e)(3); 29 C.F.R. § 1982.109(d)(1). Punitive damages are warranted where there has been a callous or reckless disregard of the Complainant's rights or intentional violations of federal law. *Beatty v. Celadon Trucking Servs., Inc.*, Nos. 15-085, 15-086, 2017 WL 6572143 at *8 (ARB Dec. 8, 2017); *Smith v. Wade*, 461 U.S. 30, 51 (1983) (*citing Adickes v.*

²⁸ Complainant's loan is apparently tied to both this adjudication and a separate adjudication in state court. Tr. at 403-04. This eviscerates any argument that Complainant's loan is sufficiently attributable to this matter, as the loan comes due if either case results in an award (or if both are denied). *Id.* at 404-05.

Kress & Co., 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting)). “The inquiry into whether punitive damages are warranted focuses on the employer’s state of mind and does not necessarily require that the misconduct be egregious.” *Carter v. BNSF Ry. Co.*, Nos. 14-089, 15-016, 15-022, 2016 WL 4238480 at *4 (ARB June 21, 2016). For the purposes of the Act, Congress specifically limited punitive damages to a maximum penalty of \$250,000.00. *See* 49 U.S.C. 20109(e)(3).

In evaluating and applying punitive damage awards, the Supreme Court has provided guideposts that courts must apply, lest the punished party be denied due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell* [henceforth “*State Farm*”], 538 U.S. 408, 417-18 (2003). The three guideposts to consider are: 1) the degree of reprehensibility of the defendant’s misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award;²⁹ and 3) the difference between the punitive damages awarded . . . and the civil penalties authorized or imposed in comparable cases. *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). The Supreme Court has specifically noted that “few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.” *Id.* at 425.³⁰

In this case, Complainant was retaliated against for reporting a workplace injury. While the exact mental state of the Respondent is difficult to track (given that this case relies almost entirely on circumstantial evidence), the record does establish that Complainant started to receive different treatment after his injury reports. As noted above, Complainant suffered multiple adverse actions after he reported his injuries. Discussion Part II.A.2, *supra*. Additionally, Respondent’s investigations into alleged misconduct at the worksite show a cavalier attitude toward safety; the investigation undertaken by Respondent was poorly executed and woefully inadequate. *See* Discussion Part II.A.2.a, 3. Respondent’s failure to even seek first-hand statements regarding Complainant’s alleged threats shows either gross incompetence or deliberate malfeasance. Such actions and attitudes are sufficient to warrant punitive damages in this matter.

As I have found that Respondent’s behavior warrants punitive damages, I must now determine the amount to award. To begin this inquiry, I must evaluate the reprehensibility of Respondent’s conduct. *See State Farm*, 538 U.S. at 418 (citation omitted). This, too, is a difficult question. While Respondent did eventually terminate Complainant for his conduct, he was not openly terminated immediately for making an injury report. Rather, it appears that Respondent waited for a convenient event (the allegation of Complainant making threats) to remove him from service. While this shows a degree of calculation and planning that is reprehensible, I am not convinced that, absent the allegation of wrongdoing, Respondent would have removed Complainant. This at least shows that Respondent did not openly defy the Act by removing Complainant immediately due to his injury report.

²⁹ This value is often represented as the ratio of punitive damages to other damages. *See State Farm*, 538 U.S. at 424-25.

³⁰ Some circuits have rejected strict applications of the *State Farm* proportionality guidepost in Title VII contexts. *See, e.g., Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (“[the] ratio analysis has little applicability in the Title VII context . . .”). The extent to which this relaxed interpretation applies to whistleblower laws is unclear, as a stricter application of the guideposts were suggested by the 10th Circuit. *See BNSF Ry. Co. v. U.S. Dep’t of Labor*, 816 F.3d 628, 644 (10th Cir. 2016).

At the same time, however, the strategic nature of the retaliation is arguably more dangerous than openly flouting the strictures of the Act. Terminating an individual only when an employer believes its malfeasance will be covered by another circumstance potentially allows an employer to obscure its wrongdoing and escape punishment. If there were clear evidence in this case that this was Respondent's strategy, then significant punitive damages would be warranted.

The record contains no such evidence of Respondent's state of mind. Only circumstantial evidence and inference connect the adverse action to Complainant's injury report. The record does establish that Respondent's lower and upper managers reviewed the investigative hearing transcript. Tr. at 705-06. That transcript clearly shows that Complainant did not make threats against his coworkers, and that the only evidence of any such threats were second and third-hand statements. See Discussion Part II.B.3.c, *supra*. Even accepting that Respondent's upper management was unaware of the direct relationship between the injury report and Complainant's tribulations in the signal shop, the investigative hearing transcript is insufficient to warrant termination based only on the evidence contained therein. Still, I cannot eliminate the possibility that the termination was simply due to the incompetence of Respondent's managers. This uncertainty tempers the reprehensibility determination.

Finally, I must compare the circumstances of this matter to similar cases. This is a somewhat difficult task; few cases under the Act have analogous fact patterns to this case. However, looking at a spectrum of cases provides some insight to the pattern of punitive damages awarded in FRSA matters. I provide brief summaries of some example cases below:

- The ARB approved \$50,000.00 in punitive damages in a case where a complainant was retaliated against due to his allegation of workplace injury. *Carter*, 2016 WL 4238480 at *2, 5. Employer retaliated against the complainant by conducting an investigative hearing and firing him. *Id.* at *2. The back pay award, however, covered a period of some five years and was a significant amount. *Id.* at *2-3.
- The ARB approved a punitive damage award of \$25,000.00 despite only \$906.00 in other damages. *D'Hooge v. BNSF Ry. Co.*, Nos. 15-042, 15-066, 2017 WL 1968504 at *9 (ARB Apr. 25, 2017). Complainant in this matter was retaliated against for reporting a safety hazard, which resulted in Respondent terminating the job he was working on (though he had the option to re-bid onto another job). *Id.* at *8. The ARB upheld the punitive damages amount, specifically noting that the value was required to deter Respondent from repeating the misconduct. *Id.* at *9.
- The ARB approved a \$1,000.00 award of punitive damages where an employer threatened discipline against a complainant who filed an injury report. *Vernace v. Port Authority Trans-Hudson Corp.*, No. 12-003, 2012 WL 6849446 at *1 (ARB Dec. 21, 2012). Complainant received damages of two days of back pay. *Id.* at *2.

These example cases do not mesh well with the circumstances of this case. However they provide a scale of ratios (with one, the *Carter* matter, being less than 1 to 1, and another, the *D'Hooge* matter, boasting a 25 to 1 ratio), and they establish that punitive damages in most

FRSA cases are highly fact dependent. Further, they also show a strong policy of deterring employers from penalizing injury reporting.

Given the information above, and being mindful of the Supreme Court's guidance, I find that Complainant is entitled to \$58,553.79 in punitive damages (or 40% of the award in additional punitive damages). I find that this amount is sufficient to deter Respondent's future misconduct. This award will hopefully incentivize Respondent's management to conduct better investigations into potential misconduct before terminating employees.

6. Total Damages

Summing the foregoing damage amounts, Complainant is entitled to \$204,938.26 in damages in this matter. Of this amount, \$136,928.79 are for lost wages, \$4,455.68 are for medical expenses, \$5,000.00 are for emotional distress damages, and \$58,553.79 are for punitive damages.

D. Attorney's Fees

Complainant is entitled to reasonable costs, expenses, and attorney fees incurred with the prosecution of his complaint. *See* 49 U.S.C. § 20109(e)(2)(c). Counsel for Complainant has not submitted a fee petition in this matter. Counsel for Complainant is instructed to file and serve a fully supported application for fees, costs, and expenses (stating the work performed, the time spent on such work, and the reasonable basis for counsel's rate). Complainant's counsel is granted 30 days from the issuance of this order to provide a fee application, and Respondent is granted 30 days thereafter to file an objection (should it be warranted).

Conclusion

Based on my review of the entire record, I find as follows. Complainant engaged in protected activity when he reported his injury to his Employer. *See* Discussion Part II.A.1, *supra*. Complainant suffered unfavorable personnel actions when he was removed from service and then terminated from his employment with Respondent. *See id.* Part II.A.2, *supra*. Complainant established that his injury reporting was a contributing factor to his termination. *See id.* Part II.A.3, *supra*. Respondent failed to establish that it would have terminated Complainant in the absence of the protected activity. *See id.* Part II.B.3.f, *supra*. Complainant thus is entitled to an award of damages for back pay (minus mitigation), medical damages, punitive damages, and attorney's fees. *See id.* Part II.C-D, *supra*.

ORDER

Given the foregoing:

1. Respondent shall pay Complainant \$136,928.79 in lost pay and benefits;
2. Respondent shall pay Complainant \$4,455.68 in medical expense damages;

3. Respondent shall pay Complainant \$5,000.00 in emotional distress damages;
4. Respondent shall pay Complainant \$58,553.79 in punitive damages;
5. Complainant is granted 30 days from the date of issuance of this order to submit an application for attorney's fees; and
6. Respondent is granted 30 days thereafter to file an objection to the fee application.

SO ORDERED.

PAUL R. ALMANZA

Associate Chief 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.

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. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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 the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(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. §§ 1980.109(e) and 1980.110(b). 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. § 1980.110(b)