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**Issue Date: 15 August 2014**

**CASE NO.: 2014-FRS-82**

**IN THE MATTER OF**

**MARK GRIGSBY**

**Complainant**

**v.**

**THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

**Respondent**

**ORDER GRANTING MOTION FOR SUMMARY DECISION**

This proceeding arises under the employee protective provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20109.

On July 3, 2014, Respondent filed a Motion For Summary Decision seeking dismissal of Complainant's complaint with prejudice. Respondent contends that Complainant's claim is barred by the principles of res judicata and collateral estoppel since his claim is a "repackaged attempt to enforce the terms of the Settlement Agreement into which he and KCSR entered in September 2013." Secondly, even if Complainant's complaint were not procedurally barred, it should be dismissed because it wholly fails to state a claim for relief under Section 20109; that OSHA determined Complainant has not suffered any adverse employment action; and has received all payments due under the Settlement Agreement. Further, Respondent argues Complainant's complaint is devoid of any facts suggesting a causal link between his alleged protected activity and KCSR's actions. Lastly, Respondent argues there is clear and convincing evidence that Complainant would have been paid the same amount under the Settlement Agreement even if he had not engaged in any alleged protected activity.

On July 8, 2014, an Order issued to Complainant to show cause why Respondent's Motion should not be granted.

On July 28, 2014, Complainant filed a Response In Opposition to Respondent's Motion For Summary Decision with supportive exhibits reiterating his complaint allegations contending that Complainant enrolled in KCSR's "Temporary Wage Continuation Program" and was paid TWCP benefits until he decided to see a doctor of his own choosing for his injury; that KCSR then suspended the TWCP benefits; that Complainant applied for Off-Track Vehicle "OTV" benefits which were denied because he was then in litigation with the Occupational Claims department; that Complainant filed a complaint with OSHA on April 18, 2013, which was later amended on May 8, 2013, alleging the suspension/termination of TWCP benefits and denial of OTV benefits; and that thereafter KCSR began paying OTV benefits on May 30, 2013.

Complainant asserts that in September 2013, OSHA began mediation efforts for a settlement agreement between the parties. It is alleged that on September 16, 2013, KCSR's Associate General Counsel Kayden Howard advised OSHA that KCSR's calculations yielded \$28,077.92 to Complainant "less a RRB lien of \$4,054.64." On September 18, 2013, KCSR's payroll supervisor Dawn Slater double-checked the calculations and determined the figures were correct. Complainant accepted the proposed settlement offer and OSHA prepared a written settlement agreement for execution by the parties.

The Settlement Agreement includes a paragraph entitled "Monies" in which Respondent agrees to payment of \$28,077.92 (less applicable taxes and withholdings **including but not limited to** any Railroad Retirement Board lien). The Settlement also includes a paragraph entitled "Enforcement of Settlement" which indicates the settlement constitutes the Secretary's findings and preliminary order under the Federal Railroad Safety Act and is a "final order under the statute and is enforceable in an appropriate United States District Court." (Complainant's Response, Exh. 6).

Complainant alleges that rather than paying the agreed-upon settlement funds, KCSR tendered a letter to Counsel for Complainant stating that "the amount of the settlement after withholdings for 401K contributions, federal and state taxes, and the statutory lien of the Railroad Retirement Board was \$11,291.05." However, KCSR then "unilaterally" decided to give itself a settlement credit of \$12,332.99 for payments it made

several months before the settlement agreement for OTV benefits paid to Complainant, leaving Complainant with a net amount of negative \$1,041.94.

Complainant filed an enforcement action in the United States District Court which found that only the Secretary of Labor may enforce a final order in District Court.

Thereafter, on March 11, 2014, Complainant filed the instant complaint alleging that he was subjected to an adverse action by KCSR's improperly withholding the settlement funds due under the terms of the settlement agreement of his initial complaint, which action was subsequent to the execution of the settlement agreement and constituted a "new actionable wrong."

On August 4, 2014, Respondent filed a Motion For Leave To File Reply to Complainant's Response in Opposition along with its Brief in Reply. Respondent's Motion is hereby granted and its Reply will be considered. Respondent contends that the material facts are undisputed:

In April 2013, Complainant filed an FRSA complaint with OSHA against KCSR related to an injury he incurred in December 2012;

In May 2013, Complainant received \$12,332.99 in OTV benefits which compensated him for the period of time during which he was unable to work following his injury. Under Article V of the Collective Bargaining Agreement (CBA), KCSR is entitled to "offset" the OTV benefits that Complainant received from any recovery he later obtained relating to the same injury. Complainant so acknowledged the offset when he signed the Off Track Vehicle Benefit Payment Receipt on June 6, 2013. (Respondent's Answer, Exh. 5, p. 9).

In September 2013, the parties entered into a Settlement Agreement in which KCSR agreed to pay Complainant \$28,077.92 "less applicable taxes and withholdings." Under the CBA, KCSR withheld from the total settlement amount the \$12,332.99 in OTV benefits Complainant had already received in May 2013.

Complainant complained to OSHA that KCSR breached the terms of the Settlement Agreement by withholding the OTV benefits, but in its March 19, 2014 determination, OSHA dismissed Complainant's complaint explaining that Complainant had "received payment in full for the benefits entitled under the Settlement Agreement."

Respondent contends that Complainant concedes in his Response that he seeks relief for KCSR's failure to comply with the terms of the Settlement Agreement. Respondent reiterates that the United States District Court for the Southern District of Texas analyzed and determined that only the Secretary of Labor has standing to obtain the relief that Complainant now seeks, i.e., the enforcement of **his** interpretation of the Settlement Agreement.

#### DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. § 18.40(d) (2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 1999-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. Part 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Rollins v. American Airlines, Inc., ARB Case No. 04-140, Case No. 2004-AIR-9 (ARB April 3, 2007); Webb v. Carolina Power & Light Co., Case No. 1993-ERA-42 @ 4-6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d).

Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 1991-ERA-31 and 1991-ERA-34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present **affirmative evidence** in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. Affidavits must be made on personal knowledge, set forth such facts as would be **admissible** in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. F.R.C.P. 56 (e).

A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit . . . cannot thereby create an issue of material fact. See Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993); Rockefeller v. U.S. Department of Energy, Case No. 1998-CAA-10 (Sept. 28, 1998); Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 1995-WPC-6 (Dec. 13, 1995). Consequently, Complainant may not oppose Respondent's Motion for Summary Decision on mere allegations. Such responses must set forth specific facts showing that there is a genuine issue of fact for a hearing. 29 C.F.R. 18.40(c).

The determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 1987-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. at 587.

Respondent initially argues that the undersigned does not have jurisdiction to consider Complainant's complaint because the alleged violation stems from a previous Settlement Agreement approved by OSHA and constitutes a final order of the Secretary of Labor.

Complainant clearly alleges in his complaint filed with the undersigned on May 21, 2014, that KCSR violated the FRSA and subjected him to an adverse action by **improperly withholding the settlement funds due under the terms of the settlement agreement of his prior complaint.** Thus, a withholding of settlement funds constitutes an alleged breach of the terms of the settlement.

The implementing regulations for the FRSA provides "whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, **including one approving a settlement agreement,** issued under FRSA, [as here], **the Secretary may file a civil action seeking enforcement** of the order in the United States district court for the district in which the violation was found to have occurred. See 29 C.F.R. § 1982.113 (emphasis added). Here, the Secretary of Labor did not pursue enforcement of the Settlement Agreement or its alleged breach.

Respondent is correct that the undersigned does not have jurisdiction to determine whether Respondent has breached the Settlement Agreement in this matter. Therefore, the federal district courts, not an administrative law judge of the Office of Administrative Law Judges, have jurisdiction to consider actions based on alleged settlement breaches. White v. J.B. Hunt Transport, Inc., ARB Case No. 06-063 @ 4, ALJ Case No. 2005-STA-065 (ARB May 30, 2008).

The remaining concern is whether Respondent's withholding of settlement funds constitutes an adverse action against Complainant in retaliation for his alleged protected activity. Respondent claimed as an offset, pursuant to the CBA, payments made to Complainant in the form of OTV benefits. (See Complainant's Complaint, Exh. 3, p. 4).

To prove retaliation under the FRSA, Complainant must demonstrate by a preponderance of the evidence that (1) he engaged in protected activity, as statutorily defined; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. See 49 U.S.C. § 42121(b)(2)(B)(iii); Rudolph v. National Railroad Passenger Corporation (AMTRAK), ARB No. 11-037, ALJ Case No. 2009-FRS-015, slip opinion @ 11 (ARB March 29, 2013). Because FRSA-protected activity must be a reason for the adverse action, intentional retaliation is an essential element in Complainant's case.

If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. But to prevail on summary decision, Respondent need only demonstrate a complete failure of proof concerning an essential element of Complainant's case. In moving for summary decision, Respondent produced evidence that it did not intentionally retaliate against Complainant and withheld an offset of OTV benefits for a legitimate and non-retaliatory reason. See 49 U.S.C. §§ 20109(d)(2)(A)(i) and 42121(b)(2)(B)(iii)(iv); Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ Case No. 2002-AIR-008, slip op. @ 13 (ARB Jan. 31, 2006).

Here, Complainant alleges he suffered an adverse action when Respondent withheld as an offset from the Settlement Agreement the amount of OTV benefits he previously received as reflected in the receipt he signed on June 6, 2013. Complainant does not dispute his receipt of OTV benefits, nor arguably Respondent's right to claim an offset under the CBA for the amount of OTV benefits paid to Complainant. To claim otherwise would be to seek double recovery for monies paid to him while he was unable to work, which would constitute a windfall. Yet, he claims Respondent withheld the monies as an adverse action in retaliation for his protected activity because OTV benefits were not raised by him, his counsel or Respondent during the mediation discussion with OSHA. The filings before me patently show that the OTV payments made to Complainant were subject to offset by Respondent. Complainant has not demonstrated any disputed material facts at issue which establish an adverse action suffered by Complainant by Respondent's actions.

As part of his case, Complainant must establish that adverse action was taken because of his alleged protected activity. The evidence does not support a finding that Complainant's protected activity contributed to Respondent's actions in rightfully claiming an offset for OTV benefits previously paid to Complainant. Even if it did, Respondent could demonstrate by clear and convincing evidence that it would have taken the same action (offset for OTV benefits paid) in the absence of Complainant's alleged protected activity.

Thus, viewing the events Complainant describes in his complaint in the light most favorable to his position, I conclude that he has not "set forth specific facts showing that there (are) . . . genuine issue(s) of material fact regarding an essential element of his claim warranting a trial." Treiber v. Tennessee Valley Authority, @ 5.

In view of the foregoing, I find that Complainant has not presented sufficient evidence to create a genuine issue of fact that Respondent intentionally retaliated against him because of his engaging in FRSA-protected activity which requires resolution through a full evidentiary hearing. Therefore, Respondent is entitled to summary decision.

Accordingly,

**IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision be, and it is, **GRANTED**. Accordingly, Complainant's Complaint is **DISMISSED** with prejudice.

**IT IS FURTHER ORDERED** that the formal hearing presently scheduled to commence on September 24, 2014, be, and it hereby is, **CANCELLED**.

**ORDERED** this 15<sup>th</sup> day of August, 2014, at Covington, Louisiana.

LEE J. ROMERO, JR.  
Administrative Law Judge