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Issue Date: 17 June 2020

CASE NO.: 2018-FRS-00140

In the Matter of:

TRACY ASMORE,
Complainant,

v.

AMTRAK,
Respondent.

Appearances: Fredric A. Bremseth
David H. Stern
For the Complainant

Sonali Setia
For the Respondent

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER

This matter arises out of the employee-protection provisions of the Federal Railroad Safety Act ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109. Tracy Asmore ("Asmore" or "Complainant") alleges that her employer, Amtrak,[1] ("Amtrak" or "Respondent"), violated the whistleblower protection provisions of the FRSA by assigning her extra duties and then firing her after she reported a work-related injury and reported in good faith a hazardous safety condition.

I find that the Complainant has established that the Respondent violated Section 20109 of the Federal Railroad Safety Act. For the reasons below, I award reinstatement, back pay with interest, compensatory damages, and punitive damages.

[1] Officially the National Railroad Passenger Corporation, a federally chartered corporation with the federal government as majority stockholder. Both parties referred to it as Amtrak throughout, including in the caption, and I will do the same.

PROCEDURAL HISTORY

Asmore filed her complaint alleging whistleblower retaliation with the Occupational Safety and Health Administration's ("OSHA") whistleblower office on October 25, 2017. Asmore alleged that she was threatened with termination and had been harassed since she reported an injury and hazardous condition – bed bugs on an Amtrak sleeper car, and having been bitten herself – on or about September 24, 2017. Asmore was terminated by Amtrak during the course of the investigation. Amtrak's position is that if Asmore engaged in protected activity, it was not a contributing factor in her termination some months later; and in any event that Amtrak would have terminated Asmore for misconduct regardless of any protected activity.

This claim was docketed with the Office of Administrative Law Judges ("OALJ") on September 7, 2018, following OALJ's receipt of Asmore's timely August 7, 2018 objection to the findings of the Regional Administrator of OSHA dated August 2, 2018. This case is before me de novo.

I held a formal hearing in this case on March 11-12, 2019, in Seattle, WA, at which Asmore and Respondent appeared and presented evidence.[2] At the hearing, the parties submitted Joint Exhibits A-L, which I admitted. Asmore submitted exhibits CX 1-36, and the Respondent submitted exhibits RX A-K, which I admitted. HT 7-11.

The findings and conclusions below are based on a review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and precedent. *See* 49 U.S.C. § 20109; 29 C.F.R. Part 1982; *see also* 5 U.S.C. §§ 554-57.

STIPULATIONS

The parties stipulated in their prehearing statements, HT 5-6, and I find that:

1. Ms. Asmore worked as a "Service Attendant/Train Attendant" for Amtrak from approximately January 2010 through January 2018. At all relevant times Ms. Asmore worked aboard the Empire Builder, an overnight sleeper train that transports passengers between Seattle, Washington and Chicago, Illinois.
2. As a Service Attendant/Train Attendant, Ms. Asmore was responsible for working in the coach and sleeper cars, and providing service directly to passengers, including room service, food/drink service and assisting the passengers in her car with boarding and deboarding the train. One of Ms. Asmore's duties as a Service Attendant/Train Attendant on the Empire Builder included bed-making services.
3. At all relevant times, Ms. Asmore was a member of the Transportation Communications International Union ("TCU").

[2] Exhibits are cited as "PX" for Plaintiff's (technically, Complainant's) exhibits, consistent with how they were labeled by Asmore's counsel; "RX" for Respondent's exhibits; and "JX" for Joint exhibits, plus the page number if necessary. The hearing transcript is cited as "HT" and page number. Briefs are cited as "P. Br." or "R. Br." and page number.

4. Between roughly September 21, 2017, and September 27, 2017, Ms. Asmore worked as a Service Attendant/Train Attendant on the Empire Builder, servicing a run from Seattle, Washington to Chicago, Illinois and back. Amtrak Supervisor Tamara Baggett was Ms. Asmore's supervisor during this timeframe. Mr. William Francik and Mr. Jose Gamboa were Ms. Asmore's coworkers during this timeframe. Mr. Peter Van Zanten was Ms. Asmore's union representative during this timeframe.
5. On September 23, 2017, Amtrak's outside vendor, Copesan, inspected and chemically treated car #32086. A copy of Copesan's service summary from that day is Joint Exhibit "C".
6. On September 24, 2017, Ms. Asmore reported to work and inquired as to whether car #32086 was taken out of service due to bedbugs. Later that day, Ms. Asmore, Mr. Van Zanten, Supervisor Patricia Croom, and Supervisor Monica Morris participated in a phone call. During this phone call, Ms. Asmore and Supervisor Croom were physically in Chicago, while Mr. Van Zanten and Supervisor Morris appeared by phone from other locations. An email from Ms. Croom from that same day is Joint Exhibit "D".
7. On October 7, 2017, Ms. Asmore reported to a supervisor that she was bitten by bedbugs while in train car #32060 on October 6, 2017, and filed an employee injury report. A copy of Ms. Asmore's Employee Injury/Illness Report dated October 7, 2017, is Joint Exhibit "F". That same day, Amtrak's outside vendor, Copesan, treated car #32060. A copy of Copesan's service summary from that day is Joint Exhibit "G".
8. On October 27, 2017, an Amtrak customer tweeted that she was "just told [she] had to remove [her] political button before boarding [her] @Amtrak train because it's 'federally funded' #America #facisism[sic]." The tweet was accompanied by a picture of a button which stated "Love trumps hate".
9. Supervisor Baggett issued a Letter of Intent to Impose Discipline to Complainant on November 22, 2017. A copy of this letter is Joint Exhibit "H".
10. On November 29, 2017, Supervisor Baggett issued Ms. Asmore a Notice of Investigation stating that a formal hearing would take place on December 11, 2017. A copy of this notice is Joint Exhibit "I". Ms. Asmore requested an adjournment, and the hearing was rescheduled for January 25, 2018.
11. A formal disciplinary investigation was conducted by the Office of Disciplinary Investigations on January 25, 2018.[3] Ms. Asmore appeared for the hearing with her union representative for a formal disciplinary investigation before Hearing Officer Michael J. Mullen. A copy of the ODI Hearing Transcript and exhibits are Joint Exhibit "J".
12. Hearing Officer Mullen issued his decision on January 30, 2018 and found all of the charges against Ms. Asmore to have been proven. A copy of the decision is Joint Exhibit "K". Based upon the hearing officer's findings, Ms. Asmore was terminated on January 31, 2018. A copy of the termination letter is Joint Exhibit "L".
13. Prior to September 24, 2017, there have been reports of bedbugs made by both employees and customers on various Amtrak trains.[4]

[3] A "formal investigation" in this context is akin to an adversarial hearing, with a presiding officer and witnesses, and a transcript produced.
[4] The parties submitted this stipulation by joint filing on February 15, 2019.

FINDINGS OF FACT

1. Complainant's background

Originally from New Orleans, Asmore has lived in Seattle for 25 years. HT 22. She has a high school education. *Id.* She loved her work at Amtrak, especially meeting different passengers and coworkers, and learning from them. HT 23.

Asmore had a long history of receiving compliments and commendations from passengers. In the record are 25 exhibits, including both letters and Amtrak Customer Relations Reports, dating from her first year in 2010 forward, praising Asmore for her service on the Empire Builder. PX 6-30. In feedback from 2017, when the events giving rise to this case took place, passengers:

- complemented her "great attitude," PX 22;
- related that she was "very friendly and eager to help," PX 23;
- said she was "always cheerful and helpful" resulting in a "great Amtrak experience," PX 24;
- reported that she was "hard working, funny, friendly, and had one of the best work ethics! She is a diamond!" PX 26.

Asmore earned a Customer Service Star Award from Amtrak management for her work in the month of July 2017. PX 25.

On the trip originating in Chicago on September 24, 2017, discussed at greater length below, Asmore earned the following praise:

> Tracy was the best of the best in room attendants. . . . [N]o Amtrak employee has shown so much concern for the health and safety of passengers. . . . [S]he was always laughing, smiling, and cleaning up messes. . . . [H]er cars are the cleanest and best stocked cars [the passenger] has ever been in.

PX 27.

Even after Asmore was placed into the Amtrak investigation proceeding in fall 2017 that resulted in her termination (and this case), she continued providing customer service that resulted in a similar commendation from a passengers in her car. PX 30. Remarkably, a week after On-Board Services Manager Tamara Baggett ("Baggett") launched the formal investigation and discipline process, JX H, I, Amtrak's CEO wrote a letter congratulating Asmore on her recent positive customer feedback, and wrote that "I am proud to count you among our most valued employees." PX 29.

Asmore also had a discipline history with Amtrak, with two incidences of formal discipline prior to the events of fall 2017. On November 14, 2010, while on board a train in the yard for service, Asmore made an "unprofessional comment over the PA system stating 'Jeremy you're a drunk and you are too intoxicated to be on the train. Don't come in the diner.'" RX B. When the other employee, Jeremy, approached, Asmore called him a bastard. *Id.* Amtrak alleged

violations of its Professional and Personal Conduct Standard for the substance of the PA announcement, and a violation of the Service Standards Manual for making an inappropriate PA announcement. *Id.* Asmore waived a formal investigation, admitted "guilt and responsibility," and accepted a three-day suspension without pay deferred for six months.

On February 9, 2013, Asmore was "rude and intimidating" to a passenger. RX C. Amtrak alleged another violation of its professional conduct standard. Asmore again waived her right to a formal investigation and accepted a five-day suspension. *Id.*

At hearing, Asmore offered some context for both. With respect to the unprofessional conduct on the PA, Asmore claimed that it did not happen the way that the other employee claimed, but that she was advised by her union representative to sign the investigation waiver and admit the allegation because she would avoid the formal investigation hearing and it would be expunged after a period of time. HT 113-14. Regarding the rude conduct toward a passenger, Asmore alleged it was retaliation for having called Amtrak police to deal with the passenger. Again, a union representative told her to sign the waiver and admit the allegation to avoid an investigation, and on this occasion an attorney told her to do so also. HT 115-17. Asmore claimed that both instances were expunged from her personnel record at a meeting in 2017 between her, Van Zanten, Meeds, and "Corrine." HT 117.

However, Jonathan Lombardi, Amtrak's Director of On-Board Services for the region including the Empire Builder, said that the type of misconduct that Asmore admitted, misconduct toward another employee and toward a passenger, were of a type that would never be expunged under the applicable collective bargaining agreement. HT 309; RX H. As discussed below, the managers, Baggett and Lombardi, who recommended termination of Asmore to the final decision authority, considered this discipline history in their decision to do so. HT 257, 308.

2. The bedbug incidents

When Asmore arrived at work in Seattle on September 21, 2017, she found an Amtrak foreman and an exterminator from Copesan "fumigating" Room 15 in her assigned sleeper car, #32086. HT 24. There are 21 rooms in a sleeper car, with 44 total beds. HT 23. Asmore was told by either the foreman or exterminator "there's an infestation of bed bugs in Room 15, and there's no way we can fumigate it[;] it would have to be taken out in Chicago and replaced with another car." HT 25.

The same person showed Asmore "a picture, and there were bed bugs lined up in the crevice of what you would call the seat/mattress, because the seat turns into a mattress. And they were just everywhere. They were mating, there were babies, there were big ones, there [were] little ones." *Id*. He told Asmore "there's no way . . . [that] we can take care of it – it's too infested. So, they'll have to do it in Chicago." *Id*. He recorded the bedbugs on the MAP-21 form, which is a maintenance log sheet kept for each car. HT 26; PX 4.

The Copesan exterminator, Dennis McNabb, completed a service report, which detailed "live adult, nymph, and eggs in the corner of the sleep cushion" and "ten to twenty live bedbugs

underneath the head rest pillows attached to the framing" in Room 15. JX A. He characterized the bedbug activity as "high" and treated the room with dust and liquid insecticides. *Id.*

Throughout the transcript and record, there are references to "fumigating" for bedbugs. To be precise, the records from Copesan indicate that dust and/or liquid treatments were used on the occasions at issue, including the September 21 treatment in Seattle. JX A, C, E, F. From two records, one from Copesan, JX E, and Amtrak's Mechanical Bulletin on pest control, PX 2 p. 3, it is clear that to be fumigated with gas insecticides for bedbugs, a car must be taken completely out of service – and that that is Amtrak's prescribed and mandatory policy for bedbug treatment. Amtrak's Mechanical Bulletin on pest control has a special section, boxed for emphasis, addressing bed bug abatement. "Bed bug sighting infestation requires a more complex pest control program; the following protocol **must be followed** . . . ." PX 2 (bold and underlined emphasis in original). The first step in the protocol is "[q]uarantine infected car for further inspection and/or pest control treatment." *Id.* Once Copesan inspects and produces a report, "[i]f pest activity exists car must be quarantine/shopped for Gas fumigation." PX 2 p. 3.

Nevertheless, Asmore's assigned sleeper car, #32086, remained in service for the Empire Builder trip departing Seattle on September 21. Lombardi explained that in Chicago it is easier to swap in a new car; it is harder in outstations such as Seattle because they are less likely to have a replacement car available. HT 354-55.

In lieu of taking the car out of service, the foreman and exterminator closed the door to the room and "tagged it" out of order. HT 25; PX 3. Asmore worked the trip, and on the night of September 22, she was bitten by a bed bug, though she did not notice the bite until after arriving in Chicago on September 23, and did not know what the bite was right away. HT 26.

Anticipating that the car would be taken out of service, as was a typical practice Asmore stripped the beds. HT 78-79. She acknowledged that a manager did not tell her to do so. *Id.*

She arrived at work in Chicago on September 24 to work the next trip, back to Seattle, and discovered that she had been assigned to work the same car, #32086. HT 27. She boarded the car and saw that the Out of Order tag was still on the door of Room 15, no record of bed bug treatment had been made on the car's MAP-21, the beds in Room 15 were in the same state as when the room had been closed up in Seattle on September 21, and there were no "fumes or odors" from pest treatment as she had smelled in Seattle on September 21. HT 29-30; PX 3-4. Asmore took the photos in PX 3 and PX 4 at that time. *Id.*

Lombardi acknowledged that an employee might be reasonable in relying on the absence of fumigation on the MAP-21 form to conclude that fumigation hadn't been completed. HT 333.

Asmore left the car and spoke with an unnamed person, and then Supervisor Patricia Croom. *Id.* Asmore told Croom that car #32086 had bedbugs, and was coming out of service. RX J p. 7-8.

But Croom told Asmore that car #32086 was not being taken out of service. *Id.* Asmore then called someone in the Mechanical Department directly, who referred her to another person, who told Asmore that the car should be coming out of service and to expect a call back. *Id*. That person never called Asmore back. *Id.*

Croom returned to speak with Asmore, and told her again that they would not be taking the car out of service. *Id.* Asmore then said that she would "mark off." *Id.* "Marking off" means that an employee is not going to work that day, as Croom explained. RX J p. 6.

As Asmore explained parenthetically at hearing, she meant that she "felt unsafe and I didn't want to work the car." HT 27.

Croom asked Asmore not to mark off yet, and said she would make additional phone calls. HT 28. After 30 minutes, Croom returned and said that the car was not going to be taken out. *Id.* Asmore said she would mark off, and called the crew management office and spoke with a woman named Denise. Denise told Asmore that the car *was* supposed to be taken out, and promised to make phone call and call Asmore back. *Id.* She did not call back. *Id.*

At that point, according to Asmore, Patricia Croom herself said that "if I was you, I wouldn't work the car either." *Id.* From that, Asmore took that Croom was agreeing with her action, called Denise back and marked off. *Id.* Asmore left for lunch with others. *Id.*

Asmore was called back early from lunch to the train, and Croom said that Monica Morris, a more senior supervisor, RX K p. 4, wanted to speak with Asmore. HT 30. Another supervisor named Pat Ford was present. *Id.*, *see also* JX D. Asmore requested that they also call and conference in her union representative, Peter Van Zanten, when they called Morris. *Id.*

Morris told Asmore that the car was not being taken out and that if Asmore did not work the car Asmore would be terminated. HT 30-31. Asmore explained that the room was still in the same condition, the tag was still on the door, and the MAP-21 did not have any new maintenance notes. HT 31; *see also* PX 4. In response, Morris said that Mechanical was not taking the car out; she told Asmore, "[t]his is a direct order, if you don't work the train back to Seattle, you are terminated." *Id.* Morris explained that failure to follow a direct order is insubordination, a terminable offense. RX K p. 9.

The giving of a "direct order" is "very uncommon," according to Baggett. HT 286-87. Lombardi agreed it was unusual. HT 317-18. Regarding marking off, Baggett said, "In six years, I can probably say less than five times someone has threatened to mark off, because of a condition they didn't like." HT 286. She explained that in each case, "[t]hey worked. And they were not given a direct order to do it, they just continued their job." *Id.* As Onboard Services Manager for the Empire Builder and one other route, Baggett supervises about 100 employees, 60 of whom are train attendants like Asmore was. HT 235.

Asmore then said she would like to take a "safety stand-down." Asmore said at hearing that all employees had the ability to take a safety stand-down "when you don't feel safe in a work environment and you have the right to not work that area." HT 31. She believed that all

supervisors knew what a safety stand-down was. HT 31-32. Van Zanten explained that the term originated from senior management as a response for employees to use if given an order to perform an unsafe task. HT 144-45.

According to Asmore, Morris said, "No, you're not taking a safety stand-down. This is a direct order. If you don't work the train back to Seattle, you're terminated." HT 32. Van Zanten objected that Morris would not acknowledge a safety stand-down, and Morris replied "Mechanical said they're not taking the car off." *Id*. The conversation continued, and ultimately Van Zanten advised Asmore on the call that she could not work, get fired, and file to get her job back; or, work the car and file a grievance. HT 33. Asmore agreed to work the car in order to not get fired. *Id.*

Asmore said that no one on the call – e.g. Croom, Ford or Morris – ever said that the bed bugs on car #32086 had been taken care of. *Id.* "All they said was that Mechanical said they're not taking the car off." *Id.* On cross-examination, she acknowledged that Croom and Morris did tell her that the car had been "inspected and treated." HT 80-81.

After the call, Asmore boarded the car to start working. As she had stripped the beds before arrival in Chicago, none of the beds were ready.[5] Typically, a Ready Crew helps set up a sleeper car before the passengers board, including making the beds. HT 35-36.

By that time, the train was pulling into the station from the yard, and passengers began boarding. HT 34. Croom and Ford began boarding passengers while Asmore continued to try to make beds. Asmore went downstairs to tell them the beds weren't ready, and "Pat" told her, "sarcastically. . . 'well, I guess you have to make them during your route.'" HT 34. Asmore had to make up all 44 beds on her sleeper car that day, enroute, which is not normal. HT 35, 39. She described how trying to make up beds enroute, in rooms with passengers in them and while passengers were requesting water, ice and other services, was "really hectic and really stressful." HT 39. Asmore also had to work with the conductor to move the passengers assigned to Room 15, which was still tagged out of service. HT 34-35.

William Francik, a member of the Ready Crew in Chicago on September 24, HT 36, did not testify at hearing but gave a written statement. PX 1. Francik has been with Amtrak for at least 30 years. HT 147. When the train arrived on September 23, the dining car crew told Francik that car #32086 was being taken out of the train in Chicago, due to bedbugs. PX 1. The next day, as the departure time approached, Francik learned from Croom that car #32086 was not coming out. *Id.* And with time running short, Francik was "told by Ms. Croom to ready the car for passenger boardings." *Id.* Also, Francik recalled, "[w]e were told NOT to make up any beds, that Ms. Tracy Asmore would be making up any beds left unmade – which I believe was the entire

[5] The details here are not completely clear to me. I trust and assume that Amtrak changes the sheets on sleeper cars in between guests, like a reputable hotel. There is testimony throughout the record about "stripping" and then "making" the beds on September 23 and 24, which again I assume has to be done to some degree in Chicago and in Seattle on every trip. I take from all this discussion that there is some greater degree of "stripping" bedding, when a car is being taken out for fumigation, which Asmore performed on September 23, which then needed to be reversed with additional effort on September 24.

car." *Id.* Francik approached Asmore on the next trip and told her he was upset about this action by Croom, and that he had reported it to others. HT 37.

According to Van Zanten, a Ready Crew member being told not to make up beds is out of the ordinary. HT 147, 151.

Croom reported her version of the September 24 confrontation with Asmore up the chain of command. The same day, at 5:53 p.m., she emailed Jonathan Lombardi, and copied Monica Morris, Tamara Baggett, Kaloa Young, and Patricia Ford, detailing that day's events from her perspective. JX D. Croom emailed that at "approximately 11:53 a.m., Monty (Ready Crew) contacted me to inquiry [*sic*] about if Sleeper Car #32086 was coming out due to bed bugs in Room 15." *Id.* Croom "contacted Control Center and spoke with Cedric[;] he stated the car was treated for bed bugs and wasn't coming out of service." *Id.* Croom went to the car and found the tag on Room 15; she then called Cedric back, who again told her the car was treated. *Id.*

Croom said that she "communicated this information to" Asmore, but with no further explanation of exactly what Croom meant by "this information," i.e., exactly what and in what detail was communicated. *Id.*

Croom continued, in her email: "[Asmore] stated she was marking off if the car wasn't taken out of service." JX D. Croom and Ready Crew Supervisor Patricia Ford looked at Room 15 themselves, "to see if we could detect any indication of disturbance of bugs." *Id.* "We made several calls to various departments to confirm that the car had been fumigated . . . on 09/23/2017." *Id.* Croom "encouraged [Asmore] to work the car after being told by Tracy [Asmore] that she would mark off." *Id.* She made "several attempts" but Asmore marked off "with CMC."[6]

Also, Croom said that Pat Ford informed "the Ready Crew (Bill, Monty and Karen) to complete their assignment to set up the car." *Id.* "Bill" is presumably William Francik, whose statement is discussed both above and below. PX 1.

Croom "called Jonathan Lombardi to inform him of the sleeper being infested with bed bugs and Ms. Tracy Asmore marking off."[7] Croom related that Lombardi said that since the bedbug situation was resolved if Asmore "did not have any medical issues she could work in the car assigned." JX D. Croom also talked to Kaloa Young, interim On Board Services manager, on

[6] Presumably "Crew Management."

[7] Here I note that Croom's 5:53 p.m. email is plainly a considered statement made in anticipation of litigation. It was written several hours after the fact, enough time to consider what to include, frame, and omit; and, though it was addressed and sent to Jonathan Lombardi, states "I called Jonathan Lombardi" rather than "I called you." In plain English, this is odd; one ordinarily does not, when talking to a person, refer to them in the third person. Arguably this is even less common than referring to oneself in the third person. Though written when the events were fresh in Croom's mind, and valuable for that purpose, I will consider this as a factor when weighing Croom's account against Asmore's or Francik's. This is not what one might call a "present sense impression," which is admissible as an exception to hearsay where the Federal Rules of Evidence apply because it is presumed that the declarant is not consciously shading her own statement in real or close-to-real time. *See* Fed. R. Evid. 803(1). Croom is also a front-line supervisor in the field, writing to her superiors, and might be expected not to include facts harmful to what she anticipated the company's position would be, given the chance to write a considered statement.

the phone, telling her that Asmore was to report to her assignment. *Id.*

With 500 employees under his supervision in 2017, and over his 10 years at Amtrak, supervising, Lombardi could not specifically recall another instance in which an employee marked off because of an unsafe condition. HT 322.

Croom then received a call from Morris, and an instruction to find Asmore and set up the call discussed above, on which Croom, Morris, Ford, Asmore and Van Zanten participated. HT 322. Croom recounted that "Monica [Morris] gave Tracy Asmore a direct order to resume her work assignment." *Id.* Croom relayed that Asmore said "it was against the Cardinal Rule 'Stand Down' to put an employee in harm's way." *Id.* Croom continued: "Mr. Peter Van Zanten explained to Tracey that he could not make the decision for her and to return [*sic*]. However, Amtrak have [*sic*] made the necessary actions to resolve the issue." *Id.*

It is not clear, in the quote "Amtrak have [*sic*] made the necessary actions to resolve the issue," whether Croom is stating that Van Zanten said that on the call, or, if she was inserting that as commentary into her email to the other managers.

Finally, Croom wrote, once Asmore agreed to work "[s]he called CMC[;] Pat [Ford] and I assisted with making up the unmade beds and directed her passengers where to go until their rooms were available. It was assume [*sic*] the beds were not made due to her [Asmore] thinking the car was coming out." *Id.* As far as Croom and Ford helping with the unmade beds, here Croom directly contradicts Asmore's testimony and Francik's statement that they did not and that Croom told Francik not to. Asmore highlighted that the beds were not made before the train left Chicago, and Croom got off of the train before it left. HT 41.

Croom omitted from her email making any statement along the lines of "if I were you I wouldn't work the car either," as Asmore related at hearing.

Both Croom and Morris were deposed, and their depositions were submitted as testimony at hearing. Their testimony was generally consistent with Croom's September 24 email.

Baggett learned about the bed bug confrontation from Croom's September 24 email. HT 265. Though Baggett was on leave, Croom was regularly emailing Baggett between Sept 17 and Oct 1, to create a log of "anything that was abnormal" during Baggett's leave. HT 267. As Baggett explained,

> What was abnormal is the fact that [Asmore] didn't believe she should have to work the car, that she felt that the car should have come out. It was abnormal for someone to have to be given a direct order to work a car. I mean a bed bug, we deal with bed bugs, that's not a problem, we know what we should do. . . . But everything besides her reporting it was abnormal, yeah, this was very abnormal.

HT 268. While Croom had sent her email to Lombardi, Baggett reforwarded the email to Lombardi upon her return from leave. JX D; HT 288. When asked why, Baggett said, "I thought that it was important that we had to give someone a direct order to continue doing their job." HT

288. Lombardi was already familiar with the bedbug incident before Baggett resent the email. HT 336. He and Baggett also spoke about the bedbug incident. *Id.*

Even as of the hearing, Baggett continued to feel that Asmore should not have marked off.

> [I]f you feel that something needs to be discussed, take the opportunity to talk with a manager or supervisor, so we can give you the correct information and you can make a better decision. She [Asmore] was given the correct information that the car had been properly taken care of. Because that car had been properly taken care of, there was no reason for her to mark off, because she felt that it was unsafe for her. . . . So no, she should not have marked off . . . .

HT 299. Baggett did agree that bedbugs were a safety concern. HT 249.

During the Empire Builder trip from Chicago to Seattle that departed September 24, Asmore was again bitten, several times, by bedbugs. HT 39-40. She reported the bites to manager Kaloa Young when she arrived in Seattle. HT 40. A customer also reported a bedbug bite on car #32086 on this trip. JX E.

Upon arrival in Seattle on September 26, the same Copesan exterminator as the week before, Dennis McNabb, returned and inspected car #32086. In his report, JX E, he explained as follows: "First, I inspected cabin 15 that was treated last week for bedbug activity. No live bedbug activity was found at time of service." *Id.* He continued: "[T]he cabin was out of service when it returned to Chicago *and was supposed to be fumigated there upon arrival.*" *Id.* (emphasis added). He related that instead the car was inspected in Chicago and since the inspector did not find any activity the car was not fumigated. *Id.*

McNabb proceeded to inspect, and found live bedbug activity in "cabin 12 and 13. . . . Live bedbugs, eggs and nymphs were found in the cushions between the back and head rest." *Id.* "The planned [*sic*] is to remove the car and fumigate." *Id.*

Young completed Employee Injury/Illness Reports for Asmore's bedbug bites on October 7, 2020. JX B, JX F. Young acknowledged that Asmore reported her first bite on September 23, at 10:30 a.m, JX B, which would correspond to the first bite on the September 21-23 trip to Chicago ahead of the confrontation on September 24. The second report reflected a third bedbug bite, on October 6 on car #32060, which Asmore reported to Young on October 7, apparently prompting the completion of both reports. JX F. There is no report in the record for the bites Asmore reported in Seattle on September 26.

In addition to being required to make all 44 beds on her car on September 24 alone while enroute, Asmore recounted other unusual actions toward her after the September 24 confrontation in Chicago and her bedbug injury reports. HT 43-45. On one occasion, Asmore was told to call Baggett, and was questioned by Baggett as to why she had not loaded emergency water and snack packs on the train, which Asmore testified was a responsibility of managers or Lead Service Attendants, not front-line sleeping car attendants. HT 43. Nevertheless Baggett

added that task, which she had never been responsible for, to Asmore's duties. *Id.* On another occasion Young repeatedly called Asmore in a short time, as if the matter was extremely urgent, while Asmore was off duty and asleep, regarding a customer service question from a prior trip. HT 45.

3. The button/Twitter incident

About four weeks after the bedbug confrontation and bite reports, on October 27, Asmore was working the Empire Builder departing Chicago westbound. HT 50. It was an ordinary boarding process that day; Asmore stood at the door of her sleeper car welcoming passengers and pointing them in the direction of their rooms. *Id.* Asmore's understanding is that she does not have the authority to deny a passenger boarding under Amtrak rules, as she is not a conductor. HT 92. Van Zanten agrees. HT 156.

Among the passengers in Asmore's car was one Melissa Stone. Asmore met Stone at the door, asked her her name, told her what room she was in, and told her where her room was. *Id.* Asmore did not see that Stone was wearing a pin of any kind. *Id.*

The train departed Chicago. *Id.* Once the train departs, Asmore's practice is to go to each room and reintroduce herself, and give an orientation to the car and the train, which she did that day. HT 50-51.

Reintroducing herself to Stone at Stone's cabin door, she noticed that Stone was wearing a pin. HT 51. Asmore understood the pin to be expressing a political viewpoint, though she was not sure precisely what message. HT 86-87, 89. Asmore made a gesture across her own chest with the vest she was wearing as if she was covering up a pin on her own chest. HT 51.

Stone asked "why?" and Asmore related a story of a recent "heated, very bad" argument over politics in the train's dining car, which resulted in one of the passengers crying and avoiding the dining car. *Id.* "It just ruined her whole experience on the train, dealing with that," Asmore explained at hearing. She told Stone she wanted her to be safe and be aware. *Id.*

Stone said that she understood, and then began questioning Asmore about "political stuff." HT 52. Asmore replied that she could not talk about politics with passengers, and Stone asked what the policy was. Asmore said that she did not know, but would find out. *Id.* Asmore went and spoke to the conductor and other employees, who did not know either, so Asmore returned and gave Stone the Amtrak customer service phone number, 1-800-USA-RAIL, and said Stone could call and ask. HT 52-53.

As she was talking, Stone "was all about the political stuff," but never seemed upset with Asmore: "as far as being upset, no, not with me, no." HT 53. Stone did not cry. HT 54.

Asmore did not equate suggesting that Stone cover up a button expressing a political viewpoint with discussing politics or religion with passengers. HT 89-90.[8] Asmore is certain that

[8] Q: And that is why you suggested that Melissa Stone remove the political button?
A: No, it was for her safety.

only one conversation about the button took place with Stone, and it was at her room. HT 131-32.

Unbeknownst to Asmore, shortly following their conversation, Stone sent a Tweet from her Twitter account, @feytwee.[9] The Tweet read:

> I was just told I had to remove my political button before boarding my @Amtrak train because it's "federally funded" #America #fascism.

RX D. The Tweet ended with an emoji[10] of an American flag following the hashtag #facisism [*sic*]. RX F. The Tweet included a close-up photo of three fingers holding a pin-on button that reads "Love trumps hate." *Id.* The background of the photo is the interior of an Amtrak cabin. HT 131-33.

By 4:00 p.m. Central time the same afternoon, Marc Magliari, the Amtrak media spokesperson for "everything west of Harrisburg, Pennsylvania," HT 164, received an inquiry from a reporter for a website focusing on local Chicago news, DNAinfo.com.[11] HT 165-66. Stone's Tweet had rapidly gone "viral,"[12] and the DNAinfo reporter described Stone's Tweet to Magliari and asked him if it was an Amtrak policy. RX F. The reporter had already spoken to Stone and her partner, Chase McClure, who alleged Stone had been required to take off the button by an employee, "Stacy (or Tracy)," as they were boarding the 2:15 p.m. Empire Builder, due to an Amtrak policy. RX F.[13] The reporter described the pin's slogan as one used by Hillary Clinton "and others who oppose President Donald Trump and his policies." RX F. Once DNAinfo published, Magliari said that Fox News, Conde Nast, and "many other news entities" picked up the story on their web sites. HT 168; *see also* RX F.

Upon receiving the inquiry from the DNAinfo reporter, Magliari contacted Clint Meeds, who at the time was an On-Board Services manager in Seattle. Magliari told Meeds about Stone's tweet and the reporter's inquiry, and forwarded him information, including the inquiry

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> Q: So, it had nothing to do with the policy?
> A: No. I wasn't aware of what the policy was, that's why I told her. I didn't find this out until I spoke with Clint. But my concern was her safety. . . .
> Q: You testified earlier that you told Ms. Stone that you cannot discuss politics with her?
> A: Right.
> Q: Why?
> A: That's against Amtrak's rules to discuss policy, religion, stuff like that with passengers. . . .
> Q: Do you believe that the same rule would apply to suggesting that she remove her political button?
> A: I'm not sure.

HT 89-90.

[9] According to the Associated Press, to tweet, as a verb, is lowercase; a Tweet is a proper noun for a message sent via Twitter.

[10] An "emoji" is "a small digital picture or pictorial symbol that represents a thing, feeling, concept, etc., used in text messages and other electronic communications and usually part of a standardized set" *Emoji*, Dictionary.com, https://www.dictionary.com/browse/emoji (accessed June 9, 2020).

[11] This site is now defunct. HT 170, 195.

[12] This is a metaphor for the spreading of online content that I hope is put to rest after the spring of 2020.

[13] The version of the DNAinfo article in the record is the version updated on October 30, 2017, which included Amtrak's apology and an explanation from Magliari. RX F. It shows the original publication date and time of 4:23 p.m. October 27.

and a copy of Stone's Tweet. HT 198-99. This was Meeds' first experience with a customer complaint over social media. HT 199. Meeds located Stone's reservation and phone numbers in Amtrak's systems, and within 10 minutes had identified Asmore as the likely employee involved through Amtrak's crew management system. HT 200-01. Meeds left messages for Stone, and then called Asmore. HT 205-06. He very briefly spoke to Asmore, outlining the situation and saying that he was calling the customer, at which point he received a call back from Stone's traveling partner, who handed the phone to Stone. HT 202.

Meeds interviewed Stone by phone. HT 202. The Customer Relations Report in the record, evidencing the interview, is Meeds' report of the interview. RX E. The body of the report is an email at 5:57 p.m. in the GMT-06:00 time zone[14] from Meeds to "Tamara" (presumably Baggett) that was apparently copied into a Customer Relations Report in Amtrak's systems. *Id*. It is not in the record whether Meeds wrote the email during the interview with Stone, took notes from which he wrote the email, or wrote the email from memory following the interview. *Id.* The report is phrased in Meeds' voice, in the first-person. *Id.*

Neither Meeds' Customer Relations Report, nor any other document evidencing Meeds' interview with Stone, is a sworn statement. There is no audio recording of Meeds' interview with Stone in the record.

The Customer Relations Report reflects a single interview with Stone, apparently relatively brief. Stone did not testify at the hearing, and there is no sworn testimony or sworn statement from Stone in the record. The only statements directly from Stone in the record are her Tweets.

There are no third-party witnesses to Stone and Asmore's conversation reflected in the record, save for a comment from Stone's partner in the DNAinfo reporter's story. No statement or testimony from Stone's partner is in the record.

Meeds is the only person from Amtrak who spoke to Stone, because, as Baggett explained, "[s]he didn't need to speak to three or four different people about the situation." HT 237. But Meeds, from his own perspective, was "triaging a customer service situation[;] I give greater credence to the customer who is very upset and relaying a story to me." HT 222. "I'm not investigating when I'm having these interactions." *Id.*

Meeds testified that in his report, phrases in quotations are "exactly what Ms. Stone relayed to me . . . her statement[s] to me on the telephone." HT 203. "Anything in quotation marks was a direct quote from the customer," the customer being Stone. HT 204. It is not known and not clear from the report whether *Stone*, however, was directly or accurately quoting Asmore to Meeds; or, whether Stone was expressing her own interpretations.

Meeds testified that Stone told him that "she was told on the platform, before boarding, that she had to remove a pin." HT 204. Meeds' report written the same day as the events, however, does not contain the allegation that the conversation took place on the platform before

[14] GMT-06:00 corresponded to Mountain Daylight Time on October 27, 2017. Since Meeds was in Seattle, on Pacific time, the reason for this is unknown.

boarding phrased as coming directly from Stone; the "forced to take off a pin . . . before being allowed to board" was a "report" that Meeds heard before he called Stone, i.e., from Magliari. RX E.

In his report, Meeds wrote:

> Ms. Stone relayed the whole story to me again while I was on the phone with her, stating that Asmore noticed the lapel pin on her outer garment, approached her and said "you can't get on this train with that pin on, if you want to ride with us, you have to take it off." Ms. Stone questioned the instruction [and] was told "It is Amtrak's Policy – we are a government funded train and can't have none of that."

Id. Meeds apologized to Stone, who thanked him. *Id.*

Meeds believed that Stone was crying when he first reached her on the phone. "She was pausing a lot to breathe"; though he could not see her, she sounded emotional and "very clearly conveyed . . . that she thought her First Amendment rights were being infringed upon and that was very upsetting." HT 202-03.

To his recollection, Stone did not tell Meeds that Asmore said removing the button was for safety, or anything about a past incident between passengers. HT 204.

After Meeds ended the call with Stone, he called Asmore back. As he recounted in his report:

> I then spoke with TA-S Tracy Asmore, who was sitting in the dining car with other crew members. I asked her [to] educate the entire crew, discretely, that the passenger had alerted the media and that she felt her 1st Amendment Rights had been violated. Tracy agreed . . . . Tracy Asmore told me that when she approached Ms. Stone she did so with discretion and politely asked her to remove the pin or cover it up[.] [S]he maintains that she never told the passenger she couldn't board while wearing the pin. She mentioned this was a standing instruction from "management" during the Trump Campaign, and that they were told to not allow these guys to wear political clothing on board. I corrected her understanding . . . .

Id.

Meeds made clear in his testimony that when he called Asmore back after his call with Stone, Asmore volunteered that she was the employee in question and explained her side of the story. Meeds said Asmore told him: "'I'm absolutely happy to tell the rest of the crew about this; by the way, I was speaking with Ms. Stone, I'm the one who spoke with Ms. Stone.' And that's when Tracy relayed her story to me . . . that it didn't happen outside the train car, it happened as she was walking from room to room, that's when she noticed [the pin]." HT 207.

Meeds acknowledged that there were differences between Stone's and Asmore's accounts, in which Stone's was "much more severe" and Asmore's "somewhat less severe." *Id.*

Asmore's testimony at hearing was consistent with Meeds' account here. HT 54. Asmore testified "[t]hat Tweet is not correct. I never told her she could not get on the train. I simply guided her to her room. I never even [saw] the pin to tell her she couldn't get on the train." *Id.*

But Asmore disagreed with some of Meeds' account of his call with her. She recalled that she was not sitting in the dining car with others, she was called to the dining car by Young when Meeds called. HT 53. She testified that he did not tell her to educate the other crew members, or that Stone believed her First Amendment rights were being infringed, just to continue to do her work. HT 53, 93-96. She learned about Stone's Tweet only after speaking with Meeds, from Young. HT 93.

Throughout the rest of the trip to Seattle, Asmore saw Stone "having a good time. We talked, we laughed, [she] said what she was going to Seattle for[;] we had a good time." HT 54; *see also* HT 133-34. Stone even apologized to Asmore for the Tweet. HT 100-01.

Though on the train with Stone, Young did not speak to Stone. Asmore marveled at that: Young "was on the train at the time and not one time did Kaloa go to Melissa's room and speak to her, to find out if everything was okay . . . . [T]hat's why I don't understand how they figure she was upset . . . ." HT 55.[15]

Young departed the train in Shelby, Montana, due to personal plans. HT 55-56, JX J p. AMTRAK00044. Before leaving, she told Asmore and the rest of the crew that there might be media at the station in Seattle. HT 56. Asmore was nervous as a result, and had no interest in or experience with dealing with reporters. HT 56-57. A co-worker offered to open Asmore's assigned door and "de-board" Asmore's passengers for her, because Asmore was nervous. *Id.* Arriving into Seattle on October 29, Asmore finished all of her other duties and signed herself out so she was off the clock. HT 57, 97-100. Her co-worker de-boarded the passengers. *Id.* The co-worker in question, Rose Judie, testified at Asmore's formal investigation hearing and corroborated Asmore's account. JX J p. AMTRAK000057.

Asmore didn't tell a manager she was signing out early and that her co-worker would de-board the passengers, but she explained that this practice of front-line employees covering for each other if need be, even without informing management, is a regular practice and an example of teamwork. HT 56-57.

There was no media at the platform or station in Seattle. *Id.*

4. Complainant's termination

Baggett formed her belief about what happened between Stone and Asmore by hearing from Meeds first, and then Magliari. HT 236. She denied making a decision to believe Stone over Asmore, but in fact did so, citing "proof that what was said to [Stone] was written down."

[15] Young testified at Asmore's formal investigation hearing that as a new manager, she did not know how to handle media and passenger complaints of this nature, so decided to leave it to Meeds as instructed by Baggett. JX J p. AMTRAK000047, -49; *see also* HT 23738.

HT 289. The "proof" cited by Baggett was "the Twitter, the Facebook . . . and again the conversation that Clint Meeds had with Ms. Stone." HT 290.[16] Baggett never talked to Stone herself. HT 293. Baggett did not have Stone testify at the formal investigation hearing because "she's not required to be there," HT 289, and "[w]e don't want a passenger to have to re-live any ordeal that brought negativity to them." HT 297. But Baggett felt that Asmore "was not being as truthful as she should have been." HT 293. Baggett also believed that Asmore asked her co-worker to detrain Asmore's passengers in Seattle, which she viewed as not proper teamwork. HT 244.

Baggett issued a Letter of Intent to Impose Discipline to Asmore on November 22, 2017, followed up with a disciplinary meeting on November 26, 2017. JX H. The letter alleged two violations of Amtrak's Standards of Excellence: the first was for telling Melissa Stone that she had to remove her "Love trumps hate" pin or she could not ride, "lead[ing] to negative press . . . ." *Id.* The second violation was for failing to de-board her sleeping car passengers upon arrival in Seattle on October 29. *Id.* The allegation related to Stone and Stone's tweet adopted, verbatim, the language of Meeds' report of his interview with Stone, and attributed Meeds' quotes of Stone directly to Asmore. *Id.* Baggett and Labor Relations drafted the letter, which Lombardi reviewed. HT 256, 307.

Baggett did know of the praise in Asmore's file, but in her view "we didn't have to factor in how good of an employee she was." HT 292.

On November 29, 2017, Baggett issued Asmore a Notice of Investigation. JX I. After one continuance, Asmore appeared before Hearing Officer Michael Mullen for a formal investigation hearing on January 25, 2018. JX J. Baggett served as the charging officer for Amtrak, and Van Zanten appeared as Asmore's union representative. *Id.* The hearing focused on the button/Twitter incident and Asmore's not de-boarding her passengers, as charged by Baggett; Asmore was precluded from raising the bedbug incident or her allegations of retaliation, *id.* at AMTRAK000062, -81, as Baggett objected each time. HT 294-95. Baggett also objected to a question to Asmore from Van Zanten about an "active whistleblower case." HT 294.

Stone did not testify; the hearing officer heard testimony from Meeds and relied on Meeds' report of his interview with Stone. JX J.

Baggett's views about Asmore hardened at the formal investigation hearing. As Baggett said at hearing, imitating Asmore with disdain and speculating about her thought processes:

> Q: Why did you not believe Ms. Asmore?
> A: Her actions sitting there made me think that she wasn't telling the truth. As we were in that room her stories kept getting twisted and jumbled. She was just very agitated, like – I don't know what that means, I'm not into politics. Well, this was a political year, you didn't have to be into politics to understand that this was a political – you've made a statement that this was a political button, so I don't believe that she was telling the truth. I just think that she was in there and she got caught with saying something that the passenger actually heard, and it was bigger than what she thought it would be.

[16] There is no Facebook post related to the Stone incident in the record.

> Q: And when you said that her story kept changing, what do you mean by that?
> A: First it was – oh, I don't know what that means – oh, we have a policy. Well, what policy? Well, it was some years ago, I know we had a policy. Well, when did you know about this policy? Oh, it was a while ago. Well, no, she was crying – well, no she wasn't crying – when I checked on her, she was okay. So, was she crying or was she okay? Did you know about this made-up policy? I don't know what that button means. I never said that. Her story just was not believable, as she was sitting there.

HT 247. But Asmore's account has remained consistent in each telling and retelling: what she told Meeds on October 27 on the phone, discussed above; what she testified at the formal investigation hearing, JX J, p. AMTRAK00060-63; and what she testified at hearing before me both on direct, as set out above, and on cross-examination. HT 86-93.

At hearing, Baggett denied knowing or understanding anything about any whistleblower case as of the date of the investigation hearing. HT 294-95. She also denied knowing what Asmore meant when Asmore brought up retaliation at the investigation hearing. HT 295.

As stipulated, Mullen issued his decision on January 30, 2018 and found the charges against Asmore to have been proven. JX K. And as stipulated, based upon the hearing officer's findings, Ms. Asmore was terminated on January 31, 2018.

Overall, Lombardi, Baggett, Labor Relations, and Bill Setser participated in the decision to terminate Asmore. HT 304-05, 310-11. Baggett suggested termination and Labor Relations agreed. HT 248.

In deciding to recommend termination, Baggett "had found that Tracy [Asmore] was extremely aggressive towards some of her managers and supervisors." HT 257. "I think Tracy's actions, some of her previous history, gave us the impression that we would not be able to properly counsel her to be a better employee." *Id.* The only examples given by Baggett were that she saw Asmore hang up the phone on a supervisor once, and a general reference to past "counselings." *Id.* She also considered Asmore's disciplinary history, discussed above. *Id.* Ultimately, according to Baggett, Asmore's termination was for "what she said to Ms. Stone, her actions, what happened after Ms. Stone tweeted information onto social media, the impact that it had." HT 270. "She was also terminated for basically abandoning her job. She left her job and she left it for somebody else." *Id.*

For his part, Lombardi considered Asmore's disciplinary history in conjunction with the "egregiousness" of the offense, which he characterized as "put[ting] the company in kind of a negative light" before "millions of people" and "abandoning" her duties. HT 308-11. He did not consider Asmore's length of service or her record of customer and supervisor praise. HT 346. He never spoke to Asmore, but instead relied on Baggett, Meeds and Young for what happened. HT 345-46. He recalled that Asmore's account and Stone's account of the conversation about the pin were "slightly different," but that "the major parts were essentially confirmed." HT 344-45. He did not read the entire hearing transcript, but did speak with Baggett among others. HT 342

After the hearing officer upheld the charges, Baggett, Lombardi, and Labor Relations discussed terminating Asmore. HT 305. Lombardi then "debriefed" Setser, who "signed off on the discipline" of termination. HT 305, 311.

Lombardi denied that he considered the bedbug incident in deciding to recommend termination. HT 318-19. His understanding was that Asmore was told that the sleeping car was treated for bedbugs on September 23 in Chicago, and that Morris gave her the direct order to work the car on pain of termination "so that she understood that there was kind of a consequence for her behavior." HT 317. Lombardi testified he never discussed the bedbug incident with Setser. HT 318-19.

According to Lombardi, it is unlikely Asmore would have been terminated solely for abandoning her job duties, even with her discipline history. HT 347-48. Over his three years in his current position, he has been involved in between 10 and 20 disciplinary actions that resulted in employee terminations. HT 359. As examples, he recalled a sexual assault of a passenger, misappropriation of funds, intimidation and harassment between employees, failure to perform duties and attend work, as well as terminations that were customer complaint-driven. HT 360. Of the customer complaint-driven terminations, he gave one example of a sleeping car attendant who established a pattern over time in which the attendant hid in a room, used a personal cell phone on work time, did not de-board passengers, and "just didn't tend to the passengers." *Id.*

Meeds knew of six terminations, including Asmore's, following formal investigation hearings. In the cases he could recall, the conduct at issue included a sexual assault, defrauding the company, theft, and insubordination. HT 232.

Van Zanten has never heard of an Amtrak employee being fired for a passenger's social media post. HT 154.

Magliari believed that Asmore's actions had a negative impact on Amtrak, "[b]ecause it made us appear that we're a political player and we're taking a side . . . [and] infringing upon someone's First Amendment rights." HT 172. He continued: "the fact that it made it to Fox News' website, which is a place where people who support President Trump are more likely to go than, let's say, MSNBC's web site, is especially damaging, because the conservative position on funding Amtrak is the government shouldn't be in this business of paying for passenger trains." *Id.*

When asked, however, Magliari did not have data on how many people had seen the original article, and relied for his opinion his view of how many people "had access" to the article.

> Q: Do you know how many people saw this article from DNAinfo, electronically and on paper?
>
> A: No, because as it happened, DNAinfo went out of business within two weeks of the article being posted, so some of their circulation information is not available. I mean we could run a report that would say something like that. But in the end, would millions be a

> wrong number between the number of people who see DNAinfo, or see Fox News' website, or see Conde Nast Traveler, in terms of potential impressions, which is how the measurement works? I would say clearly millions did. Now millions had access to it, because, again, The Fox News Channel is the number one watched cable TV news network, and they have loyal viewers across the country. And Conde Nast Traveler is a website you would go to if you're planning travel and thinking about travel. So, the impact of this wasn't just a tweet and wasn't just DNAinfo, it was the amplification of the tweet by potentially millions of people seeing it, and these media sources picking it up.

HT 171. Similarly, Magliari said that the Foxnews.com article was "accessible to millions," and added that the site uses "Click Bait . . . [meaning] sensationalized headlines and even sensationalized first couple of paragraphs of a story to encourage you to click it, so your eyes will see another advertisement . . . ." HT 171. When asked "do you know how many people saw" the article on Conde Nast Traveler, he said that "[t]he data is available, but it's certainly millions of people." HT 171-72. He could run a report as to the potential readership, but acknowledged that he had not. *Id.*; *see also* HT 178-80. There is no way of knowing the actual number of people who read the articles. HT 181-82. Metrics are available for Stone's Tweets.[17]

During her last full year at Amtrak, 2017, Asmore made $61,286. Since her termination, Asmore has been working for a home remodeling contractor, Universal Repair, doing the full range of renovation tasks. HT 62. She typically makes $600 a week, paid in cash, though the pay varies by the availability of work; she estimates she made about $15,000 in the year between her termination from Amtrak and the hearing, based on a review of her bank records.[18] HT 71-73. She answered an interrogatory, however, simply estimating $600 a week without further qualification, RX I, which on an annual basis would equate to $30,000 assuming 50 weeks of work.

After her termination, but before she found work with Universal Repair, Asmore was unable to pay her bills and her lender nearly foreclosed on her house. HT 62-63. She was embarrassed in front of her friends and former colleagues by being fired. *Id.* She would like to return to Amtrak.

ANALYSIS

Before turning to the substance of the FRSA, I will address witness credibility.

[17] As a metric of the Tweet's "virality," the copy of the DNAinfo article at RX F in the record, a duplicate of which is at JX J page AMTRAK00090, shows that Stone's Tweet had 1,571 comment replies, 4,564 re-Tweets, and 5,551 "likes" at the time the reporter took a screenshot image of the Tweet, if the reporter took a screenshot when she published her story on the afternoon of October 27, 2017. Magliari believed it was a screenshot. HT 181-91. On the other hand, the documents at RX F and JX J page AMTRAK00090 were printed on December 6, 2017, which I infer from the date stamp next to the URL in the footer on the printed exhibit. It is a common web browser feature to apply the URL and date printed to the footer. If the Tweet was embedded into the DNAinfo web page, the tally of replies, re-Tweets and likes could have continued to change. Finally, it is possible to obtain data on the number of views, known as "impressions," a Tweet receives; that data as to this Tweet is not in the record.

[18] I excluded the records because they were responsive to Amtrak's discovery requests, but were not disclosed prior to the hearing. HT 67-70; *see also* 29 C.F.R. § 18.57(c).

1. Credibility generally

Credibility "has been termed as 'the quality or power of inspiring belief.'" *Indiana Metal Products v. NLRB*, 442 F.2d 46, 51-52 (7th Cir. 1971) (citation omitted). "Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Id.* at 52 *(quoting Carbo v. United States*, 314 F.2d 718, 749 (9th Cir. 1963)). Credible testimony must not only come from a truthful source but "be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it," as well as "meet[] the test of plausibility." *Id.* (internal quotations omitted).

As the finder of fact in this matter, I am entitled to determine the credibility of witnesses, to weigh evidence, to draw my own inferences from evidence, and am not bound to accept the opinion or theory of any particular witness or advocate. *Stevedoring Servs. of Am. v. Dir., OWCP*, 10 F. App'x 440 (9th Cir. 2001*); Bank v. Chicago Grain Trimmers Assoc., Inc.*, 290 U.S. 459, 467 (1968). I am not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941 (5th Cir. 1991).

The ARB has stated its preference that ALJ's "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *See Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). An ALJ may also make credibility findings based on written testimony, though of course without the benefit of evaluating demeanor. *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-0054, slip op. at 13-14 & n.3 (ARB May 19, 2020).

I have considered the testimony of all of the witnesses at the hearing, including the Complainant, as well as witnesses who testified by deposition. I base my credibility findings as to the Complainant and the other witnesses on a review of the entire record, giving due regard to the demeanor of the witnesses who testified before me, the logic of probability, and "the test of plausibility," in light of the record and reasonable inferences drawn from the record. I will make express findings here as to Complainant, and discuss the weight and credibility I give others' testimony below as necessary.

2. Credibility of the Complainant

Overall, I find the Complainant credible. Her account of learning of the bedbugs, reporting that the train appeared to have not been treated for bedbugs, and explaining why she decided to mark off and then to work, has generally remained consistent. It is consistent with the

objective evidence in the record, such as her photographs, the Copesan records showing bedbug treatment in Seattle, the limited treatment in Chicago that was not consistent with Amtrak's bedbug policy, and further treatment back in Seattle. Her report of being forced to make the beds after the train was already moving, without the help of the Ready Crew, is corroborated by Francik and is consistent with the timing of the train's boarding and departure shortly following the confrontation with Croom and Morris.

I do note that on cross-examination, one aspect of Asmore's account of the bedbug confrontation changed. On direct, she said that no one ever said that the bed bugs on car #32086 had been taken care of. HT 33. On cross-examination, she acknowledged that Croom and Morris did tell her that the car had been "inspected and treated." HT 80-81. Asmore immediately offered the explanation, however, that the car and room appeared to be in the same condition, *id.*, in essence saying that she did not believe Croom and Morris. There is a fine distinction, too, between "inspected and treated," and "taken care of, which is especially significant here since the inspection and treatment *did not* actually take care of the bedbug problem and was not in keeping with Amtrak's bedbug policy. In the overall context of Asmore's testimony, its consistency with the other evidence of record and over time, and Asmore's demeanor, her changed testimony here does not diminish her credibility.

Turning to the button/Twitter incident, as noted above Asmore's account has remained consistent from the day of her conversations with Stone – at Stone's room, after the train was moving – and later with Meeds, to the investigation hearing, to direct examination before me, to cross-examination. For reasons discussed below including this consistency, and the story's consistency with other evidence of record, I credit Asmore's account.

Asmore's explanation for signing out and leaving the train in Seattle without detraining her own passengers is corroborated by the co-worker who volunteered to cover her duties. It is also consistent with common sense – colleagues help each other out without running every detail past management. It is only contradicted by Baggett, who was not present and for reasons I will discuss below, is not credible on this and other critical issues.

Finally, appearing at the hearing before me and testifying under oath, Asmore was calm, clear and composed in her testimony, and provided reasonable explanations in support of her actions. She acknowledged and discussed facts adverse to her, such as her discipline history, and offered reasonable explanations for her actions.

3. General standard

The FRSA provides that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part" to any protected activities. 49 U.S.C. § 20109(a). FRSA cases are governed by the burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i) (citing 49 U.S.C. § 42121(b)); *see also Frost v. BNSF Railway Co.*, 914 F.3d 1189, 1194-95 (9th Cir. 2019) (citing *Rookaird v. BNSF Railway Co.*, 908 F.3d 451, 459 (9th Cir. 2018)).

To prevail, a complainant must show: (1) she engaged in protected activity (protected activity); (2) the employer knew that she engaged in protected activity (knowledge); (3) she suffered an unfavorable personnel action (adverse action); and (4) the protected activity was a contributing factor in the unfavorable personnel action (contribution). *See* 49 U.S.C. § 20109(d)(2)(A) (citing 49 U.S.C. § 42121(b)); 29 C.F.R. § 1982.109(a); *see also Rookaird*, 908 F.3d at 459-61 (citing *Brune v. Horizon Air Indus.*, Inc., ARB No. 04-037, 2006 WL 282113, slip op. at 7 (Jan. 31, 2006))[19]; *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-0054, slip op. at 11-12 (ARB May 19, 2020); *see generally Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Jan. 4, 2017). The complaining employee bears the initial burden, and must show "by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. § 1982.109(a); *see, e.g., Palmer*, ARB No. 16-035, slip op. at 53.

The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate "by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior." 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *see Frost*, 914 F.3d at 1195; *Riddell*, ARB No. 2019-0016, slip op. at 20; *see also Araujo*, 708 F.3d at 157; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("For employers, this is a tough standard, and not by accident"). Clear and convincing evidence is evidence that shows "that the thing to be proved is highly probable or reasonably certain." *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) ("*DeFrancesco II*") (citing *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also Palmer*, ARB 16-035, slip op. at 52, 56-57; *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014); *Brune*, ARB No. 04-037, slip op. at 14.

4. Complainant's case for retaliation: has Complainant shown by a preponderance of the evidence that her protected activity was a contributing factor in Respondent's adverse actions?

a. Did Complainant engage in protected activity?

To establish a case for retaliation, a complainant must first show that he or she engaged in protected activity. *E.g. Araujo*, 708 F.3d at 157. The FRSA identifies several categories of protected activity, *see* 49 U.S.C. §§ 20109(a)(1)-(7), (b)(1)-(3), (c)(2), including notifying in good faith the railroad of a work-related personal injury, *see* 49 U.S.C. §§ 20109(a), (a)(4), and

[19] Because *Rookaird* was tried in federal district court rather than at OALJ, the discussion of elements and burden shifting in *Rookaird* is confusing. *See* 908 F.3d at 459-61. In *Rookaird*, the Ninth Circuit panel discusses a FRSA plaintiff's "prima facie" case and "substantive" case, and "prevailing" at each. *Id.* This is a valiant effort to translate into the district court milieu what we are familiar with within the USDOL administrative process as the OSHA complaint and investigation, and then adjudication at OALJ. The "prima facie" "case" or "stage" is really just a requirement to file a complaint containing some factual detail with OSHA, in order to limit the burdens of full investigations on respondents to potentially meritorious cases. The closely analogy is the recent heightened requirement, in district court, to plead a plausible case. *See generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009). I cite *Rookaird's* reference to the ARB decision in *Brune* above to make clear that what I am deciding here is solely what the Ninth Circuit describes in *Rookaird* as the "substantive" case. *See also Palmer*, ARB No. 16-035, slip op. at 3-4.

reporting in good faith a hazardous safety or security condition. 49 U.S.C. §§ 20109(b)(1)(A). The parties agree that the level of "good faith" required under both subsections (a) and (b) is subjective belief and objective reasonableness to have that belief. *See, e.g., Rookaird,* 908 F.3d at 458 (discussing subsection (a) and citing cases).

Here, Asmore asserts three protected activities: that Asmore's report of bedbugs on sleeping car #32086 in Chicago on September 24, 2017 was a good-faith report of a hazardous safety condition; that Asmore's reports of bedbug bites on September 22 and September 25 to manager Young on September 26, 2017, was a good-faith report of a work-related personal injury; and, Asmore's October 7, 2017, report of bedbug bites on October 6, 2017, was also a good-faith report of a work-related personal injury. P. Br. at 11-12.

Amtrak argues that Asmore did not prove a good-faith refusal to work when confronted by a hazardous safety condition, which is also a protected activity under the FRSA. 49 U.S.C. §§ 20109(b)(1)(A)-(B), (b)(2). R. Br. at 16-17. Amtrak does not contest in its brief that Asmore's reports of bedbug bites were work-related injuries reported in good faith.

I find that Asmore engaged in protected activity in Chicago on September 24 when she reported the hazardous safety condition of bedbugs on car #32086, and what appeared to her to be a failure to treat the car for them. I note here that the parties stipulated that "[o]n September 24, 2017, Ms. Asmore reported to work and inquired as to whether car #32086 was taken out of service due to bedbugs." Her report was in good faith, i.e., her subjective beliefs were objectively reasonable, because when she returned to the car on September 24, the car and Room 15 appeared to her to be in the same condition and the MAP-21 log she read did not reflect bedbug treatment. Moreover, she had been told in Seattle that the car would be taken out of service for bedbug treatment, and it was not being taken out; and, two other employees, Denise in crew management and the unnamed woman in Mechanical, also said that car #32086 was supposed to be taken out. She told Croom and Morris all of these reasons for her concern.

On cross-examination, Asmore acknowledged that Croom and Morris did tell her that the car had been "inspected and treated." But the good-faith report of a hazardous safety condition was already complete.

Necessarily, I also find that bedbugs present a sufficient hazard to support a Section 20109(b)(1)(A) protected report. As we know, the confrontation continued, and Asmore marked off. The FRSA does also expressly protect employees from retaliation for refusing, in good faith, "to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties" where there is no alternative and no time for a fix, and "the hazardous condition presents an imminent danger of death or serious injury." 49 U.S.C. § 20109(b)(1)(B), (b)(2). Amtrak is correct that there is no Section 20109(b)(1)(B) protected activity here, but not for the reason it argues. There is no refusal-to-work claim because after the confrontation on the platform with Croom and Morris and Morris's direct order, Asmore worked the sleeper car leaving Chicago on September 24.[20]

[20] Nor can Amtrak claim that it legitimately punished Asmore for a non-protected refusal to work, and not the protected report, because Asmore worked.

However, the "imminent danger of death or serious injury" limitation on refusing to work does not apply to reports of hazardous safety conditions, protected under Section 20109(b)(1)(A). Amtrak recognizes this, and argues that the definition of "hazardous" – "[e]xposed to or involving danger; perilous; risky; involving risk of loss, *Black's Law Dictionary* 719 (6th ed. 1990), is sufficiently limiting to rule out bedbug bites as a hazard that an employee is protected in reporting under Section 20109(b)(1)(A).

Asmore, rather than submitting factual evidence about bedbugs, relies on *Lillian v. Nat'l R.R. Passenger Corp.*, 259 F. Supp. 3d. 837 (N.D. Ill. 2017). In *Lillian*, an Amtrak employee entered a car to clean it after he was told it was "fumigated." 259 F. Supp. 3d at 839. He saw moving black specks on a mattress, left the car, refused to return to work cleaning and reported the bedbugs. *Id.* He was terminated. *Id.* On cross-motions for summary judgment, the court found that Lillian established his report as Section 20109(b)(1)(A) protected activity (as well as his FRSA claim as a whole), and in so doing necessarily found that bedbugs presented a hazardous safety condition. *Id.* at 843.[21] Asmore also notes Baggett agreed that bedbugs were a safety problem.

I agree with Asmore and find that bedbugs present a sufficient hazard to support a protected report. While the court in *Lillian* did not expressly discuss the hazard issue, I infer that this conclusion was sufficiently clear to the court as to not be worth discussing. Moreover, Baggett's admission, plus the fact that Amtrak treats bedbugs as a separate class of pests in its Mechanical Bulletin on pest control procedures, requiring a heightened, "more complex" control program, PX 2, is sufficient evidence to support this finding.

Regarding Asmore's reports of her own bedbug bites to Young, I also find these constitute protected activity. As noted, Amtrak does not contest this issue.

b. Did Respondent take adverse action against Complainant?

Second, a complainant must show by a preponderance of the evidence that the respondent took some adverse action against him or her. *E.g. Araujo*, 708 F.3d at 157. A railroad may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" on the basis of protected activity. 49 U.S.C. § 20109(a); *see also* 49 C.F.R. § 1982.102(b)(1) (interpreting the statute to add "including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee").

Interpreting this "expansive" language, the Board has explained that an adverse actions in FRSA cases are "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Riddell*, ARB 2019-0016, slip op. at 20; *see also Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 2014-0047, ALJ No. 2013-FRS-00035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010)). The FRSA / AIR-21 standard for adverse action is broader than the Title VII rule, which bars an action

[21] Interestingly, both Lombardi and Morris were involved as supervisors whose actions were at issue in *Lillian.* 259 F. Supp. 3d at 839-40.

"materially adverse . . . [that] well might have dissuaded a reasonable worker" from protected activity. *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006); *see Williams*, ARB No. 09-018 slip op. at 10-14 (ARB Dec. 29, 2010) (discussing *id.*). Under AIR-21 framework cases, including the FRSA, the *starting point* for an adverse action is any action that "would dissuade a reasonable employee from engaging in protected activity." *Menendez v. Halliburton*, ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-2005, slip op. at 20 (ARB Sept. 13, 2011). No tangible job consequence is required; that question goes to remedy. *Id.* Employer actions must be considered in the aggregate to determine if together they rise to the level of an actionable adverse action. *Id.* at 20-21.

Hence, under the FRSA, there is an extraordinarily broad range of potential adverse actions. The quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. *See, e.g., Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761 (1998). But the ARB has also held that a railroad's charging letter qualifies as an adverse action under the FRSA. *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 2-3 & n.4 (ARB Dec. 21, 2012). The ARB has held that "unfavorable personnel actions" include reprimands, written warnings, and counseling sessions where (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline. *Williams*, ARB No. 09-018 at 15. But "any alleged adverse action must be considered in context, including internal investigations and hearings which may result in the imposition of discipline." *Thorstenson v. BNSF Railway Co.,* ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052, slip op. at 7 (ARB Nov. 25, 2019) (en banc) (per curiam) (bringing a disciplinary charge alone, in and of itself, does not automatically constitute an adverse action, although it can constitute one if such action would dissuade a reasonable employee from engaging in the protected conduct)).

First, Asmore was terminated effective January 31, 2017. I agree that termination is the quintessential adverse action, and so find.

Asmore alleges three adverse actions in addition to being terminated: assignment of additional work under stressful circumstances, i.e., being forced to make all of the beds on her sleeping car on September 24; calls from a manager while off shift; and being told by Baggett to make sure that emergency supplies are on her car.

I find that the assignment of additional work to Asmore – making all of the beds on car #32086, was an adverse action. I rely on the context here. First, there is the temporal proximity – mere minutes – between the conclusion of the bedbug confrontation and making the beds. Second, there is the express order to Francik not to help; and finally, there is the acute pressure and strain placed on Asmore of having to serve a car full of passengers on a moving train as well as make all of the beds, a task typically completed by the Ready Crew before the train boards, which Croom had to have known would result. These factors lead me to conclude that forcing her to make the beds was an adverse action and intended as such, i.e., as an express response in retaliation for assertively raising the bedbug issues.

Francik, an experienced co-worker without any known reason for bias in favor of Asmore, gave a written statement. PX 1. Francik was "told by Ms. Croom to ready the car for

passenger boardings." Also, Francik recalled, "[w]e were told NOT to make up any beds, that Ms. Tracy Asmore would be making up any beds left unmade – which I believe was the entire car." *Id.* Francik's statement, though unsworn and out of court, is detailed and consistent with Asmore's account and the other known facts (e.g. that time was running short to prepare car #32086, and Croom was present and managing the Ready Crew). Croom states in her email to Baggett and others the same day that she and Ford helped with the beds, but I do not credit her statement, as few people put overt retaliation in writing. When deposed, Croom highlighted that time was short to get the train ready once Asmore agreed to work, but claimed that she did not recall telling Francik not to help Asmore make the beds. RX J p. 11-12. She also claimed that making the beds is the car attendant's responsibility, not the Ready Crew's. RX J p. 11. I find Francik credible, and Croom not credible, on these points; he performs the duties of a Ready Crew member regularly and the circumstances, taken as a whole, suggest that he has reported events accurately.

I do not find that either of the other two occurrences rose to the level of an adverse action. Once, Baggett questioned Asmore as to why she had not loaded emergency water and snack packs on the train, which Asmore testified was a responsibility of managers or Lead Service Attendants. Baggett added this as a new task to Asmore's duties. While this is adding additional work, like the bed-making, this was some weeks after the protected bedbug report, and there is no other context given. Perhaps this is a particularly arduous task, but on its face it does not seem to be. Asmore has not proven why the addition of this task was adverse as a matter of law, i.e., would dissuade protected activity.

On another occasion Young repeatedly called Asmore in a short period of time while Asmore was off duty and asleep, regarding a non-urgent customer service question. There is no allegation that Young knew Asmore was asleep, or that the content of the call was harassing, or any other factor that suggests the calls would dissuade protected activity.

c. Was Complainant's protected activity a contributing factor in Respondent's adverse action?

The final element in a complainant's case for retaliation is a showing, by the preponderance of the evidence, that the protected activity was a contributing factor in the adverse action. *See Frost*, 914 F.3d at 1195-97 & n.5 (citing *Araujo*, 708 F.3d at 158). This is not meant to be a difficult showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013). "A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Rookaird*, 908 F.3d at 461-62 (quoting *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017)); *see also, e.g., Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5th Cir. 2011)); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1150 (Fed. Cir. 1993); *Williams*, ARB No. 09-092 at 5. "Showing that an employer acted *in retaliation for* protected activity *is* the required showing of intentional discrimination; there is no requirement that FRSA plaintiffs separately prove discriminatory intent." *Frost*, 914 F.3d at 1195; *see also id*. at 1196 (citing *Rookaird*).

Necessarily, a complainant must show that the respondent knew about her protected activity. *E.g. Araujo*, 708 F.3d at 157.[22] It is not enough for a complainant to show that her employer, as an entity, was aware of his protected activity; rather, the complainant must establish that the decision-makers who subjected her to the adverse actions were actually or constructively aware of his protected activity. *See Conrad v. CSX Transp.*, 806 F.3d 103, 107-08 (4th Cir. 2016); *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 09-015, slip op. at 16-17 (ARB Mar. 29, 2013) ("*Rudolph I")*; *see also Riddell*, ARB No. 2019-0016, slip op. at 17. By constructively aware, I am referring to a "cat's paw" theory of liability, discussed further below. Under a cat's paw theory, even if there is no evidence that the final decision maker in the adverse action was aware of the protected activity, the complainant may still prevail if the evidence shows that a lower-level supervisor knew of the protected activity and that the activity was a contributing factor in that supervisor's actions to advise or influence the final, higher-level decision maker. *See id.*

A complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action. *Frost*, 914 F.3d at 1195-97 & n.5; *Thorstenson*, ARB No. 2018-59, slip op. at 8.[23] *Marano*, 2 F.3d at 1141; *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9th Cir. 2010). Nor is it necessary to show any animus. *Frost*, 914 F.3d at 1195; *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012) ("*DeFrancesco I*"). Contribution might be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action, even when there is no evidence of retaliatory animus or motive. *E.g. Hutton*, ARB No. 11-091 slip op. at 6-7.

Even if a respondent has the honest belief that a complainant engaged in the conduct for

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[22] The ARB has made clear that absent governing circuit precedent, *see, e.g., Araujo*, 708 F.3d at 157, a complainant proves knowledge as part of contributing factor causation, not as a separate element. *See See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 2 n.5 (ARB July 17, 2015) (citing *Bobreski v. J. Givoo Consultants, Inc*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011) ("*Bobreski I*")); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42 (ARB Feb. 18, 2016) (knowledge not a distinct element in a complainant's required showing under Sarbanes-Oxley Act); *DeFrancesco II*, ARB No. 13-057 at 5 (knowledge omitted as separate element in FRSA claim).

[23] As we are in the Ninth Circuit, *Frost* and *Rookaird* apply; at footnote 5 in the *Frost* opinion, the panel acknowledges a circuit split on whether a plaintiff must explicitly show retaliatory motive or intent as an additional element. *Compare Frost*, 914 F.3d at 1195-97 & n.5 *with Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 790-91 (8th Cir. 2014). Respondent raises a related argument, arguing that *Frost* is "unreliable authority" while *Rookaird* is reliable in citing *Kuduk*. R. Br. at 15. The authors of the *Frost* opinion I think explained this issue well:

> *Rookaird*'s citation to *Kuduk* does not imply, much less impose, an obligation to prove retaliatory intent that is not included within the FRSA's clear and explicit statutory scheme. Instead, *Rookaird* simply confirms that although intent or animus is part of an FRSA plaintiff's case, showing that plaintiff's protected conduct was a contributing factor is the required showing of intent or "intentional retaliation[.]" *Id.* That is, by proving that an employee's protected activity contributed in some way to the employer's adverse conduct, the FRSA plaintiff has proven that the employer acted with some level of retaliatory intent.

Frost, 914 F.3d at 1196. I adopt this rationale in relying on both *Frost* and *Rookaird* throughout as both consistent with each other and the statutory language, and binding.

which it was stated she was terminated, the complainant may still prevail, *Frost*, 914 F.3d at 1195-97; this is the case even if the protected activity "played only a very small role in [the railroad's] decision-making process." *Id.* at 1197. A fact-finder may not simply compare one reason for the adverse action to another, because "[u]nder the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist; therefore, [a complainant] is not required to prove the [respondent's] reasons are pretext." *Coates*, ARB No. 14-019, slip op. at 3-4. In sum, "if the ALJ believes that the protected activity and the employer's nonretaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question." *Palmer*, 16-035, slip op. at 53 & n. 219 (citing *Bechtel*, ARB No. 09-052, slip op. at 12).

As noted, a complainant may show contribution through a cat's paw theory in cases under the FRSA. *See, e.g., Kuduk*, 768 F.3d at 790-91. This theory of liability applies when "a supervisor performs an act motivated by [a prohibited reason] that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable*." Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (USERRA). However, *Staub* was a USERRA case, under which a plaintiff must show that the protected activity or prohibited reason was a "motivating factor." *Id.* at 417. Under the FRSA, if the prohibited reason *contributed* to actions of one supervisor, and those actions contributed to the ultimate decision resulting in the adverse action, then the impermissible factor was a contributing factor in the adverse action. *Rudolph I*, ARB No. 11-037, slip op. at 16-17 (citing *Bobreski I*, ARB No. 09-057, slip op. at 13-14); *see also Riddell*, ARB No. 2019-0016, slip op. at 17. The complainant need only show that one individual among multiple decision makers influenced the final decision and acted, in part, because of the protected activity. *Id.*

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB May 25, 2011)).

A non-exhaustive list of relevant circumstantial evidence "include[s] temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity." *DeFrancesco I*, ARB No. 10-114 at 6-7 (citing *Bobreski I*, ARB No. 09-057 at 13) (*overruled on other grounds in Thorstenson*, ARB No. 2018-59). It could also include "work pressures [or] past and current relationships of the involved parties." *Bobreski I*, ARB No. 09-057 at 13; *see also, e.g., Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 19-21 (ARB March 30, 2016); *Bobreski II*, ARB No. 13-001 slip op. at 17; *Bechtel*, ARB No. 09-052 slip op. at 13. An ALJ may closely examine an employer's evidence and stated rationale for the adverse action, and whether the action corresponds with that of a "prudent" supervisor, to shed light on whether there was contribution by the protected activity. *See Ledure*, ARB Case No. 13-044, slip op. at 8-9. Furthermore, an ALJ must consider the circumstantial evidence *as a whole* and not in discrete pieces when asking whether the evidence establishes

contribution. *Bobreski v. J. Givoo Consultants, Inc*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 17-18 (ARB Aug. 29, 2014) ("Bobreski II"). Pieces of evidence that each might be insufficient can together make a very strong case. *See id.* at 19-22.

Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *See, e.g., Bobreski I*, ARB No. 09-057 at 13; *Bechtel*, ARB No. 09-052 at 13 & n.69; *Zinn American Commercial Lines*, ALJ No. 2009-SOX-025, slip op. at 19 (ALJ Nov. 19, 2012). It is possible for temporal proximity alone to show contribution, but in most cases it must be analyzed within its "factual setting." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); *Riddell*, ARB No. 2019-0016 at 18 & n.9 (citing *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 8 (ARB Jan. 22, 2020) ("The mere circumstance that protected activity precedes an adverse personnel action is not proof of a causal connection between the two.")); *Dietz*, ARB No. 15-017, slip op. at 20. Courts must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. *See, e.g., Kuduk*, 768 F.3d at 790-92. A finding of no contribution may be sustained despite temporal proximity when there is a greater weight of evidence against contribution, such as a lack of knowledge of protected activity by the decision maker, a longer timeline disfavoring contribution, and the existence of a credible, non-pretextual intervening cause for the adverse action. *See Folger*, ARB No. 15-021, slip op. at 3-6; *see also Acosta*, ARB No. 2018-0020, slip op. at 8-9.

I find that Asmore's protected activity was a contributing factor in her termination by Amtrak, and that Amtrak's adverse actions were intentional conduct in reckless disregard of Asmore's protected FRSA rights, for the following reasons.

As an initial matter, I credit Croom's September 24, 5:53 p.m. email, JX D, to Lombardi, Morris, Baggett, Young, and Ford, as establishing knowledge of Asmore's protected activity by Baggett and Lombardi. Baggett reforwarded the email to Lombardi upon her return to the office on September 29. Both Baggett and Lombardi testified that Baggett drafted, and Lombardi reviewed, the charging letter against Asmore that initiated her discipline proceeding. And Baggett proposed and discussed with Lombardi, that Baggett wished to terminate Asmore after the hearing officer upheld Baggett's charges against Asmore. Lombardi agreed, and in turn briefed Setser as the final decision maker. Setser approved the termination. Knowledge is established.

Once they knew of it, the relevant Amtrak managers, especially Baggett, became hostile toward Asmore as a result of her protected activity. Put simply, Asmore's reporting and marking off over the bedbugs on September 24, and working the car only after being given a direct order on pain of termination, was a "big deal."[24] As described by Amtrak's witnesses at hearing, the train was preparing to depart, and the impact of a sleeping car attendant marking off shortly before departure, when a replacement might not be available, would have been substantial. It

[24] Croom equivocated here; it was a big deal for the CMC to find a same-day replacement but not for her own division. RX J p. 10.

heightened the stakes for the conflict, and fueled the hostility toward Asmore – who, as we know, was acting reasonably and in good faith given the facts known to her.[25]

Five managers – Lombardi, Ford, Croom, Morris, and Young – became involved in the discussion regarding Asmore, bedbugs and marking off, on the day it occurred. As discussed above, within minutes after the bedbug confrontation on September 24, Croom retaliated against Asmore by forcing her to make all of the beds on her sleeping car without the usual assistance from the Ready Crew.

In her email later in the day on September 24, JX D, Croom reported her management-oriented account of Asmore's protected activity up the chain of command, creating the impression that Asmore had been unreasonable – or as Baggett would refer to Asmore at hearing, "extremely aggressive." Reading Croom's email, one is left with the impression that Asmore is an employee – *another* employee – who would not listen to her reasonable managers.

But the objective fact, available to Amtrak's managers on September 24 or afterwards had they looked for it, is that car #32086 was not fumigated in Chicago; it was not treated in accordance with Amtrak's published and mandatory bedbug policy. *Compare* JX-C *with* JX-E. Amtrak's published bedbug policy is that "[i]f pest activity exists car must be quarantined/shopped for Gas fumigation." PX 2 p. 3. The car had not been quarantined and placed in the shop upon discovery of the bedbug activity in Seattle, anticipating that it would be in Chicago. But the policy was not followed in Chicago on September 23, either. Like the dust and liquid treatment in Seattle, the Copesan exterminator in Chicago used a liquid treatment, Demand CS, in cracks and crevices. Moreover, the exterminator reported that he "inspected and chemically treated car #32086" – an entire car – with only two fluid ounces. And as Asmore observed and the pictures in the record indicate, and that she reported to Croom and Morris, there were no signs that even that degree of inspection and pest control had been done. Asmore had been told in Seattle the car would be taken out in Chicago, and was told by two other Amtrak staff in Chicago that the car was supposed to be taken out, and it was not. And independently, Francik also heard the car would be taken out.

It might be the case that Croom was told by Mechanical on September 24 that the car had been "fumigated" in so many words, which it had not been, and with the time pressure to get the train out Croom ran with that explanation. That still does not excuse retaliating against Asmore with the extra bed-making. It also does not excuse failing to consult the Copesan records and the published bedbug policy after the fact, and instead, tarring Asmore in the September 24 email as an unreasonable employee for her protected safety activity. A prudent manager, *see Ledure*, ARB Case No. 13-044, slip op. at 8-9, without animus, would have run down Asmore's side of

[25] And was correct. There is a related issue here that bears mentioning: Amtrak management in the field is spot-treating sleeping cars for bedbugs and leaving the cars in service, which contradicts Amtrak's own maintenance bulletin on bedbugs. PX 2 Why? Lombardi explains that in Chicago it is easier to swap in cars, and harder in outstations such as Seattle. HT 354-55. Translated, that means that Amtrak managers are cutting corners on passenger and crew health and safety in the interest of convenience and production, instead of planning for the foreseeable occasions – given that Amtrak has an aggressive written bed bug policy requiring taking cars out of service – that cars will have to be taken out of service for bedbug fumigation, and they will need to accommodate the passengers. Only on the third bedbug report, back in Seattle, was car #32086 taken out for fumigation, in accordance with the policy, instead of spot-treated.

the story, i.e., why she believed so strongly that the car was unsafe and was supposed to be taken out of service, before drawing and communicating conclusions.

But the key manager behind Asmore's termination was Baggett. Though she was on vacation, she learned of Asmore's protected activity from Croom's September 24 email upon her return. HT 265. It is plain that Asmore's protected activity, as described in Croom's email, strongly influenced Baggett's opinion of Asmore going forward.

Before I turn to what Baggett said, a word about how Baggett said it. At the hearing, I observed Baggett throughout her testimony. Baggett's tone and demeanor with respect to Asmore was one of palpable irritation and hostility. Combined with the language that Baggett used, Baggett's demeanor completely demolished her credibility, including in particular the credibility of her denial that Asmore's protected activity influenced her decision making in charging Asmore and recommending Asmore's termination. *See Palmer*, ARB No. 16-035, slip op. at 58 (ALJ must expressly weigh manager's denial of retaliation).

Baggett described Asmore's protected activity as "abnormal." HT 268. "What was abnormal is the fact that [Asmore] didn't believe she should have to work the car, that she felt that the car should have come out. It was abnormal for someone to have to be given a direct order to work a car. I mean a bed bug, we deal with bed bugs, that's not a problem, we know what we should do. . . . But everything besides her reporting it was abnormal, yeah, this was very abnormal." *Id.* First, as discussed above with respect to Croom, the objective fact that car #32086 should have been taken out of service in Chicago on September 23, as a matter of Amtrak's bedbug policy, was available to Baggett. Yet Baggett formed the belief, and continued to believe at hearing, that Asmore's report and resistance to working the car was just Asmore's feelings.

Second, Baggett's repeated use of the word "abnormal" in discussing Asmore's protected activity is an indicator of her hostility. "Abnormal" is defined as "deviating from the normal or average; unusual *in an unwelcome or problematic way*." *Abnormal, Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/abnormal (accessed June 9, 2020) (emphasis added).

Regarding marking off, Baggett said, "In six years, I can probably say less than five times someone has threatened to mark off, because of a condition they didn't like." HT 286. She explained that in each case, "[t]hey worked. *And they were not given a direct order to do it, they just continued their job.*" *Id.* (emphasis added). Even at hearing, more than a year later, Baggett tacked on to her answer for emphasis that other employees who wanted to mark off, unlike Asmore, did not need to be given a direct order to work, underscoring her lingering frustration with Asmore.

In connection with the temporal proximity – only a few weeks – between the bedbug confrontation and Baggett's charging decisions following the button/Twitter incident, Baggett's testimony discussed here is *almost* direct evidence – that is, almost an admission – that she considered Asmore's protected activity on the platform in Chicago in charging her and then proposing termination. I will characterize it as *strong* circumstantial evidence.

Baggett's testimony reveals additional circumstantial evidence that Asmore's protected activity was a contributing factor. At hearing, Baggett related a factually-incorrect understanding of the bed bug confrontation, and described it in dismissive terms unfavorable to Asmore, favorable to Croom, and consistent with Croom's September 24 email. HT 262-64. For example, Baggett insisted that two supervisors and one member of Ready Crew helped to make the beds. This was not accurate, as Baggett apparently did not investigate to discover that Croom assigned additional bed-making work to Asmore following her protected activity.

At hearing, Baggett denied knowing or understanding anything about any whistleblower case as of the date of the Amtrak formal investigation hearing. HT 294-95. She also denied, at hearing, knowing what Asmore meant at the formal investigation hearing when Asmore brought up retaliation. HT 295. This denial "taxes the credulity of the credulous." *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting). It is not credible and undermines Baggett's overall credibility for two reasons: the temporal proximity and the relationship between Baggett and Asmore in Amtrak's chain of command. Baggett is two levels up as a manager from Asmore, managing 100 employees. Only four weeks apart, one sleeping car attendant – Asmore – caused Baggett problems. As apparent from evidence discussed elsewhere, and her demeanor, Baggett remained *even as of hearing in May 2019* upset with Asmore for Asmore's protected activity, i.e., her report of bedbugs and related attempt to mark off. Furthermore, Baggett didn't ask, at the investigation hearing, what Asmore meant; she simply objected to the entire subject and focused on proving up the flimsy Twitter incident as grounds to discipline Asmore. A reasonable supervisor in Baggett's position who truly did not know would have asked "what are you talking about?" even if only to protect the company's interests in avoiding a proceeding such as this one, and get the employee on record.

Baggett continued to maintain the view, at hearing, that Asmore did something wrong in the course of reporting the bedbugs and the apparent failure to treat the sleeping car in Chicago on September 23, and insisting she would mark off. "She [Asmore] was given the correct information that the car had been properly taken care of. Because that car had been properly taken care of, there was no reason for her to mark off, because she felt that it was unsafe for her. . . . So no, she should not have marked off." This further undercuts Baggett's credibility, as again, Amtrak's bedbug policy is in the record, and clearly shows that Amtrak management and Copesan did *not* properly handle Asmore's bedbug reports or her report that the car appeared to not have been properly treated. It further demonstrates animus.

Baggett also believed and testified that Asmore asked her co-worker to detrain Asmore's passengers in Seattle, which she believed was not proper teamwork and led to the second misconduct charge. HT 244. Baggett believed that Asmore "abandon[ed] her job." HT 270. This was directly contradicted not only by Asmore, but by the person in the very best position to know, the co-worker herself. Rose Judie testified at Asmore's formal investigation that Judie offered to help Asmore. This is another issue where Baggett formed a belief adverse to Asmore *and* inconsistent with undisputed facts, further raising the inference that Baggett's animus toward Asmore's protected activity was clouding her judgment.

I also note that Baggett did know of the praise in Asmore's file, but asserted "we didn't have to factor in how good of an employee she was." HT 292. Perhaps it is true that Baggett did

not "have to" as a matter of the applicable collective bargaining agreement, but choosing to ignore what is plainly mitigating evidence is further evidence of Baggett's animus toward Asmore's protected activity. Certainly a prudent supervisor would not ignore such facts. *See Ledure*, ARB Case No. 13-044, slip op. at 8-9.

Finally, at hearing, Baggett delivered a diatribe, in substance and delivery, as to why she did not believe Asmore at the formal investigation hearing, which I quoted in full above. HT 247. I cite this here not because a witness's opinion about whether another witness is lying or telling the truth is relevant; it isn't.[26] I cite this because the tone and substance of Baggett's answer is more telling about Baggett's lack of credibility and impermissible motivation than it is about Asmore's veracity. As I have noted elsewhere, Asmore's account has remained consistent in each of its tellings, from her initial interview with Meeds, to the formal investigation hearing, to the hearing before me.

In deciding to recommend termination Baggett "found that Tracy [Asmore] was extremely aggressive towards some of her managers and supervisors." HT 257. "I think Tracy's actions, some of her previous history, gave us the impression that we would not be able to properly counsel her . . . ." *Id.* Baggett's explanation at hearing for that characterization was wafer thin. Neither of Asmore's prior disciplinary actions arose from aggression toward a supervisor. At no time, not in testimony or in Croom's 5:53 p.m. September 24 email, did anyone allege that Asmore was aggressive or rude during the bedbug confrontation. And it almost goes without saying that one person's "extremely aggressive" is another person's forthright and assertive. Baggett knew about Asmore's protected activity prior to the button/Twitter incident, and indeed, the bedbug confrontation would have been fresh in Baggett's mind as relates to Asmore.

Here, I acknowledge that "'federal courts do not sit as a super-personnel department' that re-examines an employer's disciplinary decisions," *Kuduk*, 768 F.3d at 792 (citation omitted), and that "it is not unlawful for a company to make employment decisions based upon erroneous information and evaluations." *Id.* (citation omitted). But Baggett's factual conclusions were time and again so clearly incorrect and inconsistent with facts available to her so as to support the conclusion that she was hostile toward and biased against Asmore.

In *Lillian*, the district court relied on similar circumstantial factors – a poor investigation and the employee's other good work – even absent the sort of animus expressed by Baggett, in finding that the employee's protected activity contributed to his termination. "[I]t is highly relevant that Simane and [Monica] Morris not only failed to take any steps to verify or negate Lillian's expressed safety concerns concerning bedbugs—they simply removed him from service without any additional time to address those concerns. 259 F. Supp. 3d at 844. "Nor did they pay

[26] In proceedings governed by the Federal Rules of Evidence, "[t]estimony regarding a witness' credibility is prohibited unless it is admissible as character evidence" under Rule 608. *See U.S. v. Ramirez*, 537 F.3d 1075, 1084 (9th Cir. 2008) (quoting *U.S. v. Geston*, 299 F.3d 1130, 1136 (9th Cir. 2002)). Assessment of a witness's veracity is an issue for the finder of fact. *United States v. Weatherspoon*, 410 F.3d 1142, 1147 (9th Cir. 2005).

heed to the facts that he had completed his other assigned duties that day and that he had even offered to complete other tasks in lieu of stripping car 30289." *Id.*

Moreover, Baggett's conduct toward Asmore was plainly intentional and was carried out over a period of months. And even if Baggett possibly – *possibly* – did not realize from the start that Asmore's bedbug report on September 24 could be deemed protected activity under the FRSA, Asmore's attempt to raise retaliation and the existence of a whistleblower complaint at the formal investigation hearing gave notice to Baggett that Asmore was asserting FRSA rights. From that point in time at the very latest, Baggett's actions to recommend and then personally carry out the termination of Asmore were in reckless disregard of the FRSA and Asmore's rights.

Lombardi adopted many of the same incorrect operative facts as Baggett, and did not see to it that a more thorough investigation was done before participating in disciplining Asmore. In his testimony, he was calm and straightforward, and did not project the irritation toward Asmore that Baggett did. Nor did he express animus by using language describing Asmore as "extremely aggressive" and Asmore's protected activity as "abnormal." I therefore find his denial that he personally did not consider Asmore's protected activity credible, but he closely participated with Baggett – the manager "predominantly" responsible in this case, he said, HT 304 – agreed with her decision, knew of the protected activity, and concurred in proposing Asmore's termination to Setser.

I turn to the credibility, or lack thereof, of Amtrak's stated reason for termination: the button/Twitter incident. I may weigh the credibility of a respondent's stated reason for termination as evidence of whether the protected activity was a contributing factor to the adverse action. *See, e.g., Palmer,* ARB No. 16-035, slip op. at 53-56. Both "indications of pretext" and the "falsity of an employer's explanation for the adverse action taken" tend to show that protected activity was a contributing factor in adverse actions. *DeFrancesco I,* ARB No. 10-114 at 6-7; *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the [Title VII] *prima facie* case, suffice to show intentional discrimination."); *Hamilton v. G. E. Co.*, 556 F.3d 428, 436 (6th Cir. 2009). "[W]hen an 'employer . . . waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee,' the employer's actions constitute 'the very definition of pretext.'" *Hamilton,* 556 F.3d at 436 (citation omitted).

At a more granular level, "the *evidence* of the employer's nonretaliatory reasons must be *considered* alongside the employee's evidence" in deciding whether protected activity was a contributing factor, "for if the employer claims that its nonretaliatory reasons were the only reasons for the adverse action (as is usually the case), the ALJ must usually decide whether that is correct." *Palmer,* ARB No. 16-035, slip op. at 55.

In this case, there are both undisputed and disputed elements of the button/Twitter incident. It is undisputed that the Tweets say what they say, as do the Foxnews.com and DNAinfo.com stories. Asmore does not dispute that Stone was a passenger on her car on the

October 27 departure from Chicago, and that she had a conversation with Stone about Stone's button.

But critical details of the button/Twitter incident *are* disputed, as between Asmore's account and Stone's account given to Meeds. And as directed in *Palmer*, I must evaluate the evidence supporting Amtrak's stated reason for terminating Asmore.

I find the evidence in support of Stone's version of events – the version that supported Amtrak's managers' decision to terminate Asmore – sorely lacking. Amtrak did not ever re-interview Stone to obtain additional, critical details about her conversation with Asmore. Amtrak did not call Stone as a witness at this hearing, or even obtain a detailed sworn statement.

Instead, Baggett and the other managers unquestioningly adopted Stone's version of the story over Asmore's, based on Meeds' report of a single, short phone interview; two Tweets; and a brief article by a reporter for a defunct news blog. Baggett, Lombardi, Magliari, the formal investigation hearing officer, Foxnews.com, and the rest all derived their opinions about Asmore and the incident from those few, limited sources.

On the other hand, Asmore's account of the conversation she admits she did have with Stone, and her explanation of her reasons for having that conversation, is credible. Indeed, she volunteered to Meeds that she was the employee who had spoken to Stone, and gave her account of what happened, before she knew the extent of the uproar Stone had caused. At every opportunity, including at hearing under oath before me, Asmore expressly contradicted the substance of Stone's Tweet: that she would deny Stone boarding unless Stone removed the button. On a core issue, with head-to-head contradictory testimony between Asmore and Stone, I find that Asmore's credible and consistent recounting – including in-court and under oath – outweighs Stone's out-of-court unsworn statements, relayed through Meeds, Twitter, and the online news article.

But how to square the competing accounts? It appears that Stone interpreted Asmore's good-faith advice, coming from an Amtrak employee at the door of her cabin, as a statement of a content- or viewpoint-based restriction on speech established by Amtrak.[27] Asmore described how she gave her advice to cover up the pin, to which Stone replied by bringing up "political stuff" and asking about policy. Asmore clearly did not view the advice she gave as political. Even apolitical advice can be seen as political.[28] Someone who is not personally engaged in politics, as Asmore said she was not, could reasonably offer advice that is subjectively viewed and in turn described by another person as political when that was not the original speaker's intent. That explains the ensuing conversation and the Tweets, especially the follow-up tweet regarding an employee misunderstanding the policy, except that the "policy" was that there was no policy. But we will never know for certain what was going through Stone's mind because Stone didn't testify, wasn't deposed, and didn't give a written sworn statement.

[27] The First Amendment does apply to Amtrak. *See generally Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995).

[28] At some level small-p politics is unavoidable, to the extent that even facially neutral statements in favor of being polite by avoiding politics, or promoting unity over other values, has the effect of perpetuating the status quo.

There are elements of this story where I simply believe Asmore's first-hand account over Stone's as relayed through others. As described above, I find that the button conversation occurred between Asmore and Stone at Stone's cabin after the train was moving, not on the platform at boarding. Asmore's recollection and explanation of the conversation with Stone was clear and consistent, from the day it occurred (to Meeds on the phone) through to her testimony under oath at hearing.

Stone's Tweet was sent from on board the train in the cabin, per the photo. While it is *possible* that Stone took the button off on the platform, put it in her pocket, boarded, went to her cabin, and composed and sent her Tweet and photo, *nowhere* in the record is that sequence of events explicitly set out by Stone herself or anyone else. The only detailed description, under oath, of seeing the button and then having the conversation, including where and when, is Asmore's.

Moreover, other facts of record cut against Stone's account. Asmore believed she did not, and it appears does not, have the authority to deny a passenger boarding. She does have the duty to meet and board her whole train car's worth of passengers – up to 44 beds – in a limited time. Asmore's account that her lengthy conversation with Stone about the button took place at Stone's cabin once the train was already moving, as part of Asmore's routine of visiting each cabin after departure, makes more sense than the story of a drawn-out discussion of politics at the boarding door. The absence in the record of any third-party, independent witness testimony describing the conversation further supports that the conversation was in a private location.[29] Again, I find Asmore credible on this critical point and credit her over Stone.

Also, we do not know how accurately Stone related to Meeds and the reporter what happened. Stone was not subject to cross examination. "The greatest engine for truth, it has been written, is the opportunity to confront one's accusers and to cross-examine them." *Doe v. U.S.*, 132 F.3d 1430, 1437 (Fed. Cir. 1997) (citing *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367, at 32 (J. Chadbourn rev. 1974))). "In administrative proceedings such as this, the rules are modified to permit agency processes that are less formal than those of a law court." *Id.* But just because I may admit and weigh hearsay in FRSA proceedings does not mean that I must ignore the fact that it is hearsay in weighing the testimony. *C.f.*, *Riddell*, ARB No. 2019-0016, slip op. at 13-14 & n.3 ("it is the ALJ's task to review the totality of the record" in connection with evaluating written out-of-court statements).

In turn, Baggett's explanation for disciplining Asmore without the participation of Stone, or even more information or clarity from her, was unpersuasive. Baggett relied on "there being proof that what was said to [Stone] was written down," HT 289, apparently referring to Meeds' report of interview, which as I have noted quotes Stone, not Asmore. And Meeds testified he was "triaging a customer service situation," in which he "give[s] greater credence to the customer." HT 222. "I'm not investigating . . . ." *Id.* Meeds said investigation was the train manager's job, *id.* referring apparently to Baggett. Turning to the formal investigation hearing, Baggett, as the charging officer, decided not to call Stone as a witness because Stone "is not required to be there," HT 289, and "[w]e don't want a passenger to have to re-live any ordeal that brought

[29] As Meeds testified, he had access to the passenger reservations for Asmore's sleeping car. At any time, Amtrak could have asked the other passengers if they saw an argument at the boarding door.

negativity to them." HT 297. To reiterate, simply because hearsay may be admitted does not mean it must be believed. Also, even if Stone did not want to attend,[30] that does not explain choosing not to re-interview her to obtain a detailed sworn statement, especially if the company believes the misconduct to be so serious as to warrant termination.

At hearing, having acknowledged that there was substantial praise in Asmore's personnel file from passengers and supervisors, Baggett claimed that she factored "how good of an employee [Asmore] was when [Baggett] was deciding whether to believe Ms. Asmore or Ms. Stone." Baggett "felt that Ms. Stone was being credible in what took place on the platform and on the train that day. And that Ms. Asmore was not being as truthful as she should have been." HT 293.

> Q You felt that even though you never talked to Ms. Stone?
> A With the information that I had received from Clint [Meeds] and Marc Magliari, yes.

Id. Recall this was only four weeks after the bedbug incident. Baggett chose to believe a brief phone interview with one passenger, relayed second hand, over an employee who not only denied the incident but had received first-hand praise from many passengers over years of service – and *admits* that she made that choice in response to a question about "how good of an employee" the Complainant was. This is simply not persuasive and not the work of a "prudent" supervisor. *Ledure*, ARB Case No. 13-044, slip op. at 8-9.[31]

I consider also that Asmore continued to have conversations with Stone over the course of the trip from Chicago to Seattle, over two more days. Asmore relayed that her ongoing contact with Stone over those two days was positive and uneventful, both to her managers and at hearing before me, and none of this is contested. By comparison, the allegation that Stone was crying was based on Meeds' perception over the phone, not an eyewitness or even Stone's own statement. Yet the perceived crying was presented as fact and relied on by Baggett and Lombardi, while Asmore's two days of continued contact with Asmore was discounted.

Finally, Baggett and Lombardi embraced what is clearly speculation about the effect of Stone's Tweet and statements to the reporter, which I will not do. Magliari appears to be experienced at his job and presented well as a witness. But he was not qualified or tendered as an expert witness, nor did he produce an expert witness report or a summary of his expert opinions in advance of the hearing. *See* 29 C.F.R. § 18.50(c)(2). He is therefore a lay witness. In a proceeding governed by the Federal Rules of Evidence, lay witnesses may permissibly offer "testimony in the form of an opinion . . . that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. While the Federal Rules of Evidence do not apply in this proceeding, I view them as persuasive

[30] It strikes me that there are plenty of customers who would relish the opportunity to testify at a discipline hearing for the employee who wronged them.

[31] "The customer is always right" is a fine rule of thumb as far as customer service goes, but is not a fair or Congressionally authorized rule of jurisprudence. *See generally, e.g., Director, Office of Workers' Compensation Programs, DOL v. Greenwich Collieries*, 512 U.S. 267 (1994) (Administrative Procedure Act places burden of persuasion on the party initiating the proceeding).

authority as to how to evaluate the weight and credibility of evidence and testimony under the relaxed rules of evidence applicable here.

At hearing, Magliari offered opinion after opinion based on "other specialized knowledge" about media. Moreover, when asked, "do you know" questions, Magliari repeatedly speculated. For one example, Magliari said "I would say clearly millions did" see the stories about the button/Twitter incident, before immediately qualifying that testimony with "[n]ow[,] millions had access to it," citing that the Fox News Channel is the "number one watched cable news network." Magliari has no personal knowledge of Fox News Channel's viewership. He conflated the Fox News Channel's cable TV viewership with readership of Foxnews.com, which are two different outlets on two different forms of media. He also testified that he did not run web site traffic reports that were available to him – which would have been the stuff of expert witness research in any event. Some data about Stone's Tweets is in the record, but the re-Tweets and Likes are in the low thousands, not the millions.[32]

It is common sense that bad publicity has a negative effect on businesses, especially travel businesses with strong competition and where customer experience is important. But *any* statement on the public internet is "accessible" to millions; it does not mean they were viewed by millions, or are credible, or support firing an employee, without more. This is all common knowledge of anyone with the most cursory familiarity with the internet. I give Magliari's testimony no weight. Moreover, I view Baggett's willingness to rush to judgment against Asmore on this basis as more evidence of her bias against Asmore.

I find Baggett's and Lombardi's credulity in embracing Stone's version of events without further investigation, their embrace of speculation as to of the effect of Stone's Tweet without supporting evidence, and the firing of a longtime employee based on all of these unverified assertions that "fortuitously materialize[d]," *Hamilton*, 556 F.3d at 436, so extraordinary as to constitute persuasive circumstantial evidence of pretext.

On top of animus and pretext, there is meaningful temporal proximity, *see, e.g., Folger*, ARB No. 15-021 at 3-6, between the protected activity and the beginning of the discipline process that led to Asmore's termination. Only four weeks separate the bedbug confrontation on September 24 and the button/Twitter incident, following which Baggett promptly commenced Asmore's discipline process. Asmore's two bedbug injury reports occurred in the interim, of which Baggett knew, HT 269-70, and which plausibly served to remind Baggett of Asmore and the bedbug confrontation.

Viewing and weighing the constellation of facts here, I find that Asmore's protected activity was a contributing factor in Baggett's and Lombardi's actions leading to Asmore's termination. Baggett's charging letter led to the formal investigation hearing, and to Baggett's and Lombardi's recommendation to Setser to terminate Asmore. In the role of the cat's paw, Setser approved the termination, *see Riddell*, ARB No. 2019-0016, slip op. at 17, which Baggett carried out.

[32] Twitter has a metric called "impressions," but the number of impressions of Stone's Tweets is not in the record.

For these reasons, and after considering all of the evidence, I find that it is more likely than not – indeed, I am firmly convinced – that Asmore's protected activity was a contributing factor in her termination. *See Palmer*, ARB No. 16-035, slip op. at 56. I further find that because of her expressed animus and use of a pretext to fire Asmore, this FRSA violation was intentional conduct in reckless disregard of the FRSA by Baggett acting on Amtrak's behalf.

I further find that based on the temporal proximity – essentially immediate – and the intentional and unusual act of directing the Ready Crew not to help, Asmore's protected activity of making her bedbug report was a contributing factor in Croom's adverse action of assigning Asmore the additional work of making all of the beds on Asmore's sleeping car. Croom's conduct was also intentional conduct in reckless disregard of the FRSA.

5. Respondent's affirmative defense: has Respondent shown by clear and convincing evidence that it would have taken the same adverse action absent the protected activity?

Having found that Asmore made her case for retaliation, I must determine whether Amtrak has made out its affirmative defense. An ALJ may not order relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1982.109(b); *see also, e.g., Palmer*, ARB No. 16-035, slip op. at 56-57; *Williams*, ARB No. 09-092 at 6. Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Williams*, ARB No. 09-092 at 6 (citing *Brune,* ARB No. 04-037 at 14).

To prevail under this standard, the respondent must show that its factual contentions are highly probable—clear and convincing evidence is the burden of proof in between "preponderance of the evidence" and "proof beyond a reasonable doubt." *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)); *Palmer*, ARB No. 16-035, slip op. at 56-57; *DeFrancesco I,* ARB No. 10-114 at 10-11. Evidence is clear when the employer "has presented an unambiguous explanation for the adverse action." *DeFrancesco II*, ARB No. 13-057, slip op. at 7-8. It is convincing when based on the evidence the proffered conclusion is "highly probable." *Id.* This is a difficult standard for employers, signaling Congressional concern with past industry practice and the importance of the interests at stake. *See Araujo*, 708 F.3d at 159 (citing cases); *DeFrancesco II*, ARB No. 13-057, slip op. at 8.

In *DeFrancesco II* the ARB offered a series of questions to consider. Does the employer routinely monitor or investigate compliance with the rules? Does the employer consistently impose equivalent discipline to employees who violate the rule but engage in no protected activity? Are the rules charged routinely applied? Are those rules vague and subject to manipulation? Does the evidence show that the investigation was designed to further the purpose of the rule rather than as a way to punish the employee? *Id.* at 11-12.

To prevail, an employer must show more than that a rule was violated, that it had a legitimate motive for the adverse action, and that it imposes discipline generally whenever it determines a rule has been broken. Instead, the employer must establish the particular rule is applied consistently such that employees who engage in similar conduct absent protected activity are also investigated and punished in the same manner. *Id.* at 13-14.

Amtrak failed to prove by clear and convincing evidence that the button/Twitter incident, or the fact that Asmore did not personally de-board her passengers in Seattle on October 29, would have resulted in termination absent Asmore's protected activity.

This is not a close call. Amtrak presented no evidence that it had ever fired any employee for causing a negative "viral" social media post, or indeed, causing a customer to publish a single complaint via media of any kind.[33] Van Zanten, over his many years at Amtrak, has never heard of an Amtrak employee being fired for a passenger's social media post. According to Lombardi, it is unlikely Asmore would have been terminated solely for abandoning her job duties, even with her discipline history – and I would add, even if Asmore *actually did* abandon her duties, which the evidence shows she did not.[34] Lombardi has been involved in between 10 and 20 disciplinary actions that resulted in terminations, for misconduct including a sexual assault of a passenger, misappropriation of funds, intimidation and harassment between employees, failure to perform duties and attend work; and, one example of a sleeping car attendant who established a pattern over time of not doing their job. Meeds knew of six terminations, including Asmore's, where the conduct included a sexual assault, defrauding the company, theft, and insubordination. To summarize, the terminations about which there is information in the record involved criminal conduct or an ongoing pattern of poor or non-performance.

REMEDIES

A successful FRSA complainant is entitled to be made whole, including reinstatement with the same seniority she would have enjoyed absent the discrimination, back pay with interest, compensatory damages including any special damages, and attorneys' fees and costs. 49 U.S.C. § 20109(e); 29 C.F.R. § 1982.109(d). Punitive damages up to $250,000.00 may also be awarded. *Id.*[35]

1. Reinstatement

Asmore seeks reinstatement with her record expunged and with seniority. As reinstatement with seniority is expressly directed upon a finding of violation, *see* 29 C.F.R. § 1982.109(d)(1), it will be ordered. I note that "[a]ny ALJ's decision requiring reinstatement . . . will be effective immediately upon receipt of the decision by the respondent." *Id.*

2. Back pay

[33] One could imagine a customer's letter to the editor of an influential travel magazine, or a poor review by a newspaper travel reporter, prompting discipline in the past. Amtrak presented no evidence of this.

[34] I accord no weight to the decision of the Amtrak hearing officer, whose mandate is limited and who was therefore precluded from hearing all of the relevant evidence.

[35] "Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters." 29 C.F.R. § 1982.109(d)(1). The current IRS underpayment rate is 5 percent. *See* IRS Rev. Rul. 2020-7, *available at* https://www.irs.gov/pub/irs-drop/rr-20-07.pdf.

The FRSA also directs awards of back pay with interest, upon a finding of a violation. *See* 29 C.F.R. § 1982.109(d). During her last full year at Amtrak, 2017, Asmore made $61,286. Asmore was terminated on January 31, 2018. Since then, she has mitigated damages with work in home demolition and renovation that is not regular, such that I credit her estimate of $15,000 in annual earnings over her response in discovery of $600 per week which, annualized *assuming regular work*, would give $30,000 annually.

As there are 52 weeks in a year, and 124 weeks have elapsed between the first day after her termination, February 1, 2018, and the date of issuance of this Decision and Order, I calculate back pay as follows:

- $61,286 / 52 = $1,178.58
- $15,000 / 52 = $288.46
- $1,178.58 - $288.46 = $890.12
- $890.12 x 124 = **$110,374.88.**

I calculate interest on a beginning balance of $890.12, growing weekly by $890.12 over a total of 124 weeks, compounded daily at 5 percent, to total **$7,072.65.**

Back pay and interest shall continue to accrue, in amounts consistent with these calculations, through the date of payment.

3. Compensatory damages

Complainant requests $250,000 in compensatory damages for her emotional distress and and embarrassment. Compensatory damages may be awarded. 29 C.F.R. § 1982.109(d)(1); *e.g. Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Compensatory damages "are meant to restore the employee to the same position he would have been in if not discriminated against." *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, OALJ No. 2005-STA-00035, slip op. at 8 (ARB Jan. 31, 2018). Compensatory damage awards may compensate for direct pecuniary loss, as well as "such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Id.*

To recover compensatory damages for emotional distress and mental suffering, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citation omitted) (affirming $50,000 award for emotional distress). A complainant need not submit corroborating evidence of medical or psychological treatment to support an award for emotional harm or mental anguish, and a complainant's credible testimony alone is sufficient to establish emotional distress. *Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040, slip op. at 8 (ARB Nov. 30, 2007). "Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, e.g., sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." *Id.* (citation omitted). A "key step in determining the amount of compensatory damages is a

comparison with awards made in similar cases." *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op at 32 (ARB Feb. 9, 2001).

I have surveyed a sampling of compensatory damage awards in broadly comparable cases. For several examples, in *Brough v. BNSF Railway Co.*, ARB No. 2016-0089, ALJ No. 2014-FRS-00103, slip op at. 13 (ARB June 12, 2019), the ALJ awarded $29,000.00 of compensatory damages for out-of-pocket expenses and emotional distress following a retaliatory termination, which BNSF did not contest on appeal. In *Raye v. Pan Am Rys., Inc.*, ARB No. 14-074, ALJ No. 2013-FRS-084, slip op. at 8-10 (ARB Sept. 8, 2016), the ALJ awarded $10,000 in compensatory damages where the employee was retaliated against but not terminated, which the employer did not contest on appeal.

In *Helgeson v. Soo Line Railroad Co.*, 2016-FRS-84 (ALJ Apr. 25, 2019), where the complainant sought $500,000, the ALJ observed:

> [H]igh amounts of compensatory damages are linked to very serious and lasting damage, for example, a $75,000 award in a case where the complainant lost his house through foreclosure and required public assistance and a $250,000 award where the complainant suffered such damage to his reputation that he would be unable to ever work in his chosen field again. *Michaud v. BSP Transport*, ARB No. 97-113, ALJ No. 1995-STA-029 (ARB Oct. 9, 1997); *Hobby v. Georgia Power Co.*, ARB Nos. 1998-166, -169, ALJ No. 1990-ERA-030 (ARB Feb. 9, 2001). Here, while Helgeson faced financial difficulty and associated stress and anxiety, he did not suffer foreclosure, nor does evidence show that this incident left lasting harm, either reputational or emotional, that will prevent him from working in the railroad industry again.

Helgeson, ALJ No. 2016-FRS-84, slip op. at 67.

In awarding $45,000, the ALJ compared the facts of *Helgeson* to those in *Harvey v. Union Pacific Railroad Co.*, ALJ No. 2011-FRS-00039 (ALJ Feb. 12, 2015) and *Rudolph v. National R.R. Passenger Corp. (Amtrak)*, ALJ No. 2009 FRS-15 (ALJ Apr. 24, 2014), *aff'd*, ARB Nos. 14-053, 14-056 (ARB Apr. 5, 2016). "In *Harvey*, the complainant was investigated and terminated by a railway. Harvey testified that he suffered fear, anxiety and stress and worried that he would lose his family's health insurance and be unable to support his family, [but] sought no professional help." *Helgeson*, ALJ No. 2016-FRS-84, slip op. at 67 (citing *Harvey*). The ALJ awarded $25,000. *Id.* "In Rudolph, the complainant sought $325,000 to $500,000 in damages for emotional distress, credibly testified he suffered stress, anxiety, sleep and appetite disruption, and the stress contributed to his divorce[;] he was awarded $25,000 in compensatory damages." *Helgeson*, ALJ No. 2016-FRS-84, slip op. at 68 (citing *Rudolph*). The ALJ added more detail:

> Helgeson sought professional counseling and met with clergy, testified that he suffered emotional stress from financial insecurity due to a lower paying job and needing to use retirement savings to pay bills, and suffered emotional stress from working in a job where he had to travel for weeks at a time; the record supports an award of emotional distress, but not of sufficient severity to support a $500,000 award. Complainant has established

> credible emotional distress caused by his termination, but it is not of sufficient magnitude that it has dissuaded him from seeking reinstatement. Complainant has further not provided evidence to demonstrate that he has suffered lasting emotional or other damage from this experience.

Id.

As she credibly testified, Asmore's considerable financial hardships and embarrassment were caused entirely by the unfavorable personnel action by Amtrak. *See Ferguson*, ARB No. 10-075, slip op. at 7. Asmore was also forced to take a much more physically challenging and low-paying, unskilled job, a substantial departure from her customer-service position at Amtrak. Not only is this apparent from the facts of record, but this is the only evidence in the record on these issues, and I so find. However, there is no evidence that Asmore had to seek professional counseling or has lasting emotional or other damage, as the complainant did in *Helgeson*. Asmore, like the complainant in *Helgeson*, seeks reinstatement.

Considering the amounts awarded in the cases cited above, I award **$40,000** in compensatory damages for emotional distress.

4. Punitive damages

Under the FRSA, a punitive damages award

> is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law." Gross or reckless indifference to the law can establish the intentional component needed for willfulness. An employer may avoid punitive damages when it has made a good-faith effort to comply with the law.

Brough, ARB No. 2016-0089, slip op. at 15 (citations omitted); *see also, e.g.*, *Raye*, ARB No. 14-074, slip op. at 8 (citing *Smith v. Wade*, 461 U.S. 30, 51 (1983)).

> The inquiry into whether punitive damages are warranted focuses on the employer's state of mind, and thus does not require that the employer's misconduct be egregious. As the Supreme Court has noted, "[e]gregious misconduct is often associated with the award of punitive damages, but the reprehensible character of the conduct is not generally considered apart from the requisite state of mind." Nevertheless, egregious or outrageous conduct may serve as evidence supporting an inference of the requisite state of mind.

Raye, ARB No. 14-074, slip op. at 8 & n. 28 (collecting cases); *see also Brough*, ARB No. 2016-0089, slip op. at 15 (vacating punitive damage award "because of the ALJ's unchallenged finding that BNSF did not intentionally discriminate or violate the FRSA").

As discussed at length above, Baggett persisted in a months-long campaign to fire Asmore, involving a series of intentional acts after the appearance of a fortuitous pretext, out of animus toward Asmore's protected activity. Baggett pushed to find Asmore committed misconduct and to terminate her even after the formal investigation hearing, where Asmore and

Van Zanten raised the issue that the discipline was in fact retaliation for the bedbug confrontation. Baggett, having narrowly crafted the charges to be determined at the hearing, successfully objected to these questions, including a question to establish that Asmore had an "active whistleblower case." HT 294. If the pattern of Baggett's conduct leading up to the hearing left any doubts about whether disciplining Asmore was in "reckless or callous disregard" for Asmore's FRSA rights, or with "gross or reckless indifference to the law," the hearing eliminated those doubts.

Lombardi, for his part, had essentially the same information as Baggett and was complicit in the chain of events leading to Asmore's termination. And though her retaliatory act did not cause Asmore lasting harm, Croom also had the requisite state of mind to support a punitive damage award when she assigned Asmore additional work, minutes after Asmore's protected activity.

"The next step, after determining that the evidence is sufficient for a punitive damages award, is to consider the amount necessary for punishment and deterrence." *Raye*, ARB No. 14-074, slip op. at 9 & n. 35. This is a "discretionary moral judgment." *Id.* at 9 (citing *Smith*, 461 U.S. at 52). The cases reflect a wide range of punitive damage awards. *See, e.g.*, *Helgeson*, ALJ No. 2016-FRS-84, slip op. at 68-70 (collecting cases; awarding $60,000); *Klinger v. BNSF R.R. Co.*, ALJ No. 2016-FRS-00062, slip op. at 29-33 (ALJ Nov. 30, 2018) (collecting cases; awarding $100,000); *Santiago v. Metro-North Commuter R.R. Co.*, ALJ No. 2009-FRS-11, slip op. at 15 (ALJ May 16, 2013) ($40,000).

I am most persuaded by the facts and result in *Raye*, with one caveat. In *Raye*, the Board upheld a punitive damage award of the $250,000 statutory maximum due to "egregious and intentional conduct that violated the FRSA . . . notwithstanding that the harm Raye suffered was somewhat limited because he was not ultimately fired because of the statement in his FRSA complaint." *Id.* at 9. Influential in the damages award in *Raye* was that the employer doubled down on its discipline of the employee after the employee filed an initial FRSA complaint, based on elements of the complaint itself, i.e., based on its knowledge that the employee had already made a formal FRSA whistleblower complaint.

Here, too, we have Baggett's animus and months-long pattern of conduct, plus proceeding to terminate Asmore even after learning she had an open whistleblower case. We also have Croom's conduct. However, I will not award the statutory maximum because there is no evidence that Baggett or others expressly held Asmore's fate out to other employees as an example of what happens to people who engage in protected activity, or make FRSA complaints to OSHA. While it is widely known that the second-order reason for punishing whistleblowers is to keep others in line, I view *expressly* doing so as the worst type of whistleblower retaliation, justifying an award of the statutory maximum.

For these reasons, I award **$220,000** in punitive damages.

5. Attorney's fees

A successful FRSA complainant shall be awarded reasonable attorney's fees and costs. 49 U.S.C. § 20109(e)(2)(C); 29 C.F.R. § 1982.109(d)(l). I will order the parties to meet and confer to attempt to resolve the issue of fees and costs, and if unsuccessful, to submit filings as ordered below.

6. Expungement and posting

To make an employee whole, under the FRSA an employer may be ordered to expunge from an employee's personnel file any record of the impermissible discipline. *See Brough*, ARB No. 2016-0089, slip op. at 17-18 (citing 49 U.S.C. § 20109(e)(1)). Since the charges and termination in Asmore's personnel file could harm her in the future and was the result of Amtrak's violation of FRSA, expungement here is necessary to make her whole. Precisely how to do so was set out recently by the ARB in *Brough:*

> "Where an ALJ finds it necessary to order an employer to disregard certain information which had been placed in an employee's personnel record . . . [the ALJ should] require that the information be placed in a sealed and/or restricted subfolder or that the employer be specifically prohibited from relying on the information in future personnel actions or referencing it to prospective employers."

Id. Upon reinstatement of Asmore with seniority, Amtrak shall search Asmore's personnel file for documents and references to the incidents, charges, and adverse actions addressed in this Decision and Order, and shall seal all such documents and redact any such references. Amtrak is specifically prohibited from relying on or referencing any of these documents or this information in future personnel actions or relying on or referencing it to prospective employers.

Finally, Respondent shall post this Decision and Order for a minimum of 60 days from the date the Decision and Order is served on Respondents in a place and manner that is usual and customary for employees to gather and review employment related information, in both Chicago and Seattle. "As the ARB has noted, 'it is a standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer.'" *Klinger*, ALJ No. 2016-FRS-00062, slip op. at 34 (quoting *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, OALJ No. 2007-STA-00022, slip op. at 14 (ARB Nov. 30, 2009)).

ORDER

It is ORDERED as follows:

1. Complainant Tracy Asmore's complaint for relief under the FRSA is granted.

2. Upon receipt of this Decision and Order, Respondent Amtrak shall reinstate Asmore to her former position, with seniority.

3. Within 30 days of the date this Decision and Order is served, Amtrak shall pay to Asmore back pay plus interest through the date of reinstatement, which as of the date of this

Decision and Order total **$110,374.88** in back pay and **$7,072.65** in interest. Amtrak shall submit documentation to the Social Security Administration or the Railroad Retirement Board, as appropriate, allocating any back pay award to the appropriate months or calendar quarters. Back pay and interest shall continue to accrue, in amounts consistent with the calculations above, through the date of payment.

4. Within 30 days of the date this Decision and Order is served, Amtrak shall pay to Asmore compensatory damages of **$40,000** and punitive damages of **$220,000**.

5. Upon reinstatement of Asmore with seniority, Amtrak shall search Asmore's personnel file for documents and references to the incidents, charges, and adverse actions addressed in this Decision and Order, and shall seal all such documents and redact any such references. Amtrak is specifically prohibited from relying on or referencing any of these documents or this information in future personnel actions or relying on or referencing it to prospective employers.

6. Amtrak shall post this Decision and Order for a minimum of 60 days from the date the Decision and Order is served in a place and manner that is usual and customary for employees to gather and review employment related information, in both Chicago and Seattle.

7. Asmore's counsel is entitled to reasonable attorney's fees and costs. Complainant's counsel is ordered to serve an initial petition for fees and costs including supporting records on opposing counsel, but not this office, within 30 days of the date of this Decision and Order is served. All counsel are ordered to initiate a verbal discussion within 14 days after service of the fee petition in an effort to amicably resolve any dispute concerning the amount of fees requested. Counsel must make good faith efforts to resolve the fee dispute before filing the fee petition with me. If counsel are able to agree on the amount of fees and costs to be awarded, they are ordered to promptly memorialize their agreement in writing and to file it with me. If counsel cannot resolve all their disputes, Complainant's counsel is ordered to file within 30 days of the date the initial fee petition was served a final application for fees and costs that incorporates any changes agreed to during the discussions. Within 21 calendar days after service of the final application, Respondent's counsel shall file any objections to the final fee application. Complainant's counsel may file a reply to any employer opposition 14 days after the opposition is served. No other reply briefs are permitted.

8. The parties shall notify this Office upon the filing of any appeal.



Digitally signed by EVAN H. NORDBY
DN: CN=EVAN H. NORDBY,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

EVAN H. NORDBY
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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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

SERVICE SHEET

Case Name: **ASMORE_TRACY_v_AMTRAK_**

Case Number: **2018FRS00140**

Document Title: **Decision And Order**

I hereby certify that a copy of the above-referenced document was sent to the following this 17th day of June, 2020:



Digitally signed by Tracey Y. Queripel
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