



Issue Date: 09 April 2015

In the Matter of:

KEMBERLY STOKES,
Complainant,

Case No.: 2014- FRS-00051

v.

CSX TRANSPORTATION, INC.,
Respondent.

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This matter arises under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended by the 9/11 Commission Act of 2007. Section 20109 protects employees of railroad carriers from discrimination based on their prior protected activity pertaining to railroad safety or security. Respondent’s *Motion for Summary Decision* is now before me, and for the reasons stated below, this motion is granted.

Background

Ms. Kemberly Stokes (“Complainant”) was an employee of CSX Transportation, Inc. (“Respondent” or “CSX”) until April 5, 2013, when she was terminated from her position for violating Respondent’s absenteeism policy following a prolonged leave of absence for a non-work related injury. RP Motion, 9.

Complainant was hired as a clerk in CSX’s payroll department in November 2000. *Id.* at 4. In this position, she was represented by the Transportation Communications Union and subject to a collective bargaining agreement. *Id.* at 4-5. Complainant was also subject to CSX’s absenteeism policy, which states that an employee who is absent from work for two or more days in a two-week period is subject to review and possible discipline, including receipt of a coaching letter and an investigation hearing. *Id.* at 5. Beginning in 2009, Complainant experienced a number of health issues that caused her to be absent from work for prolonged periods of time. *Id.* at 6. As a result, she was issued several coaching letters. *Id.* at 6. She also elected to sign a waiver acknowledging that she had violated the absenteeism policy and agreeing to a one-day suspension rather than proceeding to an investigation hearing. *Id.* at 6.

In January 2012, Complainant was involved in a car accident. *Id.* at 7. She was off work for eight months as a result of injuries she sustained in the accident as well as complications

relating to non-work related illnesses. *Id.* at 7. During this time, she exhausted all her paid leave time as well as all her leave time under the Family Medical Leave Act. *Id.* at 7. Complainant was released to return to work in August 2012 and returned to work in CSX's accounts receivable department under a new supervisor. *Id.* at 7. The following month, Complainant was absent from work for approximately another 10 days. *Id.* at 7. In accordance with CSX's absenteeism policy, an investigation hearing was held on October 4, 2012, and Complainant was found to be in violation of the policy and was suspended from work for 5 days. *Id.* at 7.

In December 2012, Complainant missed four days of work due to another non-work related illness. *Id.* at 8. Another investigation hearing was held, and Complainant was found to have violated the absenteeism policy and was suspended from work for thirty days. *Id.* at 8. Complainant was again absent from work in January and February 2013 for non-work related injuries, which included surgery to repair a hole in her stomach. *Id.* at 8-9. After an investigation hearing on March 21, 2013, Complainant was again found to have violated the absenteeism policy. *Id.* at 9. As a result, her employment was terminated on April 5, 2013. *Id.* at 9. Complainant filed a charge with the Equal Employment Opportunity Commission ("EEOC") on April 29, 2013, alleging discrimination on the basis of disability. *Id.* at 9. Complainant also filed a complaint with the Florida Commission on Human Relations ("FCHR").

Procedural History

On September 12, 2013, Ms. Stokes filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that CSX terminated her employment in violation of the anti-retaliation provision of the FRSA. On January 27, 2014, OSHA issued a decision dismissing the complaint on the grounds that Complainant failed to show that Respondent retaliated against her for reporting health issues because she was in violation of its absenteeism policy when she was terminated.

On February 12, 2014, Complainant requested a hearing before an Administrative Law Judge ("ALJ"). The case was assigned to Judge Richard T. Stansell-Gamm and set for hearing on November 13, 2014, in Jacksonville, FL, as indicated in Judge Stansell-Gamm's *Notice of Hearing and Prehearing Order*, dated July 21, 2014. On September 23, 2014, this office received *Motion of Respondent CSX Transportation, Inc., Seeking an Order to Show Cause Why this Appeal Should Not be Dismissed for Failure to Prosecute, or, in the Alternative, for an Amended Case Schedule*. Respondent asserted that Complainant had repeatedly failed to attend scheduled conference calls or respond to Respondent's discovery requests.

On October 14, 2014, this office received Respondent's renewed motion to show cause, in which it alleged that Complainant had yet to provide any requested documents or responses to interrogatories despite being ordered to do so during a September 29, 2014, conference call with Judge Stansell-Gamm. This office received *Motion of Respondent CSX Transportation, Inc. to Modify the Case Schedule and for Sanctions* on October 24, 2014. Respondent asserted that although Complainant had responded to its discovery requests and had agreed to be deposed, she had failed to provide certain documents requested of her. As a result, CSX would need to depose Complainant a second time in order to gather information necessary to its case. As such,

Respondent argued, Complainant should be subject to sanctions and required to pay any expenses associated with the taking of this additional deposition.

On October 29, 2014, Judge Stansell-Gamm issued a *Hearing Cancellation and Continuance Order* continuing the proceedings. In light of the parties' availability conflicts with Judge Stansell-Gamm, this matter was transferred to my docket on November 4, 2014. On November 12, 2014, I issued a *Preliminary Order* directing the parties to provide mutually agreeable hearing dates within thirty days of the date of the notice. On December 12, 2014, I received *Status Report and Renewed Motion of Respondent CSX Transportation, Inc. for Sanctions*, which asserted that the parties were unable to provide a mutually agreeable hearing date because Complainant had yet to produce information requested in discovery and ordered by this tribunal. On January 21, 2015, pursuant to a conference call with both parties, I issued a *Scheduling Order* directing Complainant to submit discovery responses no later than February 6, 2015, and setting the hearing for August 18-20, 2015, in Jacksonville, FL.

Respondent's Motion for Summary Decision

Respondent argues in its *Motion of Respondent CSX Transportation, Inc. for Summary Decision* that, regardless of the merits of Complainant's FRSA claim, this claim should be dismissed because it was not timely filed. Respondent further argues that Complainant fails to state a claim for relief because she does not allege that she was retaliated against for a work-related injury as is required by the Act. Finally, Respondent asserts that Complainant has already elected her remedy for her termination by filing a claim with the EEOC and is therefore ineligible to bring a claim under the FRSA.

Complainant did not file a response in opposition to Respondent's motion for summary decision.

Timeliness of Claim

Respondent first asserts that Complainant is barred from bringing her claim because it was not filed within the 180-day timeframe for filing an action under the FRSA. RP Motion at 14. Respondent asserts that the claim was filed on October 23, 2013. *Id.* Respondent argues that because Complainant claims to have been retaliated against as the result of a "personal vendetta" by her former supervisor, the statute of limitations began to run in January 2012, when Complainant left work following her car accident. *Id.* Complainant returned to work in August 2012 in a different department and under a different supervisor, and Complainant does not allege that her new supervisor waged a similar campaign against her. *Id.* at 14-15. Thus, all of the instances evidencing the aforementioned personal vendetta occurred prior to January 2012, and any allegations relating to this dispute are time-barred. *Id.* at 14. Accordingly, the limitations period ended on July 31, 2013. *Id.* at 15. Moreover, as Respondent alleges that Complainant's claim was filed with OSHA on October 23, 2014, it was filed outside the prescribed 180-day timeframe for filing regardless of whether the adverse action took place in January or April 2012. *Id.* at 15. Thus, Complainant is barred from bringing her claim under the Act.

Election of Remedies

Respondent asserts that Complainant's FRSA claim is barred by the Act's election of remedies provision. RP Motion at 18-19. Respondent avers that, under 49 U.S.C. 20109(f), an employee may not seek protection under the FRSA and another provision of law for the same illegal action of an employer. *Id.* According to Respondent, Congress intended for this preclusive effect to extend to all laws under which an employee may challenge the adverse action, and courts are required to enforce the "plain and unambiguous" language of the statute by applying it broadly. *Id.* at 19. Thus, Complainant may not bring a claim under the FRSA for the same adverse action for which she seeks relief under state and federal laws. *Id.* at 19. Because Complainant has already filed a claim with the EEOC and the FCHR seeking relief for her alleged unlawful termination, she is precluded from filing her claim under the FRSA. *Id.* at 19.

Protected Activity

Respondent argues that Complainant's activity was not protected under the FRSA because she did not hold a safety-sensitive position at CSX and because her injuries did not occur while she was on duty. RP Motion at 15. Respondent states that, in order for an employee in a "safety-sensitive" position to engage in protected activity under the Act, he must sustain an on-duty injury and be following the treatment plan of a physician. *Id.* To illustrate its argument, Respondent cites recent decisions from OSHA and the Third Circuit Court of Appeals holding that an employee in a safety-sensitive position is barred from bringing his FRSA claim where he alleges that he was retaliated against for following a treatment plan pertaining to a non-work-related injury. *Id.* at 15-17. Respondent argues that, moreover, Complainant's position as a clerk in the payroll and accounts receivable departments does not qualify as a safety-sensitive position under the Act. *Id.* at 18. Respondent avers that, as an office employee, Complainant was not engaged in workplace activity that might endanger others if she was experiencing some impairment. *Id.* Respondent notes that holding otherwise would effectively entitle all railroad employees to unlimited sick leave. *Id.*

Legal Standards

Summary Decision Standard

In cases before this tribunal, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law. 29 C.F.R. § 18.40(d); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth "specific facts" showing that there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23. In assessing a motion for summary decision, the administrative law judge must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6.

Standards Applicable to FRSA Claims

The FRSA protects employees of railroad carriers engaged in interstate or foreign commerce by prohibiting their employers from retaliating against them for "the employee's lawful, good faith act done ... to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security . . ." 49 U.S.C. § 20109(a). A railroad carrier may not discipline or threaten discipline to an employee for requesting medical treatment or for following the treatment plan of a treating physician, except if the carrier's refusal to allow the employee to return to work relates to that employee's fitness for duty pursuant to Federal Railroad Administration medical standards. 49 U.S.C. § 20109(c)(2).

To prevail in an FRSA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) he suffered an adverse personnel action of discharge, demotion, suspension, reprimand, or any other discriminatory action, and (3) the protected activity was a contributing factor in the decision to take the adverse action against Complainant. *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (Nov. 30 2006); *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-002 (Sec'y Feb. 1, 1995), slip op. at 8-9; *Dodd v. Polysar Latex*, 1988-SWD-4 (Sec'y Sept. 22, 1994). However, even if the complainant establishes that an activity protected under the Act was a contributing factor in an adverse personnel action, "the employer may avoid liability if it can prove 'by clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of that [protected] behavior.'" *Harp v. Charter Comm.*, 558 F.3d 722, 723 (7th Cir. 2009) (quoting *Allen v. Administrative Review Board*, 514 F.3d 468, 475-76 (5th Cir.2008)).

Discussion

Timeliness of Claim

A Complainant bringing a claim under the FRSA must file his initial complaint “not later than 180 days after the date on which the alleged violation...occurs.” 49 U.S.C. §20109(d)(2)(A)(ii). The statute of limitations in a whistleblower case begins to run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision such as a termination. *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). “Final” and “definitive” notice has been interpreted to mean communication that leaves no further chance for action, discussion, or change. *Id.* “Unequivocal” notice refers to communication that is not ambiguous or misleading. *Larry v. The Detroit Edison Co.*, No. 86-ERA-32, slip op. at 14 (Sec’y June 28, 1991). The time for filing a complaint begins when the employee knew or should have known of the adverse action. *Riden v. Tennessee Valley Auth.*, No. 89-ERA-49, slip op. at 2 (Sec’y July 18, 1990). In determining when the statute of limitations begins to run, an employee is assumed to have a “reasonably prudent regard for his rights.” *Id.*

In the case at hand, Respondent appears to argue that Complainant received notice of the adverse action prior to January 2012 given that all of the occurrences evidencing Catherine Magennis’s personal vendetta against her occurred while Ms. Magennis was still Complainant’s supervisor. However, the adverse action for which Complainant is seeking relief is the termination of her employment on April 5, 2013. Whether the termination was the result of a personal vendetta or a response to Complainant’s violation of CSX’s absentee policy is a question of fact not appropriate for summary judgment. Further, it is plausible that Complainant was terminated in violation of the FRSA by her new supervisor, and the termination need not be the result of personal issues in order to violate the Act. Respondent has presented no reason why Complainant, prior to her termination, should have been on notice that any adverse action would occur. Therefore, I find that Complainant received final, unequivocal notice of the adverse action on the date of her termination. Moreover, although Respondent asserts that Complainant filed her complaint with OSHA on October 23, 2013, records submitted by Respondent show that she actually filed her complaint on September 12, 2013. Therefore, the complaint was filed less than 180 from the date of the adverse action, and I find that Complainant’s FRSA claim was timely filed under the Act.

Election of Remedies

In regards to election of remedies for unlawful action by an employer, the FRSA states that “[a]n employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.” 49 U.S.C. § 20109(f). Courts have found that the election of remedies provision of the Act bars state common law claims for the same adverse action but allows an aggrieved employee to pursue a claim alleging wrongful discharge for some reason unrelated to his whistleblowing. *Abbott v. BNSF Ry. Co.*, No. CIV.A. 07-2441-KHV, 2008 WL 4330018, at 6 (D. Kan. Sept. 16, 2008) *aff’d*, 383 F. App’x 703 (10th Cir. 2010); *see Shipkevich v. Staten Island Univ. Hosp.*, No. 08-CV-1008 FB JMA, 2009 WL

1706590, at 4 (E.D.N.Y. June 16, 2009) (holding that a Complainant could bring a claim for the same adverse action under both Title VII and New York's whistleblower law, and reasoning that because whistleblower laws provide protection from retaliation only to those employees who complain of violations that create a danger to public safety, it would be inconsistent to waive claims unrelated to public safety that arise from the same unlawful conduct).

Here, Complainant filed a claim with the EEOC seeking relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, based on her allegation that Respondent discriminated against her because of her disability or disabilities that caused her to be absent from work. In contrast, Complainant's FRSA claim is premised on the allegation that CSX terminated her employment in response to her protected activity under the Act. The purpose of the ADA is to protect against discriminatory employment actions based on disability, while the purpose of the FRSA is to promote safety in railroad operations by protecting the rights of employees who report violations of law that present a danger to public safety. Because the two causes of action seek to remedy separate wrongs, Complainant has not, as Respondent alleges, elected to pursue two separate remedies for the same allegedly unlawful act of the railroad. I therefore find that Complainant may bring her claims under the FRSA and the ADA without violating the FRSA's election of remedies provision.

Protected Activity

As discussed above, a complainant must prove by a preponderance of the evidence that he engaged in protected activity under the FRSA in order to prevail in a retaliation claim. A railroad carrier may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician. 49 U.S.C. § 20109(c)(2). In keeping with the FRSA's purpose of promoting safety in railroad operations and reducing railroad accidents, subsection (c)(2) of the FRSA is limited to treatment for injuries and illnesses occurring while an employee is on duty. *Stanley v. CSXT*, OSHA Case No. 4-2100-15-018 (February 19, 2015); *Perkins v. CSXT*, OSHA Case No. 3-6600-14-073 (Jan. 29, 2015); *see also Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 160 (3d Cir. 2015) (finding that an employee who was absent from work because of back pain related to an off-duty injury did not engage in protected activity under the FRSA). Section 20102 indicates that the protections of the FRSA extend to all employees who directly affect railroad safety. 49 U.S.C.A. § 20102(4).

Complainant alleges that she was following the orders of her treating physician when she was absent from work for several extended periods of time, including those days in January and February 2013 that ultimately led to the termination of her employment. However, Complainant does not dispute that the injuries for which she sought treatment were unrelated to her work at CSX. Compl. Dep. at 11:14-17. In her deposition, when asked whether her health issues bore any relation to her employment, Complainant stated that "it wasn't connected to my job." *Id.* Thus, Complainant does not allege that any adverse action was taken for an absence resulting from following a physician's treatment plan for any injury or illness within the meaning of § 20109(c)(2). Because Complainant sought treatment exclusively for non-work-related injuries, her actions fall outside the scope of FRSA protection. Further, as an accounting clerk, it is unlikely that Ms. Stokes held the type of safety-sensitive position that might lead to the endangerment of others had she been working while impaired. *See Port Auth. Trans-Hudson*

Corp. at 167 (noting that the FRSA’s safety provisions are limited to those employees whose jobs involve safety, and thus, who “pose unique dangers if they work while impaired”).

For the reasons stated above, I find that no genuine issue of material fact exists regarding whether Complainant’s activity was protected under the FRSA. Accordingly, Respondent is entitled to summary decision as a matter of law, and its *Motion for Summary Decision* is **granted**.

Order

For the reasons stated above, the *Motion of Respondent CSX Transportation, Inc. for Summary Decision* is hereby **GRANTED**, and Complainant’s case is dismissed.

IT IS SO ORDERED.

CHRISTINE L. KIRBY
Administrative Law Judge