IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NOS. 20-4342, 21-3017, 21-3282

Weatherford U.S., L.P., *Petitioner,*
v.
U.S. Department of Labor, Administrative Review Board, *Respondent*,
v. Estate of Daniel A. Ayres *Intervenor.*

Consolidated with

Estate of Daniel A. Ayres, *Petitioner*,
v.
U.S. Department of Labor, Administrative Review Board, *Respondent*,
v. Weatherford U.S., L.P. *Intervenor.*

On Appeal from Administrative Review Board Case Nos.
ARB 2018-0006 and ARB 2018-0074

RESPONDENT BRIEF SUBMITTED BY THE U.S. DEPARTMENT OF LABOR

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Respondent, U.S. Department of Labor ("DOL"), Administrative Review Board ("ARB"), is a federal government agency and does not need to make a disclosure of corporate affiliation and financial interest pursuant to 6th Cir. R. 26.1.

STATEMENT REGARDING ORAL ARGUMENT

The DOL believes that the briefs in this case constitute a thorough presentation of the facts and legal issues and does not think oral argument would significantly assist the Court in deciding the issues before it.

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STATEMENT OF JURISDICTION

This matter arises from an administrative complaint brought by Daniel A. Ayres against his former employer, Weatherford U.S., L.P. ("Weatherford"), alleging that Weatherford unlawfully terminated his employment in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105(a). Mr. Ayres' complaint was upheld by a U.S. Department of Labor ("DOL" or "Department") administrative law judge ("ALJ") on September 25, 2017, and an amended decision was issued on October 20, 2017. The Department's Administrative Review Board ("ARB") affirmed the ALJ's decision in substantial part on November 18, 2020, and issued a subsequent Order Awarding Attorney's Fees on January 22, 2021.

Weatherford filed a petition for review of the ARB's November 18, 2020 decision with this Court on December 31, 2020 and a second petition for review of the ARB's January 22, 2021 Order on March 23, 2021. Mr. Ayres' estate filed a petition for review of the ARB's November 18, 2020 decision with this Court on January 5, 2021. All petitions for review were filed within the sixty-day period prescribed by the STAA. *See* 49 U.S.C. § 31105(d); 29 C.F.R. § 1978.112(a). This Court has jurisdiction over the petitions for review under 49 U.S.C. § 31105(d).

STATEMENT OF THE ISSUES

1. Whether the ARB correctly determined that Weatherford violated the STAA whistleblower provisions when it failed to recall Mr. Ayres and ultimately terminated him in part for refusing to drive outside his certification and raising safety complaints to managers, and Weatherford failed to prove by clear and convincing evidence that it would have taken the same adverse action absent Mr. Ayers' protected activity.
2. Whether the ARB correctly concluded that Mr. Ayres' STAA whistleblower claims were not barred by collateral estoppel or res judicata where the issues raised were not fully litigated on the merits in Mr. Ayers' prior federal district court case, Weatherford waived its res judicata defense by failing to raise it before the ARB, and the STAA permitted Mr. Ayers to pursue administrative resolution of his claim rather than district court litigation.
3. Whether the ARB properly upheld the ALJ's award of compensatory damages and attorney's fees where the ARB awarded Mr. Ayres back pay, compensatory damages for mental distress, and attorney's fees and costs based on Mr. Ayres' lost wages, evidence of depression and marital strain related to the retaliation, and attorney's fees and costs related to his STAA claim.

4. Whether the ARB properly reversed the ALJ's award of punitive damages to Mr. Ayres' estate where punitive damages are penal and therefore do not survive the death of the complainant under federal common law.

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History

This case arises under the employee protection provisions of the STAA, as amended. 49 U.S.C. § 31105; *see* 49 U.S.C. § 42121 (setting forth applicable legal standards). On February 15, 2013, Mr. Ayres filed a complaint with DOL's Occupational Safety and Health Administration ("OSHA") alleging that Weatherford violated the STAA first by not recalling him and later by terminating his employment in retaliation for raising safety concerns. App'x, Vol.VI, p.1088. OSHA dismissed the complaint on November 6, 2014. *Id.* at pp.1090-91.

On December 4, 2014, Mr. Ayres appealed and requested a hearing before a DOL ALJ. *Id.* at pp.1081-82. On March 30, 2016, following the hearing, but before the ALJ rendered a decision, Mr. Ayres died. App'x, Vol.XIII, p.2083. Kim Ayres, Mr. Ayres' surviving spouse and duly appointed administrator of his estate, was substituted as the complainant. *Id.*; App'x, Vol.I, pp.57-58, n.2.

In an Amended Decision and Order ("ALJ Dec.") issued on October 20, 2017, the ALJ concluded that Weatherford violated the STAA, awarding Mr. Ayres' estate back pay, compensatory damages for emotional harm, and punitive

damages. *Id.* at p.188. Following the ALJ Decision, Mr. Ayres moved for attorney's fees and costs (*id.* at pp.150-155), which the ALJ granted in an order issued on August 22, 2018 (*id.* at p.22).

Weatherford filed a timely petition for review with the ARB on November 3, 2017, seeking to reverse the ALJ's decision in its entirety. App'x, Vol.XIV, p.2808. It also filed a timely petition for review with the ARB addressing the attorney's fees award on November 5, 2018. App'x, Vol.XIII, p.2358. Both petitions were consolidated.

On November 18, 2020, the ARB issued its Decision and Order ("ARB Dec."), affirming the ALJ's conclusion that Weatherford terminated Mr. Ayres in violation of the STAA, affirming the award of compensatory damages, reversing the award of punitive damages to Mr. Ayres' estate, and affirming the award of attorney's fees and costs. *Id.* at pp.2079-2092.

On December 31, 2020, Weatherford filed a petition for review of the ARB's Decision and Order in this Court. App'x, Vol.XIV, p.2851. On January 5, 2021, Mr. Ayres' estate filed a petition for review of the ARB's Decision and Order reversing the award of punitive damages. *Id.* at p.2856.

Mr. Ayres' estate moved for attorney's fees related to fees and costs incurred in the ARB proceeding, which the ARB granted on January 22, 2021 (App'x,

Vol.XIII, p.1991) and Weatherford timely appealed that order to this Court on March 24, 2021 (App'x, Vol.XIV, p.2862).

On April 13, 2021, this Court consolidated the parties' appeals.

II. Statutory and Regulatory Background

The STAA protects employees from retaliation for reporting safety violations or refusing to operate a commercial motor vehicle because of safety concerns. It prohibits an employer from discriminating against an employee because:

> (A)(i) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; [or]
> . . . .
>
> (B) the employee refuses to operate a vehicle because—
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security . . . .

49 U.S.C. § 31105(a)(1).

The STAA was amended in 2007 to incorporate the legal burdens of proof set forth in the whistleblower provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121(b)(2)(B). 49 U.S.C. § 31105(b)(1).

Section 42121(b) sets forth the employee's burden of establishing a prima facie showing that the protected activity "was a contributing factor in the

unfavorable personnel action alleged in the complaint," and the employer's burden to rebut "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(i) and (ii); *see* 29 C.F.R. § 1978.109 (implementing STAA provisions).

An employee who believes they have been disciplined or otherwise discriminated against for engaging in activity protected under the STAA may file a complaint with OSHA.[1] 49 U.S.C. § 31105(b). OSHA conducts an investigation, decides whether the complaint has merit, notify the parties of the determination, and if OSHA reasonably believes a violation has occurred, orders appropriate relief. *Id.* § 31105(b)(2)(A). Either the employee or the employer may object to OSHA's adverse findings and request a de novo hearing before a DOL ALJ. *Id.* § 31105(b)(2)(B); 29 C.F.R. §§ 1978.106-.107.

After the ALJ issues a decision, a party may petition for review by the ARB, which has thirty days to decide whether to accept the case for review. 29 C.F.R. §§ 1978.109(e), .110(b). If the ARB accepts review, its decision disposing of the case

[1] The Secretary has delegated authority to the Assistant Secretary for OSHA to review STAA complaints and prosecute them if appropriate. Secretary's Order 08-2020, 85 Fed. Reg. 58393 (Sept. 18, 2020). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

may be appealed within sixty days to the appropriate U.S. Court of Appeals. 49 U.S.C. § 31105(d); 29 C.F.R. § 1978.112(a).

The STAA contains a kickout provision that allows the complainant to seek de novo review in the appropriate U.S. district court if the Secretary has not issued a final decision within 210 days after the filing of the complaint and the delay is not due to the employee's bad faith. 49 U.S.C. § 31105(c).

III. Statement of Facts

A. Mr. Ayres' Employment with Weatherford

Weatherford provides drilling services to companies engaged in the exploration or production of oil and gas. Relevant to this case, Weatherford conducted fracking operations in Williston, North Dakota, and operated vehicles transporting hazardous materials. On April 22, 2012, Weatherford hired Mr. Ayres to work as an equipment operator, which included driving vehicles. From April through July 2012, Weatherford trained Mr. Ayres in Texas and Colorado. Mr. Ayres arrived in Williston on July 10, 2012. App'x, Vol.XIII, p.2080.

Weatherford's Williston employees were divided into fleets, and each fleet was broken down into crews. The crews were managed by supervisors and included between fifteen and twenty equipment operators. Ayers' crew supervisor was Lee Hammons, who reported directly to Terry Crabb, a Weatherford district manager. Employees worked rotations of three weeks on followed by two weeks

off. When Mr. Ayres began at Williston, he agreed to work for six weeks straight instead of a regular three-week rotation. *Id.*

Mr. Ayres' coworkers in Williston perceived him to be a good employee. Richard Hanson testified that Mr. Ayres "never refused any opportunity to do extra work. He worked with our crew very well. He was pleasant and he was a team player." App'x, Vol.II, p.412. Brian Gould testified that Mr. Ayres "was one of the few that actually would work . . . he was a good worker." *Id.* at p.347. Brian Pirone testified that Mr. Ayres "caught on real quick." *Id.* at p.388.

Drivers at the Williston site were sometimes asked to drive outside of their certification, and this was a safety concern among certain employees who feared losing their licenses. App'x, Vol.I, p.109. The issue of the lack of state permits came up often and "equipment operators were unhappy about the situation." *Id.* at p.112. The practice was to ask the driver to drive the load, and to then "find out from the response whether the driver had the proper certification—or would even raise the issue." *Id.* at p.105.

Work at the Williston site was slow during July and August 2012, and supervisors tried to find non-equipment operator duties for employees like Mr. Ayres to keep them busy. App'x, Vol.XIII, p.2081. On one occasion between July 12 and 31, 2012, Mr. Ayres refused to drive outside his certification when Mr. Hammons directed him to do so. App'x, Vol.I, pp.117, 123-24; Vol.III, pp.568-69.

Mr. Hammons reassigned the task to another employee. App'x, Vol.XIII, p.2081; Vol.I, p.105.

Thereafter, Mr. Ayres complained that employees were being asked to drive loads in violation of Department of Transportation ("DOT") regulations. App'x, Vol.VII, p.1247; Vol.IV, p.678. Mr. Hammons corroborated the facts of Mr. Ayres' complaint and acknowledged that if Mr. Ayres had taken the load, it would have violated DOT regulations. App'x, Vol.III, p.578. When employees refused to carry loads in violation of DOT regulations, Weatherford management simply got others (who were also not certified) to take the loads. App'x, Vol.VII, p.1251; Vol.IV, p.679.

Mr. Ayres specifically reported to his supervisor Mr. Hammons and to district manager Mr. Crabb, that non-certified people were carrying loads and expressed concerns about the potential dangers. App'x, Vol.VII, p.1251; Vol.IV, p.679. When he raised his concerns with Mr. Crabb, the district manager responded that "they needed that job done." App'x, Vol.VII, p.1259; Vol.IV, p.680.

On August 10, 2012, Mr. Crabb stated at a meeting of the employees that anyone who complains to HR will be fired. App'x, Vol.VI, p.1296; Vol.IV, pp.677-78, 834. Mr. Crabb admitted making the statement. App'x, Vol.VI, pp.1140, 1144; Vol.IV, pp.678, 826, 834.

Mr. Crabb's statement directly contravened Weatherford's policies, which allowed employees to make complaints to the human resources department. App'x, Vol.I, p.79; Vol.VII, p.1336. Mr. Ayres tried to contact the Weatherford human resources personnel in Denver, who were responsible for the Williston site. App'x, Vol.IV, p.683. When he was unable to reach the local personnel, he was connected to James Nicholson, regional HR manager for that area, located in Houston, Texas. App'x, Vol.VII, p.1317.

On August 13, 2012, Mr. Ayres had a conversation by telephone with Mr. Nicholson. During this conversation, Mr. Ayres raised his concerns about being asked to drive loads outside of his classification in violation of DOT regulations and rules related to driving hazardous materials, Weatherford employees driving company vehicles while intoxicated, and Mr. Crabb's comments about firing anyone who went to HR. *Id.* at pp.1256-1257; App'x, Vol.IV, p.685; Vol.I, pp.86, 112-13, 123-24, 132. Shortly thereafter, both Mr. Hammons and Mr. Crabb, in a meeting with Mr. Ayres' coworker Mr. Gould, told Mr. Gould that they were aware that Mr. Ayres had contacted HR. App'x, Vol.II, p.376.

As a result of the lack of work, Weatherford created a list of fifteen non-essential employees. App'x, Vol.IV, pp.829-31. The appearance of an employee's name on the list did not mean that they were laid off but meant that they would not receive a call back for their next rotation. App'x, Vol.I, p.116. The employees on

the list were still considered to be employed by the company at the minimum 40 hours per week and they received pay while they remained at home, but without site work they were precluded from earning overtime pay. *Id.*

Mr. Crabb and Mr. Hammons "evinced an awareness" that Mr. Ayres had spoken to HR, viewed him as a "troublemaker," and were aware that he "was involved in a lawsuit with a previous employer." App'x, Vol.I, p.124; Vol.II, pp.354-55, 376. Weatherford decided to put Mr. Ayres on the list the week before August 20, 2012. App'x, Vol.I, p.114; Vol.II, pp.355-56. Mr. Crabb and Mr. Hammons were involved in the decision as was Marcus Moore, Weatherford's operations manager. App'x, Vol.I, pp.125, 128; Vol.III, p.572.

On August 20, 2012, the last day of Mr. Ayres' rotation, he was escorted off Weatherford's premises following a verbal altercation. App'x, Vol.I, pp.115, 122, 124. Based on his three weeks on and two weeks off schedule, Mr. Ayres had been scheduled to return to Williston on September 5, 2012. Mr. Ayres was not called back, but the rest of his crew were all called back to work. App'x, Vol.IV, p.696; Vol.VI, pp.1150-1153. By September 20, Weatherford had not instructed Mr. Ayres to return for his next rotation. App'x, Vol.XIII, p.2082.

Mr. Ayres sent an email message to Mr. Nicholson on September 20, in which he asked about his employment status and whether he was "being improperly retaliated against for making reports in accordance with the Anti-

Corruption Compliance Manual and Enterprise Excellence Policy that is incorporated in the Weatherford personnel policies and procedures." App'x, Vol.XI, pp.1837-42. He informed Mr. Hammons that he contacted HR and was told that his allegations were being investigated. Mr. Ayers also stated that among the items he had reported were complaints about employees being asked to "carry loads in violation of DOT regulation[s]," employees "being asked to perform security assignments alone which was in violation of Weatherford safety policies," Mr. Crabb's threat to fire anyone he caught contacting HR, and supervisors "drinking and driving company vehicles." *Id.* There were no allegations of misconduct made against Mr. Ayres at any time during his employment with Weatherford and Mr. Ayres never received any discipline while employed by Weatherford. App'x, Vol.VII, p.1332; Vol.VI. p.1122; Vol.III, pp.574-575.

Weatherford did not formally implement a RIF based on the list of non-essential personnel "until the middle of October 2012." App'x, Vol.I, p.248. On October 22, 2012, Mr. Nicholson informed Mr. Ayres that his last day of employment due to a "Reduction in Force" was October 19, 2012. App'x, Vol.IX, p.1604. Mr. Ayres did not return to Williston but received pay up to that date.

When Mr. Ayres filed for unemployment compensation benefits, Weatherford contested his eligibility, claiming that Mr. Ayres was discharged for just cause because he "failed to follow instructions." App'x, Vol.I, p.64; Vol.VI,

pp.1099, 1106. The unemployment bureau notice did not indicate that Mr. Ayres was laid off due to a RIF. App'x, Vol.VI, pp.1099, 1106; Vol.VII, pp.1367-1369.

After discovering that Weatherford had classified his termination as "fired for failing to follow instructions," Mr. Ayres called Weatherford's human resources and spoke with Mr. Nicholson's supervisor, Warren Williams. App'x, Vol.IV, p.710. When Mr. Ayres asked what instructions he failed to follow, Mr. Williams said he could not talk to Mr. Ayres. App'x, Vol.I, pp.64, 83; Vol.IV, pp.710-711.

B. Mr. Ayres' STAA Complaint and Proceedings Before the ALJ

On February 15, 2013, Mr. Ayres filed a complaint with the Secretary alleging Weatherford unlawfully terminated his employment in retaliation for complaining that Weatherford violated DOT regulations.[2] App'x, Vol.I, p.57. The Secretary investigated the complaint, determined that it lacked merit, and

[2] Around the time of his STAA complaint to DOL, Mr. Ayres also filed claims for retaliation under the Ohio Whistleblower's Protection Act (OWPA), O.R.C. § 4113.52, and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., before an Ohio state court, which was later removed to the U.S. District Court for the Northern District of Ohio. App'x, Vol.III, pp.496-500, 505-16. In that suit, Ayers alleged that Weatherford had retaliated against him by discharging him in violation of the OWPA for reporting his supervisors' safety violations, and a second count for a violation of the FLSA for complaining that he was not properly paid overtime. The district court dismissed his OWPA claim for lack of jurisdiction, and it determined that his FLSA claim lacked merit because he failed to establish a causal connection between his complaints about overtime pay and Weatherford's decision to lay him off. *Id.* at pp.511-15.

dismissed it. App'x, Vol.VI, p.1092. Mr. Ayres objected to the Secretary's adverse findings and requested a hearing before an ALJ. *Id.* at p.1081. A hearing was held before ALJ John P. Sellers, III on August 26, 2015. App'x, Vol.I, p.57. The ALJ issued his decision on September 25, 2017 (*id.* at pp.188-280), which was subsequently amended on October 20, 2017, due to inadequate service to Weatherford, but was not materially changed (*id.* at pp.56-149).

In his January 29, 2016 Order Denying Respondent's Motion to Dismiss, the ALJ rejected Weatherford's collateral estoppel argument, noting that Mr. Ayres pursued relief in district court under the OWPA and the FLSA. App'x, Vol.II, pp.315-18. The ALJ noted that the district court did not consider the merits of the OWPA claim because Ohio law did not govern Ayres' employment in North Dakota. *Id.* at pp.315-16. The ALJ also found that the FLSA claim involved the litigation of issues of law and burdens of proof different from those in the STAA case. *Id.* at pp.316-18; App'x, Vol.I, p.135.

In his decision, the ALJ concluded that Mr. Ayres engaged in STAA-protected activities when he refused to drive outside of his classification in violation of DOT regulations, which contributed to his placement on the non-essential list and led to his subsequent discharge, and Weatherford management knew about his protected activity and exhibited animus towards Mr. Ayres' protected activity. *Id.* at p.132. Weatherford failed to present clear and convincing

evidence that it would have taken those actions in the absence of Mr. Ayres' protected activities. *Id.* at p.135. The ALJ therefor concluded that Weatherford violated the STAA when it dismissed Mr. Ayres and awarded him $82,119 in back pay, $10,000 for emotional harm, and $25,000 in punitive damages. *Id.* at p.146. On August 22, 2018, the ALJ awarded Mr. Ayers' estate $36,219.01 in attorney's fees and costs. *Id.* at pp.136-46; Vol.I, p.22.

C. The ARB's Decision on Appeal

Weatherford sought review of the ALJ's decision. App'x, Vol.XIII, p.2358. On November 18, 2020, the ARB issued its decision affirming the ALJ's decision except for the award of punitive damages. *Id.* at p.2079. The ARB concluded that substantial evidence supported the ALJ's finding that Mr. Ayres engaged in protected activity when he refused to operate a vehicle in July 2012 and discussed his concerns with Mr. Nicholson on August 13, 2012, and again in an email sent to Mr. Nicholson on September 20, 2012. *Id.* at pp.2084-85. The ARB also concluded that Mr. Ayres suffered adverse action when he was placed on the non-essential list and not brought back to Williston in accordance with his expected rotation and again when his employment was formally terminated. *Id.* at p.2085. The ARB also concluded that substantial evidence supported that Mr. Ayres' STAA-protected activity contributed to Weatherford's adverse employment actions based on circumstantial evidence that Mr. Hammons and Mr. Crabb exhibited animus

towards employees who complained to HR and considered Mr. Ayres to be a troublemaker, but Weatherford offered no evidence of Mr. Ayres' discipline or poor performance. *Id.* at pp.2085-86.

On Weatherford's rebuttal, the ARB concluded that Weatherford failed to demonstrate, by clear and convincing evidence, that it would have placed Mr. Ayres on the non-essential list and later discharged him even if he had engaged in protected activity. The ARB therefore affirmed the ALJ's conclusion that Weatherford violated the STAA. *Id.* at pp.2086-87, 2090.

The ARB also affirmed the ALJ's rejection of Weatherford's collateral estoppel argument (*id.* at pp.2087-88) and the ALJ's award for compensatory damages, including back pay and emotional harm, but reversed the ALJ's award of punitive damages, holding that "penal claims, including the right to recover punitive damages, abate upon the death of the injured party." *Id.* at p.2089. The ARB also affirmed the ALJ's award of attorney's fees and costs. *Id.* at p.2090.

On January 22, 2021, the ARB issued an Order Awarding Attorney's Fees, and granted Mr. Ayres' estate additional attorney's fees in the amount of $12,670.00. *Id.* at p.1991.

SUMMARY OF THE ARGUMENT

The ARB correctly concluded that Weatherford retaliated against Mr. Ayers in violation of the STAA. Mr. Ayers met his prima facie burden by establishing

that he engaged in protected activity when he refused to operate a vehicle outside of his license classification and complained about this and other potential safety violations; Weatherford's management knew about Mr. Ayres' protected activity; Weatherford took adverse action against Mr. Ayers by initially declining to recall him and ultimately terminating him; and the record contains substantial evidence that Mr. Ayres' protected activity was a "contributing factor" in Weatherford's decision to terminate him. The ARB also correctly determined that Weatherford failed to meet its burden of proving by clear and convincing evidence that it would have taken the adverse action against Mr. Ayres for non-discriminatory reasons only. Therefore, the ARB correctly concluded that Weatherford retaliated against Mr. Ayres in violation of the STAA.

The ARB properly rejected Weatherford's collateral estoppel argument because his prior district court case did not resolve his Ohio whistleblower claim on the merits, and his FLSA retaliation claim did not involve identical issues to his STAA claim. Weatherford waived its res judicata argument by failing to raise it before the ALJ or the ARB. But even if Weatherford properly preserved that issue, res judicata does not apply here for the same reasons the collateral estoppel argument fails, and because the STAA afforded Mr. Ayers the discretion to pursue his STAA claim administratively.

With regard to compensatory damages, the ARB did not abuse its discretion by upholding the ALJ's backpay calculations and award of compensatory damages to Mr. Ayres based on lost wages for the time that Mr. Ayres was unemployed (offset by his failure to mitigate his damages) and for emotional and mental distress Mr. Ayres suffered as a result of the termination. Likewise, the award of attorney's fees was not an abuse of discretion as the fees were consistent with the law, reasonable, and supported with sufficient detail.

As to punitive damages, the ARB properly reversed the ALJ's award of punitive damages in light of federal common law, which provides that penal remedies abate upon death. This Court should therefore affirm the ARB's decision.

ARGUMENT

I. Standard of Review

In reviewing decisions of the ARB, this Court will uphold the ARB's findings of fact so long as they are supported by substantial evidence in the record as a whole. *Roadway Exp., Inc. v. Admin. Rev. Bd.*, 116 F. App'x,674, 678 (6th Cir. 2004); *Yellow Freight Sys. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; a court may not re-litigate the case de novo, resolve conflicts in evidence, or decide questions of credibility. *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). The substantial evidence standard

is highly deferential, meaning this court "must uphold the [ARB's] findings . . . even if the court would justifiably have made a different choice had the matter been before it de novo." *Yadav v. L–3 Commc'ns Corp.*, 462 F. App'x 533, 536 (6th Cir. 2012) (internal quotation marks omitted). This Court "severely limit[s] [its] review of credibility determinations and accept[s] those made by the Board unless they have no rational basis." *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003).

"A reviewing court must uphold the Secretary's legal conclusions 'unless they are arbitrary, capricious, involve an abuse of discretion, or otherwise are not in accordance with law.'" *Yellow Freight*, 27 F.3d at 1138 (quoting *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)); 5 U.S.C. § 706(2). "Awards of money damages are reviewed under an abuse of discretion standard." *Hance v. Norfolk S. Ry. Co.*, 571 F.3d 511, 517 (6th Cir. 2009) (citation omitted).

II. The ARB Correctly Concluded, Based on Substantial Evidence, that Weatherford Violated the STAA When It Took Adverse Action Against Mr. Ayres.

Substantial evidence supports the ARB's conclusion that Mr. Ayres established a prima facie case of retaliation by showing that he engaged in protected activity of which Weatherford was aware, and the company took adverse action against Mr. Ayers in part because of his protected activity. Substantial evidence also supports the ARB's conclusion that Weatherford could not satisfy its

burden of proving by clear and convincing evidence that it would have taken the adverse action against Mr. Ayres absent his protected activity.[3] Based on this evidence, the ARB correctly concluded that Weatherford violated the STAA when it retaliated against Mr. Ayres in part for engaging in protected activity.

A. Substantial Evidence Supports Mr. Ayres' Prima Facie Case of Retaliation.

The ARB correctly concluded that Mr. Ayers established his prima facie case because: (1) Mr. Ayres engaged in protected activity when he refused to drive outside his license classification and made safety complaints to management; (2) Weatherford had knowledge of this protected activity; (3) Weatherford took

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[3] Weatherford's argument that the ARB should have applied the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), instead of the framework explicitly set forth in the STAA itself, is entirely without merit. Weatherford Br. at 30-32. As discussed *supra* at pp.5-7, the STAA was amended in 2007 to apply the AIR-21 legal burdens of proof (49 U.S.C. § 42121(b)), requiring the complainant to make a prima facie showing that the protected activity "was a *contributing factor* in the unfavorable personnel action" and establishing the employer's burden to rebut "by *clear and convincing evidence*, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 31105(b)(1). This framework applies whether the claim is being litigated before DOL or in the federal courts. *See Evans v. USF Reddaway, Inc.*, No. 115CV00499EJLREB, 2017 WL 2837136, at *3–4 (D. Idaho June 30, 2017), *aff'd*, 730 F. App'x 566 (9th Cir. 2018); *Maverick Transp., LLC v. U.S. Dept. of Labor, Admin. Review Bd.*, 739 F.3d 1149, 1155 (8th Cir. 2014). Weatherford's reliance on *Ridgley v. U.S. Dep't of Labor*, 298 F. App'x 447, 452 (6th Cir. 2008), is misplaced. Weatherford Br. at 30. Although *Ridgley* was decided in 2008 after the STAA was amended, the alleged retaliation occurred before the amendment. Thus, the amendment was inapplicable to that case and *Ridgley* does not stand for the proposition Weatherford urges.

adverse action against Mr. Ayres when it put him on a non-essential list and ultimately terminated him; and (4) Mr. Ayres' protected activity was a contributing factor for Weatherford's adverse actions.[4]

1. Mr. Ayres' Clearly Engaged in Protected Activity When He Refused to Drive Outside His License Classification and Made Safety Complaints to Management.

Substantial evidence supports the ARB's conclusion that Mr. Ayres engaged in protected activity when he refused to drive outside of his license classification in violation of DOT regulations and complained about this and other safety issues to Weatherford's management. The STAA prohibits employers from retaliating against an employee who has refused to operate a vehicle in violation of a regulation, order, or standard related to commercial vehicle safety, or for making complaints related to violations of commercial motor vehicle safety or security regulations. *See* 49 U.S.C. § 31105(a)(1)(A)-(B); *Maverick Transp.*, 739 F.3d at 1156; *Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998).

Substantial evidence supports the ARB's determination that Mr. Ayres refused to drive a vehicle that was outside his commercial driver's license

[4] Weatherford does not contest the fact that Mr. Ayres suffered adverse action, but only disputes the causal connection between Mr. Ayres' protected activity and the adverse action. Weatherford Br. at 28, 40. Therefore, this brief does not analyze the adverse action element in this case.

certification when asked. App’x, Vol.I, pp.117, 123-24; Vol.III, pp.568-69. His supervisor, Mr. Hammons, and co-worker Richard Hanson both corroborated his testimony to this effect. App’x, Vol.III, pp.567-568; Vol.I, pp.91-92.

Substantial evidence also supports the ARB’s conclusion that Mr. Ayres made verbal and written complaints related to violations of commercial motor vehicle safety or security regulations to Mr. Nicholson, an HR manager for Weatherford. App’x, Vol.XIII, pp.2081-82, 2084-85; Vol.I, pp.112-13. Mr. Ayres shared with Mr. Nicholson his concerns about being asked to drive loads outside of his classification in violation of DOT regulations, violations of rules related to driving hazardous materials, Weatherford employees drinking and driving company vehicles, and Mr. Crabb’s comments about firing anyone who went to HR. App’x, Vol.VII, pp.1256-1257; Vol.IV, p.685; Vol.VI, pp.1181-82, 1198; Vol.I, pp.86, 112-13, 123-24, 132. While Weatherford asserts that Mr. Ayres made no “written” complaints before his September 20, 2012, email to Mr. Nicholson and that his complaints were too vague (Weatherford Br. at 35-36), the corroborated evidence supports that Mr. Ayres made several detailed complaints in conversations he had with Mr. Hammons and Mr. Nicholson before September 20. App’x, Vol.III, pp.568-69 (Hammons corroborating incident involving Ayres’ refusal to drive); Vol.VI, pp.1197-1198 (Nicholson’s admission of his August 13 conversation with Ayres); Vol.XIII, p.2085; Vol.I, pp.105, 112-13, 132.

Substantial evidence therefore supports the ARB's determination that Mr. Ayres refused to drive outside his certification and complained about this to management, and also raised concerns about rule violations related to driving hazardous materials, Weatherford employees drinking and driving company vehicles, and Mr. Crabb's comments about firing anyone who went to HR. Based on this evidence, the ARB correctly determined that Mr. Ayers engaged in protected activity under the STAA. *See Maverick Transp.*, 739 F.3d at 1156 (holding that refusal to drive truck based upon violation of federal safety regulation constituted protected activity); *Pattenaude v. Tri-Am Transp., LLC*, ARB No. 15-007, 2017 WL 512653, at *2, 7 n.78 (ARB Jan. 12, 2017) (refusal to operate constituted protected activity where truck driver made several complaints to supervisors regarding mechanical problems with the trucks and about supervisors driving without proper licenses).

2. The Record Contains Uncontroverted Evidence of Weatherford Management's Knowledge of Mr. Ayres' Protected Activity.

Ample record evidence likewise establishes that Weatherford managers were aware of Mr. Ayres' protected activity. Mr. Ayres made complaints directly to managers, who testified about knowing about their content. App'x, Vol.III, pp.568-59; Vol.VII, p.1259; Vol.IV, p.680. Mr. Hammons corroborated Mr. Ayres' account of his refusal to drive. App'x, Vol.III, pp.568-59; Vol.I, p.105. Mr.

Nicholson acknowledged his extensive conversation with Mr. Ayres on August 13, 2012, in which Mr. Ayres "voiced his complaints . . . about him and other drivers being asked to drive in violation of DOT regulations." *Id.* at pp.112-13; App'x, Vol.VI, pp.1197-1198. District manager Mr. Crabb indicated that the fact that Mr. Ayres was known to be a complainer came up when he was seeking information about who to place on the RIF list. App'x, Vol.IV, p.865. Mr. Gould, a co-worker, also corroborated this evidence, testifying that in a meeting to decide who to designate for the RIF, both Mr. Hammons and Mr. Crabb stated that Mr. Ayres was "going to get terminated" and Mr. Hammons admitted to knowing that Mr. Ayres contacted HR. App'x, Vol.II, pp.356, 358, 376. Weatherford's claim that it was not aware of Mr. Ayres' complaints when it decided to include him in the RIF is contradicted by overwhelming evidence to the contrary.

Accordingly, substantial evidence supports the ARB's finding that Weatherford had knowledge of Mr. Ayres' protected activity.

3. The ARB Correctly Concluded that Mr. Ayers' Protected Activity Played a Role in Weatherford's Decision to Take Adverse Action Against Him.

As the ARB noted in its decision affirming the ALJ, the record contains "an abundance of circumstantial evidence involving animus, temporal proximity, and pretext" supporting a conclusion that Mr. Ayres' protected activity contributed to his being placed on the non-essential list and subsequently terminated. App'x,

Vol.XIII, p.2085; Vol.I, p.118; *see Consol. Rail Corp. v. U.S. Dep't of Lab.*, 567 F. App'x 334, 338 (6th Cir. 2014) ("the contributing factor standard has been understood to mean 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision'") (quoting *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013)); *Riess v. Nucor Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, 2010 WL 49184277, at *4 (ARB Nov. 30, 2010) ("Where there is no direct evidence of illegal motive, the employer can use indirect, circumstantial evidence."). Based on this evidence, the ARB correctly concluded that Mr. Ayers' protected activity was a contributing factor in Weatherford's decision to include him on the non-essential list and effectively terminate him. *See Kuduk v. BNSF Ry. Co.*, 980 F. Supp. 2d 1092, 1101 (D. Minn. 2013), *aff'd*, 768 F.3d 786 (8th Cir. 2014) (stating that protected activity as a contributing factor can be proven through circumstantial evidence of temporal proximity, pretext, shifting explanations by the employer, antagonism or hostility toward plaintiff's protected activity, falsity of employer's explanation or a change in employer's attitude toward plaintiff after engaging in protected activity).

a. Weatherford Managers' Animus Towards Mr. Ayres' Protected Activity Is Strong Evidence of Causation.

Substantial evidence supports the ARB's affirmance of the ALJ's conclusion that "both Hammons and Crabb had an animus toward employees who took their complaints to HR without first consulting them" and that "when employees

brought their complaints directly to Hammons or Crabb they experienced a hostile reaction." App'x, Vol.I, pp.118, 120; Vol.XIII, p.2086. Despite Weatherford's contentions that Mr. Ayres was a problematic employee, substantial evidence supports the ALJ's finding that "Weatherford did not present any contemporaneous records of the Complainant being disciplined for any rules violation during his entire time at Williston." App'x, Vol.XIII, p.2086; Vol.I, p.134. In fact, Mr. Gould and Mr. Hansen, Mr. Ayres' co-workers, testified to the opposite—that Mr. Ayres was helpful, accepted extra work, and was on time. App'x, Vol.II, pp.347; 394-395.[5]

This direct evidence of animus is sufficient on its own to support the ARB's conclusion that Mr. Ayers' protected activity played a role in Weatherford's decision to terminate him. *Timmons v. Mattingly Testing Servs.*, No. 95-ERA-40, 1996 WL 363348, at *4 (ARB Jun. 21, 1996) (holding that "ridicule, openly hostile actions or threatening statements," may serve as circumstantial evidence of retaliation); *Consol. Rail*, 567 F. App'x at 338 (finding substantial evidence that

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[5] The ALJ credited their testimony over Mr. Hammons' and Mr. Crabb's uncorroborated attestations. App'x, Vol.I, pp.125-128. Weatherford does not present any convincing arguments to overturn the ALJ's credibility determinations. *See United States v. Moses*, 289 F.3d 847, 851 (6th Cir. 2002) (according "considerable deference" to a court's credibility determinations); *Fluor Daniel*, 332 F.3d at 967 (noting that the court "severely limit[s] [its] review of credibility determinations and accept[s] those made by the Board unless they have no rational basis").

animus was a contributing factor in employee's termination where supervisor "flick[ed]" safety reports across the table, made "alleged request to quit sending in safety reports," and asked why employee still worked there).

b. Temporal Proximity Between Mr. Ayres' Protected Activities and Weatherford's Adverse Actions Further Supports a Finding of Causation.

The ARB also correctly concluded that the temporal proximity between Mr. Ayers' protected activity and the adverse actions Weatherford took against him further indicates a causal connection. App'x, Vol.XIII, pp.2081-82. Mr. Ayres had a conversation with Mr. Nicholson in HR on August 13. App'x, Vol.VI, p.1198. During that same week, the week before August 20, Weatherford made the decision to include Mr. Ayres on a list of non-essential personnel. App'x, Vol.III, p.581; Vol.I, p.122-23. Also during this time, Mr. Crabb admitted that he threatened to fire anyone who went over his head to HR, and both Mr. Crabb and Mr. Hammons knew that Mr. Ayres had spoken to HR, and they viewed him as a troublemaker. App'x, Vol.I, p.124; Vol.VI, pp.1140, 1144, 1296; Vol.IV, pp.678, 826, 834. Ultimately, Mr. Ayres was not brought back on his regular two-week rotation and subsequently was informed that he was permanently laid off about six

weeks later, after an alleged investigation into his complaints.[6] App'x, Vol.XIII, p.2096; Vol.I, p.256.

Given the short duration between Mr. Ayres' complaint to HR and his being placed on the list of non-essential personnel, the ARB correctly affirmed the ALJ's conclusion that "temporal proximity supports a causal connection between Weatherford's adverse job action and the Complainant's protected activity." App'x, Vol.I, p.256; *Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006) (finding sufficient evidence of temporal proximity to show requisite causal relationship where employee's suspensions "followed almost immediately on the heels of reports [employee] made about air safety violations" given employee's transfer a week after making a safety complaint).

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[6] Weatherford attempts to diminish the relevance of Mr. Ayres' evidence of temporal proximity by arguing that the short duration of his employment renders the evidence meaningless. Weatherford Br. at 42. The relevant question here is how much time has passed between the protected activity and the adverse action, which is the proper inquiry regardless of the duration of employment. Weatherford's reliance on *Brown-Baumbach v. B & B Auto., Inc.*, No. CIV.A.09-3962, 2010 WL 2710543, at *15 (E.D. Pa. July 7, 2010), *aff'd in part, rev'd in part*, 437 F. App'x 129 (3d Cir. 2011), to support its argument that temporal proximity is not relevant in this case is misplaced. In *Brown-Baumbach*, the district court made a clear distinction that temporal proximity alone was insufficient to establish a causal connection, emphasizing that the record as a whole must be considered. *Id.* at *14. Moreover, *Brown-Baumbach* is further distinguishable because Mr. Ayres' case contains additional circumstantial evidence of contribution, including animus and pretext, which was missing from *Brown-Baumbach*. If this Court were to accept Weatherford's argument, that would mean that no complainant employed for a short period of time could ever raise temporal proximity as evidence of contribution.

c. Substantial Evidence Supports the ARB's Finding That Weatherford's Asserted Reasons for the Adverse Actions Were Pretextual.

The ARB also correctly concluded that Weatherford's changing explanations and unsupported rationales for taking adverse action against Mr. Ayres were pretext for retaliation. Evidence of shifting justifications for an adverse action supports a finding that the justifications were unreliable and pretextual. *See Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) ("[a]n employer's changing rationale for making an adverse employment decision can be evidence of pretext").

First, Weatherford claimed that Mr. Ayres was not recalled to Williston in September 2012 in part due to an alleged investigation of his complaints. However, as the ALJ noted, there was no corroborating evidence that Weatherford engaged in those investigations. App'x, Vol.I, pp.76, 80, 83-84, 115, 124.

Although Weatherford claims Mr. Ayres was laid off because the company was undergoing a RIF due to lack of work, it also alleges that Mr. Ayers was included in the RIF because he had a bad work ethic and was a problematic employee and a troublemaker. Weatherford Br. at 11. Thus, even the company is not maintaining that Mr. Ayers was laid off for solely economic reasons, nor could it on this record. Moreover, one co-worker testified that while some employees were being laid off in a RIF, Weatherford was hiring and bringing on board new

employees in the same job category as Mr. Ayres. App'x, Vol.I, pp.90-91, 129. *See Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) ("An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge.").

Regarding Weatherford's claims that Mr. Ayres had a poor work ethic, did not fit in, and was confrontational with others, nearly getting into a fight his last day on the job, App'x, Vol.I, p.125, the ARB correctly determined that Weatherford presented no evidence of past discipline or other documentation of poor performance to corroborate this testimony. App'x, Vol.XIII, p.2087. In fact, Mr. Ayres' co-workers testified that Mr. Ayres was an enthusiastic worker who was willing to assist others. App'x, Vol.I, p.127. The ALJ credited the co-workers' testimony over Mr. Hammons, and Weatherford has failed to establish that the ALJ's credibility determination lacked a rational basis. *Id.* at pp.125-28; *Fluor Daniel*, 332 F.3d at 967.

While the ARB noted that Mr. Ayres was escorted off Weatherford's premises following a verbal altercation with another employee, it correctly found that this altercation did not contribute to his effective termination as the altercation occurred after the decision was made to put Mr. Ayres on the non-essential list and thus could not have been the reason for that action. App'x, Vol.XIII, p.2085; Vol.I, pp.115, 124, 134.

Finally, when Mr. Ayres applied for unemployment benefits, he was told by the state agency that he was terminated for "failing to follow instructions," a reason never conveyed to Mr. Ayres nor explained to him when he inquired with HR after learning of the characterization, and the unemployment bureau notice made no reference to a RIF. App'x, Vol.VI, pp.1099, 1106; Vol.VII, pp.1367-1369. This reason for Mr. Ayres' termination is clearly inconsistent with the message he previously received from HR and with Weatherford's litigation position that Mr. Ayres was laid off as part of an economic RIF. App'x, Vol.I, p.64; Vol.VI, pp.1099, 1106.

The shifting justifications for Weatherford's decision to terminate Mr. Ayers, taken together with the direct evidence of animus and temporal proximity evidence discussed above, further support the ARB's conclusion that retaliatory animus played a role in Weatherford's decision to terminate Mr. Ayers. *See Williams v. Domino's Pizza*, ARB No. 09-092, 2011 WL 327980, at *5 (ARB Jan. 31, 2011) (holding that another type of circumstantial evidence of contribution under the STAA is that which "discredits the respondent's proffered reasons for the termination, demonstrating instead they were pretext for retaliation."). For all of these reasons, the ARB correctly concluded that Mr. Ayers satisfied his prima facie burden of demonstrating that his protected activity was a contributing factor

to Weatherford's decision to place him on the non-essential list and ultimately terminate him.

B. Weatherford Did Not Prove by Clear and Convincing Evidence That It Laid Off Mr. Ayres for Legitimate, Non-Discriminatory Reasons.

For similar reasons that support the ARB's conclusion that Weatherford's proffered reasons for its adverse employment actions were pretext for retaliation (*see supra* at pp.29-32), the ARB correctly concluded that Weatherford failed to prove by clear and convincing evidence that it laid off Mr. Ayres for non-discriminatory reasons.

First, Weatherford's attempts to mask its termination of Mr. Ayres as a legitimate RIF fails because, even if it had legitimate reasons for laying off some employees, the timing and manner of the decision to include Mr. Ayres in that RIF are highly suspect. Although a layoff in and of itself may be a valid business decision, the selection process or manner in which it is conducted can be evidence of pretext or improper motivation. *See Brewer v. New Era, Inc.*, 564 F. App'x 834, 841 (6th Cir. 2014) (holding that a RIF was pretext for retaliation where defendant failed to follow its seniority policy); *Pierson v. Quad/Graphics Printing Corp.*, 749 F.3d 530, 539 (6th Cir. 2014) (finding pretext where employer's proffered reason for adverse action had no basis in fact, did not actually motivate the adverse action, or was insufficient to warrant the adverse action) (citation omitted).

Here, Weatherford's explanations for terminating Mr. Ayres are internally inconsistent. On the one hand, Weatherford claims it included Mr. Ayers in a RIF for economic reasons, App'x, Vol.IV, pp.829-31; Weatherford Br. at 10, but on the other hand they argue that they laid him off for being a difficult employee and a poor performer, App'x, Vol.I, pp.125, 127; Weatherford Br. at 11, and they apparently told the North Dakota Job Service Benefit Section that he was terminated for failing to follow instructions, App'x, Vol.VI, pp.1099, 1106; Vol.VII, pp.1367-1369. Moreover, the record does not support Weatherford's claims that Mr. Ayers was a poor performer or a difficult employee, and the ARB properly determined that manager testimony to this effect was not credible. *See supra* at p.30.

Given Weatherford's shifting justifications for terminating Mr. Ayers and the lack of credible evidence to support its claims that he had performance issues that would have justified terminating him, the ARB correctly concluded that Weatherford failed to prove by clear and convincing evidence that it would have terminated Mr. Ayres' for non-discriminatory reasons. *See Thurman*, 90 F.3d at 1167 ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext.").

III. Collateral Estoppel and Res Judicata Do Not Preclude Mr. Ayres' STAA Claims.

Weatherford's claim that the ARB abused its discretion by "fail[ing] to address collateral estoppel and res judicata" is wholly without merit. Weatherford Br. at 22. First, both the ALJ and ARB explicitly addressed and rejected Weatherford's collateral estoppel argument, and correctly concluded that collateral estoppel did not preclude Mr. Ayres' STAA claim because the district court did not actually litigate Mr. Ayres' retaliation claim under the OWPA and render a final judgment on the merits, and Mr. Ayers' FLSA claim involved different issues and burdens of proof than his STAA claim. App'x, Vol.XIII, p.2088; Vol.I, p.135.

Second, Weatherford never raised its res judicata defense below, and therefore neither the ALJ nor the ARB decided the issue. Hence, Weatherford has waived this argument and is barred from now raising it before this Court. Even if this Court were to consider Weatherford's res judicata argument, it lacks merit for the same reasons that its collateral estoppel argument must fail, and because Mr. Ayers was not required to raise his STAA claim in his district court case given that the STAA gives complainants the discretion to pursue their claims administratively.

A. Weatherford's Collateral Estoppel Argument Lacks Merit Because Mr. Ayres' OWPA Claim Was Not Fully Litigated on the Merits and His FLSA Claim Involved Different Issues of Law and Burdens of Proof.

The ARB properly rejected Weatherford's collateral estoppel argument because his OWPA claim was not fully litigated on the merits, and his FLSA claim involved the litigation of issues of law and burdens of proof different from those in this STAA case. App'x, Vol.XIII, p.2088.

Collateral estoppel, also called issue preclusion, prevents a party from relitigating issues of fact or law which were decided on the merits by a previous final judgment. *See Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997). Federal courts apply the doctrine of collateral estoppel in the same manner as the state courts in the state in which the earlier judgment was rendered. *Id.* (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)).

The doctrine of collateral estoppel may be applied only if four criteria have been satisfied: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Cobbins v. Tenn. Dep't of Transp.*, 566

F.3d 582, 589-90 (6th Cir. 2009); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007).

Weatherford's collateral estoppel argument fails to satisfy this test. Regarding Mr. Ayres' OWPA claim, because dismissal of that claim was based on jurisdictional grounds, based on the court's determination that Ohio law did not apply to Mr. Ayres' North Dakota employment, the district court did not "actually litigate" that claim and the court's judgment did not "result in a final judgment on the merits." App'x, Vol.III, p.511-13. Hence, Mr. Ayers did not have a "full and fair opportunity to litigate" the issues which serve as the basis of either his OWPA or STAA claims. Because a judgment on the merits below is a prerequisite for collateral estoppel to apply, Weatherford cannot establish that the district court's dismissal of Mr. Ayers' Ohio whistleblower complaint on procedural grounds bars his litigation of similar issues raised in this case. *See Cobbins*, 566 F.3d at 590 (holding that collateral estoppel did not apply where dismissal of prior lawsuit on non-substantive grounds did not provide a "full and fair opportunity to litigate" the issue).

As to Mr. Ayres' FLSA claim, although the district court did consider the merits of that claim, it did not involve the "precise issue" Mr. Ayers' raises here. The test for whether two cases involve the same issue is whether "the same facts or evidence would sustain both." *Sushka*, 117 F.3d at 969–70 (citing *Monahan v.*

Eagle Picher Indus., 21 Ohio App. 3d 179, 486 N.E.2d 1165, 1168 (1984)) (internal citations omitted). "If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other." *Id.*

In his FLSA claim, Mr. Ayers alleged that he was terminated for raising complaints about overtime pay, and the district court rejected his claim on the ground that "[t]he material in this record does not support a causal connection between his complaints concerning overtime and his discharge." App'x, Vol.III, p.515. Although the FLSA and STAA claims share some of the same facts in that they both involve the same adverse action (Mr. Ayres' termination), they differ materially because that case concerned whether he was terminated for complaining about overtime pay whereas this case concerns whether he was terminated in part for refusing to drive outside his certification and making safety complaints. These are plainly different inquiries.

Moreover, as the ALJ and ARB correctly identified (App'x, Vol.II, pp.315-18; Vol.XIII, pp.2087-88), Mr. Ayers' FLSA action also involved a different legal standard and burden of proof. Whereas the *McDonnell Douglas* burden-shifting framework requires a FLSA complainant to prove that protected activity was the "but for" cause of the adverse action, here the "contributing factor" framework applies to determine whether a STAA complainant proved that protected activity

contributed in some way to the adverse action and, if so, whether the employer proved by clear and convincing evidence that it would have taken the adverse action absent the protected activity. *See supra* at pp.5-7, 20 n.3. Thus, the district court's ruling on Mr. Ayres' FLSA retaliation claim has no preclusive effect because it did not involve the "precise issue" or same burdens of proof at issue in his STAA claim.[7] *Sushka*, 117 F.3d at 969–70.

Accordingly, the ARB correctly concluded that collateral estoppel does not preclude Mr. Ayres from litigating any of the issues he raises in his STAA claim.

B. Weatherford Has Waived Its Res Judicata Argument, and Even if Properly Before this Court, It Fails on the Merits.

1. Weatherford Waived Its Res Judicata Argument by Failing to Raise It Before the Agency in the Proceedings Below.

Because Weatherford did not raise its res judicata argument before the ALJ or the ARB, it cannot now raise it in these proceedings before this Court and thus,

[7] Weatherford's reliance on *Germann v. Dep't of Labor*, 206 F. App'x 662, 666 (9th Cir. 2006) misses the mark. *Germann* is inapposite because in that case the Ninth Circuit concluded that a former employee was precluded from litigating in his STAA administrative proceeding the question of whether he was terminated for reporting his employer's alleged hours of service violations, which was central to his prior state court wrongful termination action. *Id.* at 665-66. In that case, the prior court decided the precise issue before the subsequent court. Here, in contrast, the district court did not make a general determination that Mr. Ayres' layoff was legitimate or based on a valid business reason. Rather, the court found that "[t]he material in this record does not support a causal connection between his complaints concerning overtime and his discharge as part of a general reduction in force." App'x, Vol.III, p.515. The district court did not evaluate whether Weatherford was motivated in any part by Mr. Ayres' *safety* complaints related to the STAA.

this Court should exclude the argument as waived. The Sixth Circuit has ruled that it "will not address issues on appeal that were not raised and ruled upon below" in the absence of exceptional circumstances. *Meade v. Pension Appeals & Review Comm.*, 966 F.2d 190, 194 (6th Cir.1992).

Weatherford seeks to argue for the first time before this Court that res judicata applies to Mr. Ayres' STAA claim. Although similar in nature to the doctrine of collateral estoppel, this Court has recognized that the two doctrines are distinct. "Although frequently confused, res judicata and collateral estoppel are different theories which often lead to the same result." *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971) (rejecting the application of either doctrine to plaintiff's Title VII claim where similar issue under the NLRA was decided by the NLRB). This Court has explained that "res judicata necessitates an identity of causes of action, while . . . collateral estoppel" involves "some question or fact in dispute [which] has been judicially and finally determined by a court of competent jurisdiction between the same parties" on "those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended." *Id.*

By raising it for the first time in these proceedings in its petition for review to this Court, Weatherford has deprived both the ALJ and the ARB of the opportunity to address the issue. Weatherford offers no justification for its failure

to present this issue in the proceedings below. By failing to timely raise the issue, Weatherford has waived consideration of it by this Court. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 754 (6th Cir. 2019) (issues not raised before an agency are waived and will not be considered by a court on review).

2. Even if Weatherford's Res Judicata Argument Were Properly Before the Court, It Fails Because the District Court Case Did Not Involve Fully Litigating Identical Claims, and the STAA Gives Complainants Discretion to Pursue Administrative Resolution of Their Claims.

If the Court determines that Weatherford's res judicata argument is properly before this Court despite the company's failure to present it to the ALJ and ARB below, the Court should reject this argument on the merits because there is no common "identity of causes of action" between Mr. Ayres' STAA and FLSA claims, his OWPA claim was not litigated and decided on the merits, and he was not required to raise his STAA claim in his district court case. Hence, claim preclusion does not apply.

"Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject of a previous action." *Doe ex rel. Doe v. Jackson Local Schs. Sch. Dist.*, 422 F. App'x 497, 500 (6th Cir. 2011) (citations omitted). The doctrine "bars subsequent actions whose claims could have been litigated in the previous suit[.]" *Id.* (alteration in

original and citation omitted). *See Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 519–20 (6th Cir. 2011).

Claim preclusion applies when: (1) there is a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involved the same parties, or their privies, as the first; (3) the second action raises an issue that was actually litigated or that should have been litigated in the first action; and (4) there is an identity of causes of action between the first and second actions. *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). "Identity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'" *Id.* at 484 (quoting *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981)).

Regarding Mr. Ayres' OWPA claim, Weatherford's argument of claim preclusion fails on the first and third *Sanders* prongs. Although the OWPA claim may have involved similar issues and facts as Mr. Ayres' STAA claim, the district court did not decide the OWPA claim on the merits but rather dismissed it for lack of jurisdiction. *See supra* at pp.36. Thus, even if under the fourth prong there is an argument for an "identity of the causes of action" between the OWPA and the STAA claims, res judicata does not apply because the OWPA claim was not "actually litigated" and the district court did not issue a "final decision on the merits."

Nor does res judicata apply on the ground that Mr. Ayers *could have* raised his STAA claim in the district court case because the STAA required Mr. Ayres to file his claim first with DOL. *Matthews v. Transp. Div., Inc.*, No. 3:16-cv-340-GNS, 2017 WL 7000278, at *5 (W.D. Ky. Mar. 10, 2017) (dismissing STAA claim where employee did not file complaint with Secretary and noting "failure to exhaust his administrative remedies precludes the Court from hearing the claim"). Contrary to Weatherford's assertion, Mr. Ayres could not have litigated his STAA claim before the district court initially because that court would not have had jurisdiction over his claim at the time that both proceedings were filed. Congress expressly granted initial jurisdiction of STAA whistleblower complaints to the Secretary of Labor (49 U.S.C. § 31105(b)), and limited district courts' jurisdiction only in cases in which the Secretary of Labor fails to issue a final decision within 210 days after the filing of the complaint with the Secretary. 49 U.S.C. § 31105(c).

Even where the DOL has not issued a final decision within 210 days, the option to file in the district court is discretionary, as the complainant may also continue to pursue their claim through the administrative process. 49 U.S.C. § 31105(b); *see also* 29 C.F.R. Part 1978. Thus, even after 210 days passed, Mr. Ayers was not required to remove his complaint from the administrative process to federal district court, which is discretionary under the STAA. 49 U.S.C. § 31105(c).

Regarding Mr. Ayres' FLSA claim, while the district court did consider and dismiss this claim on the merits, arguably satisfying the first and third prongs of the res judicata test, the basis for Mr. Ayres' FLSA claim does not share an "identity of causes of action," as discussed *supra* at pp.36-38. Accordingly, the ARB correctly concluded that the district court's resolution of Mr. Ayers' FLSA claim does not bar this Court's consideration of his STAA claim under the doctrine of res judicata.

IV. The ARB Was Within Its Discretion to Affirm the ALJ's Award of Compensatory Damages and Attorney's Fees and Costs, and It Properly Reversed the ALJ's Award of Punitive Damages to Mr. Ayers' Estate.

A. The ARB Did Not Abuse Its Discretion in Affirming the ALJ's Award of Compensatory Damages, Including Back Pay and Damages for Emotional Distress.

The ARB did not abuse its discretion when affirming the ALJ's award for compensatory damages. The STAA permits a number of remedies, including the payment of "compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." 49 U.S.C. § 31105(b)(3)(A)(iii).

Additionally, an employer that violates the STAA may be held liable to the employee for compensatory damages for mental or emotional distress. *Id.* at § 31105(b)(3)(A)(iii); *Jackson v. Butler & Co.*, ARB Nos. 03-116, -144, 2004 WL

1955436, at *8 (ARB Aug. 31, 2004) (upholding compensatory award for emotional distress supported by complainant's and his wife's unrefuted testimony). To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *See Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992) (citing *Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978)); *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088, 2007 WL 4248548, at *6 (ARB Nov. 30, 2007).

Regarding back pay, the ARB approved the ALJ's calculations of Mr. Ayres' back pay award by calculating the lost wages based on the rate of his average weekly earnings while employed by Weatherford—$1,217.67 per week—for the period starting from the date of his discharge in October 2012 until the date of the hearing in March 2016.[8] The ARB noted that the ALJ appropriately offset the back pay for a six-month period during which Mr. Ayres did not seek comparable employment, his "business income" earnings in 2014, and the salary he earned while employed following his discharge. Based on the evidence, the ARB did not abuse its discretion when it concluded that Mr. Ayres' estate was entitled to a total of $82,119.90 in back pay. App'x, Vol.XIII, p.2088; Vol.I, pp.137-43.

[8] Mr. Ayres passed away shortly after the hearing.

Weatherford's argument that after-acquired evidence of false statements Mr. Ayres made on his employment application would have resulted in his termination, and thus should reduce his back pay award, lacks merit. *See* Weatherford Br. at 44-46. The ARB correctly concluded that there was no evidence in the record to support this assertion. App'x, Vol.XIII, p.2088 n.41; Vol.I, pp.135-36. As the ALJ noted, Weatherford did not present evidence that it had reviewed Mr. Ayres' employment application forms and determined that he "in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge." App'x, Vol.I, p.135. A Weatherford HR personnel member attested that no one at Weatherford had considered the issue of whether such a statement would cause Weatherford to terminate an employee. App'x, Vol.IV, p.870. Thus, the ARB did not abuse its discretion when it concluded that Mr. Ayres' back pay award should not be mitigated based on after-acquired evidence.

Likewise, Weatherford's argument that Mr. Ayres' back pay should be cut off as of September 2013, when Mr. Ayres was discharged from his employment with J.P. Jenks for allegedly failing to wear protective equipment resulting in a failure to mitigate his damages, is baseless. Weatherford Br. at 46-47. The ARB properly upheld the ALJ's crediting of Mr. Ayres' testimony disputing the grounds for his termination and whether he engaged in misconduct. App'x, Vol.XIII, p.2088 n.41; Vol.I, pp.135-36, 138-39. Weatherford did not present any evidence

to support its contention that Mr. Ayres' engaged in misconduct. Because the employer bears the burden of proving that the employee failed to mitigate his damages (*Starceski v. Westinghouse Elec. Corp.*, 54 F. 3d 1089, 1101 (3rd Cir. 1995)), the ARB properly determined that Weatherford did not meet its burden of proof on this issue.

Weatherford also erroneously alleges that the ALJ failed to take into account the time during which Mr. Ayres received social security disability insurance (SSDI) payments and was not seeking employment. As Mr. Ayres' estate points out, the ALJ specifically factored this into his calculation for back pay and reduced the back pay accordingly. App'x, Vol.I, pp.139-43. The ALJ correctly concluded that "the only period in which [Mr. Ayers] was not entitled to damages was the six-month period in 2014" during which Mr. Ayers "did not seek 'any' employment," and then specifically excluded those weeks from his calculations for the year of 2014. *Id.* at p.142. Moreover, Mr. Ayres testified that he went back to work in the latter part of 2014 and continued to work through the date of the hearing when work was available. App'x, Vol.IV, p.750.

With regard to damages for mental distress, the ARB properly affirmed the ALJ's award of $10,000 for nominal damages based on the limited evidence of Mr. Ayres' emotional harm or mental anguish due to his termination. App'x, Vol.XIII, p.2088. Substantial evidence supports the ARB's finding that Mr. Ayres'

termination caused him mental distress, including depression, sleeplessness, and marital strain. *Id.*; App'x, Vol.I, pp.144-45. Weatherford does not dispute this.

Accordingly, the ARB did not abuse its discretion by affirming the ALJ's award of compensatory damages.

B. The ARB Did Not Abuse Its Discretion When Affirming the ALJ's Calculation and Award of Attorney's Fees and Costs.

The ARB's award of attorney's fees and costs for the proceedings before both the ALJ and ARB was well within its discretion. A prevailing STAA complainant is entitled to be reimbursed for litigation costs, including attorney's fees. 49 U.S.C. § 31105(b)(3)(B). In accordance with Supreme Court precedent, the starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate. *Jackson v. Butler & Co.*, 2004 WL 1955436, at *8 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). The party seeking a fee award must submit "'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 99-116, 2002 WL 31662915, at *10 (ARB Nov. 13, 2002) (citations omitted).

Upon prevailing below, Mr. Ayres' estate's counsel submitted motions before the ALJ and ARB detailing his fees and costs associated with the litigation

of this case. App’x, Vol.I, p.150-87; Vol.XIII, p.2053-78. The ARB’s award of $36,219.01 for litigation before the ALJ, and another $12,670.00 in fees and costs for litigating the appeal before the ARB, was within its discretion because it applied the lodestar method using a reasonable fee for the relevant geographic region. App’x, Vol.XIII, pp.1989-91.

Although Weatherford argues that Mr. Ayres’ estate is not entitled to an award of attorney’s fees and costs for any work outside DOL, the ALJ explicitly considered and factored this into his calculation and the award of attorney’s fees accordingly. App’x, Vol.XII, p.2090; Vol.I, p.2021. Weatherford’s argument that the ARB applied an unreasonable hourly rate is also meritless because the $350.00 per hour rate was reasonable based on the average billing rate for attorneys in Ohio at counsel’s level of experience ($422.00). App’x, Vol.I, p.17. Weatherford’s claim that opposing counsel failed to sufficiently detail his work is also baseless. Both the ALJ and ARB properly found that Mr. Ayres’ estate’s counsel provided sufficient detail for them to ascertain the reasonableness and appropriateness of the fees itemized. *Id.* at p.20; Vol.I, pp.150-87; Vol.XIII, p.1991; Vol.XII, pp.1993-98, 2053-78. “The key requirement for an award of attorney fees is that the documentation offered in support of the hours charged must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended in the prosecution of the

litigation." *Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531 (6th Cir. 2008) (internal quotations and citations omitted). Weatherford has not shown that the ARB has abused its discretion in upholding the attorney's fees awarded here.

Likewise, the Court should reject Weatherford's argument that the award of fees and costs was unreasonable and should be reduced based on the alleged closeness of the case and its good faith. Weatherford relies on the district court's dismissal of Mr. Ayres' tangential OWPA and FLSA claims and presumes that Mr. Ayres' STAA claim is barred by collateral estoppel or res judicata. However, because neither of those principles applies and the district court's dismissal has no bearing on Mr. Ayres' STAA claim, Weatherford's argument is meritless.

Accordingly, the ARB did not abuse its discretion in awarding attorney's fees and costs to Mr. Ayers' estate.

C. The ARB Correctly Reversed the ALJ's Award of Punitive Damages to Mr. Ayres' Estate Because a Penal Claim Does Not Survive the Death of the Claimant.

The ARB's reversal of the ALJ's award of punitive damages to Mr. Ayres' estate is consistent with federal common law which provides that punitive damages are penal in nature and thus abate upon death. *See Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1056–57 (9th Cir. 2018) (concluding that the ADA and Rehabilitation Act compensatory claims do not abate due to claimant's death, but punitive claims do) (citations omitted).

Although the Sixth Circuit has not decided whether punitive damages under the STAA may survive the death of the complainant, under analogous law, this Court has found that similar penal awards abate upon the death of a claimant. *See Cook v. Hairston*, 948 F.2d 1288, 1991 WL 253302, at *6 (6th Cir. 1991) (unpublished table decision) ("The typical rule under the federal common law is that an action for a penalty does not survive the death of the plaintiff.") (citation omitted); *Medrano v. MCDR, Inc.*, 366 F. Supp. 2d 625, 635 (W.D. Tenn. 2005) (holding that "although plaintiff's claim for punitive damages under § 1981 would survive under Tennessee law, the claim abates because a contrary result under state law would be inconsistent with federal common law").

Because the punitive damages permitted under the STAA serve the purpose of punishing the employer for willful or egregious conduct, the ARB was correct in concluding that these payments are not in fact remedial, but rather penal, and thus, under federal common law, abate upon death. *Wheeler*, 894 F.3d at 1056–57. Accordingly, the ARB did not abuse its discretion in reversing the ALJ's punitive damages award.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the ARB.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of August, 2022, a copy of the foregoing brief was filed electronically via the Court's CM/ECF Electronic Filing System. I also served a copy of the brief on Petitioners via email at the addresses below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's brief contains 12,807 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The font used was Times New Roman 14-point proportional spaced type. The brief was prepared using Microsoft Word 365.

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