

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 September 2017

Case No.: 2016-NTS-8

In the Matter of:

JEREMY DAVIS,
Complainant,

v.

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY,
Respondent.

Appearances:

David W. Neel, Esq.
David W. Neel, LLC
Shaker Heights, Ohio
For Complainant

Robert M. Wolff, Esq.
Littler Mendelson, P.C.
Cleveland, Ohio

and

Jennifer B. Jackson, Esq.
Associate Counsel, GCRTA
Cleveland, Ohio
For Respondent

DECISION AND ORDER

PROCEDURAL HISTORY

This matter arises under the National Transit Systems Security Act (“NTSSA”), 6 U.S.C. §1142, and the regulations found at 29 C.F.R. Part 1982. Jeremy Davis (“Complainant”) was demoted from his position as a Motor Repair Leader with the Greater Cleveland Regional Transit Authority (“Respondent”) on June 2, 2014. On November 15, 2014, Complainant submitted a written complaint to the Occupational Safety and Health Administration (“OSHA”) of the United States Department of Labor. In this complaint, Complainant alleged that he had been unlawfully demoted in retaliation for his participation in a safety investigation.

OSHA conducted an investigation. On August 24, 2016, OSHA issued the Secretary's Findings, Preliminary Order and Report of Investigation ("Preliminary Order"). Both parties asked for a hearing before an Administrative Law Judge.

On April 18, 2017, Complainant filed a "Motion to Dismiss Respondent's Request for Hearing" ("Motion"). The Motion argued that Respondent's request for a hearing was not timely. Complainant asked that I determine that the Findings contained in the Preliminary Order issued by OSHA had become the final action of the Secretary of Labor because no timely appeal of those findings was perfected by Respondent. Respondent filed a Brief in Opposition to the Motion on April 19, 2017. In an affidavit attached to its Brief in Opposition, counsel for Respondent acknowledged that she had "miscalculated the due date"¹ for filing Respondent's Request for Hearing, and conceded that Respondent had filed its Request for Hearing "three days past the thirty-day deadline specified by the agency"² as a consequence of the miscalculation.

On April 25, 2017, I entered an Order granting the Complainant's Motion. In my Order, I found that under the plain language of 6 U.S.C. §1142(c)(2)(A)³ and 29 C.F.R. §1982.106(b),⁴ the "Secretary's Findings" contained on pages 1 through 4 of the Preliminary Order became the final findings of the Secretary of Labor on the 30th day after the Preliminary Order was received by the parties. I further found that in the absence of a timely appeal being filed by Respondent, I was without authority to entertain Respondent's objections to the "Secretary's Findings" contained on pages 1 through 4 of the August 24, 2017 Preliminary Order. I concluded that the facts contained in the "Secretary's Findings" were to be taken as having been finally established, and thus not subject to re-litigation at the formal hearing. My Order contained the following language:

I find that it has been conclusively established that Respondent violated NTSSA when it retaliated against Complainant because Complainant engaged in activity protected under the statute. I further find it has been conclusively established that Respondent failed to prove by clear and convincing evidence that it would have taken the same adverse employment action against Complainant in the absence of Complainant's participation in protected activity. No further evidence, briefing or argument as to the question of Respondent's violation of the statute will be permitted at the hearing, unless that evidence is also relevant to determining what remedial relief may be appropriate. Complainant will bear the burden of proof to demonstrate that he is entitled to any of the types of relief permitted to a successful complainant under the statute and regulations. I will not be bound by, nor will I give any

¹ Affidavit of Jennifer Jackson at paragraph 9.

² *Respondent's Motion in Response to Motion to Dismiss* at 2.

³ "If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review."

⁴ "If no timely objection is filed with respect to either the findings and/or the preliminary order, the findings or preliminary order will become the final decision of the Secretary, not subject to judicial review."

deference to, any of the specific remedies awarded in the Preliminary Order – each and every element of relief sought by Complainant will need to be proven by evidence introduced in this *de novo* proceeding on remedies.

APPLICABLE STANDARDS

Where, as here, Complainant has prevailed on his claim, I am directed by NTSSA⁵ to award “all relief necessary to make the employee whole.” As is applicable in this case, the statute requires me to restore Complainant’s seniority, award him back-pay with interest, determine any amount of compensatory damages, and require Respondent to pay Complainant’s attorney fees. NTSSA also permits (but does not require) an award of punitive damages in an amount not to exceed \$250,000.

THE HEARING

The hearing was held on May 22 and 23, 2017 in courtroom 11-A of the Carl B. Stokes United States Courthouse in Cleveland. These persons appeared as witnesses during the hearing: Jeremy Davis, Jacob Kabelen, Arthur Lyons, Christopher Smith, Casey Blaze and Dan Tighe. The following exhibits were admitted into the record at the hearing: C-1 through C-12, R-1 through R-3; R-5 through R-18 and R-20 through R-28. The parties have now submitted their respective post-hearing briefs. Counsel for Complainant has submitted his application for attorney fees. Respondent does not oppose the amount of attorney fees or expenses sought by Complainant’s counsel.

STIPULATIONS⁶

The parties have stipulated, and I so find:

1. Complainant was demoted from the Motor Repair Leader position on June 2, 2014. He returned to the position on November 22, 2015.
2. Between June 2, 2014 and November 21, 2015, three different people filled the Motor Repair Leader position from which Complainant was demoted. They worked a total of 727 hours of overtime, 212 hours before February 1, 2014⁷ and 515 hours after February 1, 2015.
3. The Motor Repair Leader hourly wage increased as of February 1, 2015.

⁵ Specifically 6 U.S.C. §1142(d).

⁶ In their respective Pre-Hearing Statements, each party proposed a series of stipulations (See *Complainant’s Pre-Hearing Statement* at 2; *Respondent’s Pre-Hearing Statement* at 2-3). These proposed stipulations are not entirely congruent, and I do not adopt them. Following the hearing, the parties submitted written stipulations which had been expressly adopted by both parties. I adopt the written stipulations submitted by the parties after the conclusion of the hearing. Those stipulations are set forth here.

⁷ I believe the Stipulation should state here “2015” instead of “2014.”

4. The Motor Repair Leader overtime wage rate (time-and-a-half) from June 2, 2014 until February 1, 2015 was \$43.98 per hour.
5. The Motor Repair Leader overtime wage rate (time-and-a-half) from February 1, 2015 until November 21, 2015 was \$45.30 per hour.
6. A total of \$32,653.26 was paid to the three individuals who filled the Motor Repair Leader position from June 2, 2014 to November 21, 2015.⁸
7. The overtime pay earned by Complainant from June 2, 2014 through November 21, 2015 was \$2,570.10.
8. Complainant's non-overtime wage loss resulting from a lower hourly wage during his period of demotion from June 2, 2014 through November 21, 2015 is \$4,219.60.

COMPLAINANT'S WAGE LOSSES

The parties have stipulated that the difference between the straight-time wages Complainant would have earned but for his demotion and what he actually did earn during the period of his demotion is \$4,219.60. There seems to be no disagreement that this amount should be awarded to Complainant as a part of making him whole.⁹

The parties have stipulated that the three persons who served in the Motor Repair Leader position during the period of Complainant's demotion earned a total of \$32,653.26 in overtime. Complainant testified that he believes he would have worked at least as many overtime hours during the demotion period as did the three others who worked in the Motor Repair Leader position.¹⁰ While Complainant's testimony about the number of overtime hours he likely would have worked is speculative, the entire line of inquiry concerns a hypothetical circumstance. I am forced to resolve this hypothetical question solely because Respondent acted unlawfully in demoting Complainant, and Complainant is thus entirely without fault in presenting to me a hypothetical question which must be answered. Respondent does not challenge the proposition that overtime would have been earned by Complainant during the period of his demotion, nor does Respondent argue that any amount less than the stipulated amount of \$32,653.26 should be used in my calculation of the overtime to be paid.¹¹ Based upon the evidence and stipulations, and based on Respondent's failure to argue any contrary position, I find: (1) overtime was available to those in the Motor Repair Leader position during the time of Complainant's demotion; and (2) Respondent was willing and able to pay substantial amounts of overtime to those persons holding the Motor Repair Leader position during the period of Complainant's demotion; and (3) Complainant would have earned \$32,653.26 in overtime wages had he been in the Motor Repair Leader position between June 2, 2014 and November 21, 2015.

⁸ I interpret this Stipulation to mean that \$32,653.26 in overtime wages was paid to the three individuals during the period.

⁹ *Respondent's Post-Hearing Brief* does not discuss the award of straight-time back pay to Complainant.

¹⁰ Tr. 202.

¹¹ *Respondent's Post-Hearing Brief* does not discuss the award of overtime as a component of back pay owed to Complainant.

The parties have stipulated that Complainant earned \$2,570.10 in overtime wages in the position he actually held between June 2, 2014 and November 21, 2015. I believe it would be improper “double counting” to allow Complainant to keep this \$2,570.10 if he is awarded the \$32,653.26 in overtime compensation discussed in the immediately preceding paragraph. I thus award Complainant \$30,083.16 (\$32,653.26 – 2,570.10) to make him whole for the overtime he would have earned in the Motor Repair Leader position between June 2, 2014 and November 21, 2015.

In order to make Complainant whole, Respondent is Ordered to pay Complainant \$34,302.76 (\$4,219.60 straight-time + \$30,083.16 overtime) as replacement for the wages lost by Complainant between June 2, 2014 and November 21, 2015.

COMPLAINANT’S EMOTIONAL DISTRESS DAMAGES

In his *Post-Hearing Brief*, Complainant asks that I award him \$50,000 in emotional distress damages.

Complainant was asked to describe the meeting in which he was told that he was being demoted:

Q. Did anybody in the meeting tell you why you were being denied the promotion?

A. Jackie Sorohan asked Jim Parks. She said, Mr. Parks, would you like to give Jeremy any -- would you like to give Jeremy the reasons he's been demoted?

And Jim says -- and he draws everything out. Well -- and he's so vague. There's -- he said, There's the coaching, John and the training.

Q. John who?

A. He didn't say John -- or he didn't say who. He just said John. And when he said coaching, I thought -- you know, I'm thinking the coaching is wrong. And I told them.

I said, The coaching is wrong. It's inaccurate. And then he said, You're just not the man I wanted. And I was like, I'm not the man you wanted? And he says, Yeah, you know, looking right at me. So at this point I'm not fighting nobody. I'm not even -- so I was just like, Okay.

Q. Did Chris Smith say anything at the meeting?

A. Oh, yeah. Yeah. Can we skip that?

Q. What did he say?

A. Really?

JUDGE BELL: This is an important part of the case. I think whatever you were told –

BY MR. NEEL:

Q. Tell His Honor what Chris Smith said.

A. I wrote it down.

Q. What do you remember he said? Just tell Your Honor. Just say it right to his face.

A. I really can't.

Q. Why?

A. It's more than what I need.

Q. Is it painful emotionally?

A. Yeah. Do you want to trade places with me?

MR. NEEL: Your Honor, can we take a short break, because I would like him to testify about this.

JUDGE BELL: I guess I'll defer to the Respondent's counsel about whether they want to take a short break to allow him to take –

THE WITNESS: I just need a minute.

MR. WOLFF: Yeah. If this is testimony, Your Honor, things you need to hear, then obviously we don't want to do anything to get in the way of it.

JUDGE BELL: All right. Let's take ten minutes then. We'll be back at 3:20.

(Off the record at 3:07 p.m.)

(On the record at 3:18 p.m.)

JUDGE BELL: Mr. Neel, go ahead.

BY MR. NEEL:

Q. How long did the demotion meeting take? How long did it last?

A. A lifetime.

Q. In minutes, how long did it last, if you can recall?

A. You know, I'm not even sure. It lasted a long -- it lasted a long time but, you know, maybe it was a half an hour.

Q. Did anybody at the meeting tell you that your performance was unsatisfactory?

A. That my performance was unsatisfactory? Well, Chris Smith said that he's got the records of poor performance in front of him.

Q. Did he or anybody else at the meeting tell you how long your performance had been unsatisfactory?

A. He said it dated back to 12/13 of last year, which would have been 2013.

Q. When the meeting ended, what happened?

A. I asked to see Jackie in private, without everybody. And she asked me if I wanted John Griffin to stay, and I said no, because he didn't say a word during this whole thing. They wouldn't show me the reasons, because Chris Smith has them under his hand. And he says, These are the reasons we're demoting you. And he says, We're not showing them to you and looks at Jim Parks, and Jim Parks agrees that -- you know, he shakes his head.

JUDGE BELL: Do you have any idea what those things were that he was referring to?

THE WITNESS: No. I had no idea. I had no idea what he was talking about. And I said, It's manufactured. This is manufactured. There's -- because I'm pleading with him, like

maybe he's got the wrong information. You know, maybe there's a mistake somewhere. But -- so I asked to see -- talk to Jackie in private, and everybody leaves. And I say, You know, I'm being retaliated against. And I said, This is all because I went to Safety. And she wasn't saying nothing.

Then I said, Can I have -- can I see the reasons I'm being demoted? And she said no. If I want to see them, I have to ask Angela Smith, which is the director of Labor Relations. And I said, Didn't Jacob call you and tell you what was happening with me? And she said, Me and Jacob speak all the time. We talk all the time, but we didn't -- we didn't mention your name. And I'm pretty sure -- that's all I can remember at this time. That's how that went. There was a lot that happened, but that's what I remember at this time.

Tr. 170-174.

Complainant felt that his demotion was unjustified, and that he was being retaliated against for his participation in a safety investigation. Complainant's testimony indicates that he suffered emotional distress during and immediately after he was informed that he was being demoted. Complainant later testified about the longer-term impact of the demotion:

Q. From the time that you began to experience what OSHA determined to be retaliation by your supervisors until the time that you received OSHA's finding of fact and order, how did you feel about how you had been treated?

A. There's a million feelings. I don't know how to describe it. It's horrible. It's an empty feeling. You know, I guess I could say, you know, they say -- I wish I -- you know, I ask that question all the time. I try to find out how I feel. But I -- you know, during that time frame it's just you're -- it's a paralyzing feeling. You know, because this whole time prior to that was -- you know, you hang on every word that somebody says, hoping that they're going to find something or give me that phone call.

But there's so many highs and lows that when you get let down and you know -- I know that something's wrong here, but nobody will listen. So after a while, you just -- there's no more highs. You're just an empty person. And it's not just me, too. You know, it's -- my family picks up on how I feel.

Q. Did your experience that you've described today affect your marriage?

A. Yes, absolutely.

Q. How did it affect your marriage?

A. It not only paralyzed it, it just -- you know, there is no divorce. That's -- you know, my wife and I have known each other since we were five. We'll never get divorced. I shouldn't say never, but -- no, I -- you know, that's not an issue, you know. That's not what I've ever been worried about, never been concerned about that. But what is an issue is -- it's nonproductive. It's -- I know there's a word for it, other than paralyzing. But it's -- it's been deeply affected by this. Because all of our conversations seem to revolve around, you know, this, or has something to do with this. You know, she's really worried that something's going to happen to me. So I've got to spend my time trying to -- trying to reassure her that it won't. But then I'm driving to work thinking, Oh, what if it does? Then how am I going to explain it, you know. So it's just one problem after another, after another, after another. And I've fixed things my entire life, and I can't fix this.

Q. So as you've lived with this problem -- I mean, how often do you think about what happened to you, that you've described today?

A. Every day.

Q. How long has that been going on for?

A. Over three years.

Q. Have you ever seen a therapist?

A. You know, no, no. But I don't want anti-depressives (verbatim). I want anti-retaliation. I don't want -- you know, I don't want none of that. I don't even know if that would help. I don't -- you know, seeing a therapist is just another -- another -- another wound. You know, I don't see them as a benefit. I see ending this soon as a benefit.

Q. Is that why you've pursued this case for as long as you have?

A. Yes, absolutely.

Q. Have you talked to a priest or minister or pastor about your experience?

A. No.

Q. Your wife?

A. My wife.

Q. Who have you shared the experience with to talk about things?

A. Just my wife. But that does more harm than good and puts the burden on her. So, you know, she knows a whole lot more than she needs to know, actually. But, you know, it's still -- this whole situation is Catch-22 situations, you know. You're wrong if you do and you're wrong if you don't. That's my -- when something like this gets derailed, and nobody will do anything to fix it or at least try to fix it, the whole situation just caves in on you. So when it's so simple that all you have to do is meet with me and we could have cleared this up quickly. And it was just -- it was just a misunderstanding, no harm, all is good, let's get back to work type of thing. But it never happened.

Q. Have you slept as well as you did before this experience?

A. No. Absolutely not. No, that doesn't happen.

Q. What's your sleep been like?

A. It usually has to -- it usually has to -- see, that's a dangerous thing too. Because going to work and working in this environment and not being rested is a problem. But, you know, I get by with what I can, a few hours. I've been up all night already.

Tr. 186-189.

I credit Complainant's testimony about the lasting emotional impact of his demotion, and note that this testimony was not challenged by Respondent. To be clear, I am not awarding emotional distress damages to Complainant's spouse.

Complainant does not explain the basis for his request that I award him \$50,000 in emotional distress damages. Respondent seems to suggest that the value of Complainant's emotional distress claim is approximately \$500.¹²

¹² Respondent's Post-Hearing Brief at 12.

Complainant's testimony alone supports his assertion that he has suffered emotional distress damages caused by his demotion. I find Complainant's testimony in this regard to be credible. As to the severity of Complainant's damages, I note that Complainant has not sought counseling or medical assistance. No medications have been prescribed. While his marriage has been stressed, the union remains intact. I heard no testimony that the loss of income suffered by Complainant caused the type of economic harm (foreclosure, repossession, loss of creditworthiness) which may be emotionally taxing. While Complainant was unlawfully demoted from his Motor Repair Leader position, that demotion was relatively brief, and he has now been fully restored to that same position. Based upon the record before me, I believe Complainant should be compensated for his emotional distress at the rate of \$250 per month. I find that Respondent's liability for Complainant's emotional distress damages began at the time of Complainant's demotion (June 2014), and ended at the time of the issuance of the Secretary's Findings (August 2016), when a public document concluded that Complainant's demotion was unlawful. I find that an award of damages in the amount of \$250 per month for the 26 months beginning from the month of Complainant's demotion until the month in which the Secretary's Findings were issued is appropriate. I find the award of \$6,500 to Complainant is fully sufficient to make him whole for the emotional distress described by him during the hearing.¹³ I thus Order Respondent to pay \$6,500 to Complainant to compensate Complainant for his emotional distress damages.

PUNITIVE DAMAGES

Complainant asks me to require Respondent to pay \$250,000 in punitive damages. This is the maximum amount allowed under NTSSA. In my consideration of punitive damage questions, I have generally been guided by the ARB's recent decision in *Youngerman v. United Parcel Service, Inc.*, ARB Case 11-056, ALJ Case 2010-STA-047 (ARB February 27, 2013).

I am required first to determine whether an award of punitive damages is appropriate. If that question is answered in the affirmative, I will then perform a second analysis to determine the amount of punitive damages to be awarded.¹⁴

At step one of the punitive damage assessment in this case, I am primarily examining the state of mind of those involved in the decision to demote Complainant from his position as Motor Repair Leader. I will also evaluate the state of mind of any other persons who may have taken action(s) designed to discriminate against Complainant for his participation in activity protected by the NTSSA.¹⁵ Phrases such as "reckless indifference" to, or "callous disregard" of,

¹³ I have quoted above Complainant's testimony about the meeting in which he was told that he was being demoted. Tr. 170-174. It was clear to me at the hearing that Complainant wished to more fully describe the emotions he felt at the time of his demotion. I granted a recess to allow Complainant to compose himself so that he might testify about these matters. I informed Complainant that his testimony in this regard was "an important part of the case." Despite my considerable efforts to allow Complainant to describe the exact circumstances of his demotion, that testimony was never offered. I do not speculate as to what Complainant's testimony might have been in this regard.

¹⁴ This bifurcated approach is set forth by the ARB in *Youngerman*, supra, slip op. at 5.

¹⁵ For example, there was testimony during the hearing that Complainant believed he was sent for a drug test as part of Respondent's plan to retaliate against him. See Tr. 162-65. This drug test issue is not discussed in Complainant's *Post-Hearing Brief*, and it appears Complainant is no longer alleging the drug test serves as a basis for punitive

the federally-protected rights of Complainant describe in general terms the type of evidence that will satisfy the step one threshold.¹⁶

In support of his claim for punitive damages, Complainant first argues:

Respondent's entire operation demonstrates a reckless and callous indifference to all of its employees' federally protected rights under the NTSSA. [Respondent] is a public transit transportation system. It has a legal department and outside lawyers. Yet [Respondent's] Personnel Policies and Procedures Manual do not mention the NTSSA and its prohibition of retaliation against whistleblowers. [Respondent's] bulletin boards, including the one at the rail shop, do not contain a poster advising employees of their rights under the NTSSA. [Respondent] does not provide NTSSA or OSHA whistleblower training to its employees at orientation or after. Respondent presented no evidence whatsoever that it trains its managers, supervisors and other employees on the NTSSA and the rights it creates.

Complainant's *Post-Hearing Brief* at 17-18 (internal citations omitted).

I decline to award punitive damages for the conduct alleged in that portion of Complainant's argument quoted above. First, I do not believe I may award punitive damages in the absence of a showing that there was a callous disregard of the federally-protected rights of the specific person alleging discrimination. In this case, I do not believe that proof of general workplace conditions which affect all employees coming into that workplace (such as a lack of posters) is itself sufficient to prove that there was callous disregard of the rights of the specific Complainant in this case. Second, Complainant does not cite any statute or regulation requiring an employer subject to NTSSA to post any particular type of poster in its workplace, or to provide any particular type of training to its employees. In the absence of a requirement to provide training or to post information about whistleblower rights under NTSSA, I am unable to find a federally-protected right which was violated by Respondent's failure to so train or post.

Lastly, Complainant's argument quoted above is written in present tense, but the insinuation is that Respondent does not now, and never has, cared about protecting the rights of whistleblowers. I believe this assertion overlooks written policies issued to employees of Respondent.

Respondent issued a "Personnel Policies and Procedures Manual"¹⁷ to its employees. There is no publication date on the Manual in evidence, but Complainant appears to have signed a receipt acknowledging his receipt of the Manual on September 25, 2006.¹⁸ Page 22 of the

damages. I would also have considered evidence that Complainant was subjected to discriminatory acts after his demotion, but no such evidence was presented.

¹⁶ See generally, *Youngermann*, slip op. at 6-7.

¹⁷ Respondent's Exhibit 13.

¹⁸ Complainant's acknowledgement appears 6 pages from the end of the exhibit.

Manual¹⁹ contains Section 600.07, which stresses the importance of safety: “[A]ll GCRTA personnel are charged with the responsibility of promoting the safety and security of passengers, employees, and the general public who come in contact with GCRTA transportation systems.” On page 3 of the Manual²⁰, Section 200.02 contains the following language: “[E]mployees who, in good faith, report violations of this policy . . . will not be subject of reprisals or other punishment as a consequence of reporting the violation.” Reading Sections 600.07 and 200.02 of Respondent’s Personnel Policies Manual together would suggest that it is the policy of Respondent that employees of Respondent who report safety violations will not suffer retaliation.

A safety handbook²¹ has been created by Respondent and distributed to all employees.²² A letter from Respondent’s CEO/General Manager appears at the beginning of the handbook. In part, that letter states:

[Respondent] is committed to the safest transit operation possible; as a result, [Respondent] is committed to having uninhibited reporting of all incidents, hazards and occurrences which may compromise the safe conduct of our operations. To this end, every employee is responsible for communicating any information that may affect the integrity of transit safety. Such communications must be completely free of any form of reprisal.

[Respondent] will not take disciplinary action against any employee who discloses an incident or occurrence involving safety. . . .

I urge all staff to use our hazard-reporting program to help [Respondent] become a leader in providing our customers and employees with the highest level of transit safety.

Respondent’s Exhibit 15 at 5 (emphasis added). It’s unclear to me whether the emphasized language appeared in the safety handbook at the time of Complainant’s demotion, or whether the language was added at some later date.²³ However, Complainant’s assertion that Respondent has never expressed a policy supporting whistleblower protection is inaccurate. The evidence in the record does not support Complainant’s assertion that “Respondent’s entire operation demonstrates a reckless and callous indifference to all of its employees’ federally protected rights under the NTSSA.”

Complainant’s second argument for punitive damages is essentially this:

¹⁹ A notation at the bottom of page 22 says it was “Adopted” on September 17, 2013.

²⁰ This page also contains a notation that it was “Adopted” on September 17, 2013.

²¹ Respondent’s Exhibit 15.

²² Tr. 346.

²³ A brief and inconclusive discussion of this issue occurs in the transcript of the hearing at page 346. The last page of Exhibit 15 contains two acknowledgements of receipt of the handbook. One date is in 2012, the other is in 2015. Nothing in the testimony helps me to understand when the emphasized language above was added to the text of the letter appearing on page 5 of the Exhibit.

Respondent concocted false reports about Complainant's performance and targeted him for demotion. Fabricating evidence is surely clear evidence of reckless indifference and callous disregard. It is compelling evidence of the egregiousness of that conduct and of an evil motive. The evidence of retaliation is a window into the minds of Respondent's managers. It demonstrates a concerted effort to punish Complainant for expressing his safety concerns

Complainant's Post-Hearing Brief at 18-19.

I believe when Complainant uses the phrase "false reports" in the quoted language above, he is referring to 2 documents: (1) the "coaching letter" issued to Complainant on May 6, 2014²⁴ and (2) the May 9, 2014 letter recommending that Complainant be demoted from his Motor Repair Leader position.²⁵

I would have appreciated a great deal more detail from Complainant in his Post-Hearing brief discussing the evidence which he believes supports his charge that Respondent "fabricated evidence" in order to justify his demotion. I have re-read the testimony carefully and I have considered all of the documentary evidence. I am unable to find any evidence corroborating the claim that false statements were knowingly created by any person as a subterfuge for demoting Complainant. In order to succeed on an argument that Respondent's supervisors acted with the type of "reckless disregard" or "callous indifference" sufficient to support an award of punitive damages, I need to be persuaded that the record contains some evidence that Respondent's supervisors were aware of the falsity of the statements being made by them, and that they made those statements anyway as part of an effort to discriminate against Complainant.

The coaching letter was written by Casey Blaze, who was the Rail Shop Supervisor at the time the letter was written. I find Blaze to be a credible witness. Blaze admitted at the hearing that there is at least one factual error contained in the coaching letter.²⁶ However, Blaze testified that the balance of the coaching letter was accurate and, in his opinion, appropriate.²⁷ I have carefully reviewed Complainant's cross examination of Mr. Blaze (as well as all other evidence in the case), and I find Complainant has failed to prove by a preponderance of evidence that the error(s) contained in the coaching letter were deliberately placed there in order to justify the demotion of Complainant, or for any other improper purpose.

The May 9, 2014 letter recommending Complainant's demotion was created by Jim Parkes, who was Rail Equipment Manager at the time. There is no question that Parkes' letter contains multiple factual errors. Blaze (who did not create the letter) detailed these errors during his testimony.²⁸ However, there is nothing in the record from which it can be argued that Parkes

²⁴ Respondent Exhibit 10.

²⁵ Respondent Exhibit 9.

²⁶ The identification number of the traction motor referred to in the third line of Respondent's Exhibit 10 should be C37-0001-012 instead of C37-0001-013. Tr. 230.

²⁷ Tr. 351.

²⁸ Tr. 349.

intentionally inserted inaccurate information into his letter as part of an effort to discriminate against Complainant. Complainant broadly charges that Parkes knowingly uttered falsehoods in order to demote Complainant from the Motor Repair Leader position. But other than making that charge, Complainant does not describe the evidence which is believed to support his very serious accusation. After a careful examination of the entire record, I conclude that there is insufficient evidence which proves by a preponderance of evidence that Parkes “fabricated evidence” in order to discriminate against Complainant.

I am ordering Respondent to make Complainant whole by restoring his pay and awarding emotional distress damages. Based upon the record before me, and after careful consideration of the arguments made by counsel, I do not find an award of punitive damages to be appropriate. I find there to be insufficient evidence that when it demoted Complainant, Respondent’s managers acted with “callous disregard” of, or “reckless indifference” to, the federally-protected rights of Complainant, or that they acted with any other mental state justifying an award of punitive damages. I specifically find the mistakes occurring in the May 6, 2014 Coaching Letter and the May 8, 2014 Letter recommending Complainant’s demotion were not made with the intent to fabricate evidence that could be used to discriminate against Complainant.

ATTORNEY FEES AND COSTS

Counsel for Complainant filed a Motion for Attorney Fees and Costs on August 23, 2017. Respondent has filed a timely Response to the Motion for Attorney fees. I employ a lodestar method for the calculation of fees, which requires me to determine a reasonable hourly rate for counsel, and to determine the number of hours reasonably expended by counsel on the matter.²⁹

Counsel’s fee application contains an itemized list of the services rendered by him. Some of the arithmetic used in this itemization is incorrect.³⁰

Complainant’s counsel supplies the Declaration of Mark F. Kruse in support of his request to be compensated at the rate of \$300 per hour. Mr. Kruse’s declaration describes the experience of Claimant’s counsel. Respondent does not contest the hourly rate of \$300 per hour for Complainant’s counsel. I find \$300 per hour to be a reasonable rate for an attorney of Mr. Neel’s experience.

I have carefully reviewed the itemized list of actions taken by Complainant’s counsel. Respondent does not argue that any of the work performed by Complainant’s counsel was unnecessary, duplicative, block-billed or is otherwise inappropriate. Based upon my review of the attorney fee materials presented to me, I find that 122.98 hours of work was appropriately spent by Complainant’s counsel. I multiply these hours times the approved rate of \$300, and I award Complainant’s counsel \$36,894 in attorney fees.³¹

²⁹ See generally, *Evans v. Miami Valley Hospital*, ARB Nos. 08-039, 08-043, ALJ No. 2006-AIR-22 (ARB August 31, 2009).

³⁰ For example, the first listed activity for April 11, 2017 shows .17 hours were expended at an hourly rate of \$300 per hour. The fee application shows the product of those numbers to be \$50. My calculator says it is \$51. The hourly rate for the first activity on April 13, 2017 shows an hourly rate of only \$200 per hour, which I believe to be a mistake.

³¹ This number is slightly higher than the \$36,699.42 requested by counsel in his fee petition.

The expenses claimed by Complainant's counsel are for the preparation of deposition and hearing transcripts. These expenses are reasonable and necessary. Respondent does not object to those expenses. I hereby award Complainant's counsel \$3,133 for those expenses.

ORDER

1. Respondent is to pay Complainant the amount of \$40,802.76, which is the sum of the back pay owed (\$34,302.76) plus the amount of emotional distress damages (\$6,500) I have awarded. Interest on the back pay is to be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. § 6621 and is to be compounded daily. Respondent is to submit documentation to the Social Security Administration allocating the back pay award to the appropriate months or calendar quarters. Within 10 days of the issuance of this Order, Counsel are directed to meet and confer to determine the appropriate amount of interest to be paid on the back pay award. Any dispute is to be brought to my attention promptly. The interest is to be paid to Complainant concurrently with the payment of back-pay.
2. Respondent's records shall show Complainant's seniority date as Motor Repair Leader, Classification 567, to be December 9, 2013.
3. Respondent shall remove from Complainant's personnel records the May 6, 2014, Coaching Letter and the May 8, 2014, Letter recommending his demotion. Any other evidence of Complainant's demotion shall be removed from Complainant's personnel records. Any evidence of Complainant's OSHA Complaint (or the investigation of said Complaint) or to proceedings before the Office of Administrative Law Judges of the United States Department of Labor shall be removed from Complainant's personnel records. Respondent may create a "Litigation File" containing this Decision and Order, the transcripts of the hearing and depositions taken in this case, and such other documents as may be necessary to give effect to this Decision and Order, and such other documents as may be necessary to perfect an appeal to the Administrative Review Board. The original of any such Litigation File shall be maintained in Respondent's Legal Department, and no copies may be made. Complainant shall be given the opportunity to inspect Complainant's personnel file (but not the Litigation File) at any time to ensure compliance with this Order.
4. For the duration of Complainant's employment with Respondent, Respondent shall be prohibited from considering Complainant's whistleblowing activities, or the fact that he initiated these proceedings, or the fact that damages have been awarded to Complainant, or the fact that Complainant has made a claim for emotional distress damages, in any personnel decisions (including, without limitation, any consideration of promotional opportunities) involving Complainant.
5. Within 10 days after the issuance of this Decision and Order, counsel for the parties shall meet and confer to draft a one-page posting to be placed on all appropriate bulletin boards maintained by Respondent. This posting shall, at a minimum, advise the reader:

(1) that Complainant initiated a whistleblower case before the United States Department of Labor; (2) that the Secretary of Labor determined that Respondent had unlawfully discriminated against Complainant in violation of NTSSA; (3) that damages and other relief had been awarded to Complainant; (4) that discrimination against those raising safety complaints may be a violation of federal law, and that the Occupational Safety and Health Administration may be contacted by anyone believing she or he has suffered retaliation; (5) of the toll-free telephone number of OSHA, and (6) that a copy of this Decision and Order may be reviewed in Respondent's Legal Department. The posting required by this paragraph shall remain on bulletin boards for 60 days. Should Complainant so request, the amount of damages awarded to him may be redacted from the copy of this Decision and Order available for public review in Respondent's Legal Department.

6. Within 10 days of the issuance of this Decision and Order, counsel for the parties shall meet and confer to draft language to be prominently placed in future editions of the "RTA Safety Rules" handbook distributed to all employees. A one-page Notice shall inform readers: (1) that the NTSSA may be applicable to their activities; (2) that Federal law prohibits any kind of workplace retaliation or discrimination against any employee who raises a safety concern; (3) that any employee who believes she or he has been retaliated against may contact OSHA, and (4) provide the toll-free telephone number for OSHA. This Notice shall appear in future editions of the Handbook.
7. Appended to this Order as Appendix 1 is an OSHA Fact Sheet regarding NTSSA. A version of this Fact Sheet shall be posted on the bulletin boards of Respondent until such time as the language discussed in paragraph 6, above, has been placed in the "RTA Safety Rules" handbook.
8. Respondent is to pay to Davis W. Neel, LLC the amount of \$40,027.00 for attorney fees and litigation costs.

SO ORDERED.

Steven D. Bell
Administrative Law Judge

APPENDIX 1: OSHA FACT SHEET FOR NTSSA

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. § 1978.110(a). Your Petition must specifically identify the findings, 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. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(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. §§ 1978.109(e) and 1978.110(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. § 1978.110(b).