



Issue Date: 28 December 2015

Case No.: **2014-FRS-00058**

In the Matter of:

KEVIN KROK,
Complainant,

v.

GRAND TRUNK WESTERN RAILROAD CO.,
Employer/Respondent.

Before: Pamela J. Lakes
Administrative Law Judge

**DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY DECISION
AND DISMISSING COMPLAINT**

This case involves a claim under the employee protection provisions of the Federal Rail Safety Act, as amended, 49 U.S.C. § 20109 ("FRSA" or "Act"), with implementing regulations at 29 C.F.R. Part 1982. The FRSA prohibits an employer from discriminating against, or taking unfavorable personnel action against, an employee because the employee reported a work-related injury or engaged in other protected whistleblowing activity. Complainant Kevin Krok ("Complainant") alleges that Grand Trunk Railroad Company ("Employer," "Respondent" or "Grand Trunk") issued a forty-five day suspension in retaliation for his absences due to a non-work-related injury.

The matters before me are Respondent's Motion for Summary Decision filed on November 17, 2014, along with exhibits marked A through I (hereafter "RX A" through "RX I") attached to the Affidavit of Holly M. Robbins; Complainant's Response to Respondent's Motion for Summary Decision filed on November 25, 2014, along with exhibits 1 through 3 (hereafter "CX 1" through "CX 3"); Respondent's Supplemental Memorandum In Support of Its Motion for Summary Decision filed on August 18, 2015, along with Exhibits 1 and 2 (hereafter "RX 1" and "RX 2") attached to the Affidavit of Anthony de Sam Lazaro; and Complainant's Response to Respondent's Supplemental Memorandum In Support of Its Motion for Summary Decision filed on September 17, 2015. As set forth below, I find that this case must be dismissed due to Complainant's failure to assert activity that is protected under the FRSA.

PROCEDURAL HISTORY

On February 21, 2013, Complainant filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") in Chicago, Illinois. Complainant alleged that Respondent retaliated against him by levying a 45-day suspension without pay, relating to his absences from work while under the treatment plan of his physician. OSHA investigated the complaint, and on February 18, 2014, concluded that there was reasonable cause to believe that Respondent violated 49 U.S.C. § 20109. Specifically, the Regional Administrator found that Complainant engaged in protected activity under subsection (c)(2) by following his physician's treatment plan during his illness and that Respondent failed to establish by clear and convincing evidence that it would have taken the same action in the absence of Complainant's protected activity. In reaching its determination, OSHA relied upon the decision of the Administrative Review Board in *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013) ("*Bala*"), which held that the protections of section 20109(c)(2) extend to physicians' orders relating to off-duty injuries or illnesses.

On March 5, 2014, Respondent filed a timely objection and request for a hearing. On August 5, 2014, Respondent filed a Motion to Compel, which was denied without prejudice on September 5, 2014. A hearing was tentatively scheduled for January 13 to 14, 2015; however, the hearing was cancelled upon the filing of a summary disposition motion by the Respondent on November 17, 2014. Complainant responded on November 25, 2014.

On January 23, 2015, counsel for Respondent filed a Motion for Further Briefing in light of the Third Circuit's January 15, 2015 Decision in *Port Authority Trans-Hudson Corp. v. Secretary, U.S Dept. of Labor*, 776 F.3d 157 (3d Cir. 2015) ("*Port Authority*"), which reversed the ARB's decision in *Bala, supra*. In pertinent part, Respondent stated:

Complainant's claim is premised upon the Administrative Review Board's holding in *Bala v. Port Auth. Trans-Hudson Corp.*, ARB Case No. 12-048 (Sept. 27, 2013), in which the ARB held that the prohibition against disciplining an employee for "following the orders or treatment plan of a treating physician" contained in Section 20109(c)(2) applies to non-work related injuries or illnesses.

....On January 15, 2015, the United States Court of Appeals for the Third Circuit issued its opinion in *Port Auth. Trans-Hudson Corp. v. Dep't of Labor*, Case No. 13-4547 (January 15, 2015), in which the Third Circuit unanimously rejected the ARB's position in *Bala*, and expressly held that Section 20109(c)(2) is limited exclusively to on-duty injuries or illnesses....The Third Circuit's decision should result in the dismissal of [Complainant's] case. GTW therefore requests the opportunity to provide further briefing regarding the Third Circuit's decision and how it affects [Complainant's] claims.

(Resp. Motion).

After consideration, in the interest of a full and complete record, on July 20, 2015, I issued an Order Requesting Further Briefing for the limited purpose of addressing the Third Circuit's decision. Respondent's Supplemental Memorandum In Support of Its Motion for Summary Decision was filed on August 18, 2015. Complainant filed a Response to Respondent's Supplemental Memorandum in Support of Its Motion for Summary Decision on September 17, 2015. As briefing is now complete, the summary decision motion is ready for consideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTS

For purposes of Respondent's motion, all facts are construed in Complainant's favor.

Complainant's Employment with Employer

Complainant began to work for Respondent as a railroad conductor in November 2010. (RX E, Krok Dep. at 87).¹ During the time at issue, Complainant worked on the "extra board," meaning that when Complainant was "on," he could be called in to work. (*Id.* at 47).

Complainant's Medical Treatment and Work Absences

Complainant began suffering from uncontrollable vomiting in 2011. (RX E, CX 1, Krok Dep. at 37). At first, Complainant was only ill in the mornings, but his illness got progressively worse and lasted throughout the day. (*Id.* at 39-40). On a few occasions, Complainant became ill while working. (*Id.* at 134-135).

Starting early 2011, Complainant began treating with Dr. Daniel Souphis, a family medicine doctor. (*Id.* at 38-39, 40; RX I, CX 2, Souphis Dep at 18).² Notes from Dr. Souphis' records indicate that Complainant first complained of vomiting and nausea in his visit on April 25, 2012, and that Claimant stated he had been experiencing these problems for the past year. (RX I, Souphis Dep. at 32 and Dep. Ex. 5). During the course of treatment, Complainant explained to Dr. Souphis the nature of his work on the railroad, and as a result, Complainant testified, Dr. Souphis advised him not to work if he was experiencing an episode. (CX 1, Krok Dep. at 40.) Dr. Souphis testified that he would have advised Complainant that he should refrain from work when vomiting uncontrollably: "I would definitely have given that advice and an episode that would put him at harm or others at harm I would tell him not to work, of course." (CX 2, Souphis Dep at 76). Dr. Souphis did not commit these orders to writing at the time. (RX I, Souphis Dep. Ex. 5; CX 1, Krok Dep. at 43-45).³

¹ Excerpts from Complainant's deposition transcript appear at RX E and a complete copy (without exhibits) appears at CX 1. Excerpts from the investigation transcript appear along with the depositions of the various witnesses.

² Excerpts from Dr. Souphis' deposition transcript with exhibits, including treatment records, appear at RX I and a complete copy of the transcript without exhibits is at CX 2.

³ In his deposition, Dr. Souphis testified that his treatment records did not always include everything discussed with his patients during their appointments: "not everything I discuss with the patient I'm going to dictate or remember to dictate on..."CX 2 at 56-57. Dr. later testified... "just because it's not in the notes doesn't mean I didn't say it, I say many things that I don't dictate to a patient that's not dictated in these notes." *Id.* at 76

Due to his medical condition, Complainant was absent from work on June 30th, July 1st, and July 14th of 2012. (*Id.* at 36-37). On these three occasions, Complainant “booked off” sick, and booked back on when he was feeling better. (*Id.* at 46-48). On July 14, 2012 Complainant advised Trainmaster Lance Osmond by telephone that he was off work on the days in question due to his illness and was advised by his physician not to work when sick. (*Id.* at 40-41). Osmond testified in his deposition that he recalled speaking to Complainant in July 2012 regarding his absences, and that Complainant stated that he was sick. (RX G, Osmond Dep. at 15-18.)⁴

Approximately one week later, Osmond initiated the investigation into Complainant’s absences. (CX 1, Krok Dep. at 32-35).

Complainant’s Investigation and Suspension

Complainant received a notice of disciplinary investigation dated July 19, 2012. (CX 1, Krok Dep. at 78).⁵ On August 7, 2012, Respondent held an investigation into Complainant’s excessive absences between June 22, 2012 and July 15, 2012. (*Id.* at 61). Complainant testified that he felt the hearing was not conducted fairly since Osmond was not present at the hearing. (*Id.* at 61-61).

On August 30, 2012, six weeks after Complainant informed his supervisor that he was absent from work due to his illness, Respondent’s Superintendent Phillip Tassin levied a 45-day suspension for excessive absenteeism directly related to the three absences. (*Id.* at 111; RX F, Tassin Dep. at 25-26).⁶

At the time of his July 16, 2014 deposition, Complainant had not yet served his suspension as he had been on medical leave due to unrelated injuries since August 22, 2012. (CX 1, Krok Dep. at 11-12, 24). Complainant testified that the stress from the investigation and increased scrutiny over his job performance affected his sleeping and worsened his illness. (*Id.* at 139-140).

LEGAL BACKGROUND

Summary Decision Standard

A party is entitled to summary decision or judgment if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there are no genuine issues as to any material fact and the party is entitled to judgment as a matter of law. 29 C.F.R. § 18.72(a); Fed. R. Civ. P. Rule 56. The moving party has the initial burden of demonstrating that the non-movant cannot make a showing sufficient to establish an essential element of his case. *Celotex Corp. Catrett*, 477 U.S. 317, 322, 325 (1986). The burden then shifts to the nonmoving party to establish the existence of an issue of fact that could affect the outcome of the litigation.

⁴ Excerpts from Mr. Osmond’s deposition appear at RX G; a complete copy appears at CX 3.

⁵ The investigation was originally scheduled for June 24, 2012, but was postponed to August 7, 2012.

⁶ Excerpts from Mr. Tassin’s deposition appear at RX F.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). At this stage, the non-movant may not rest upon mere allegations, speculations, or denials in his pleadings but must set forth specific facts in each issue upon which he would bear the ultimate burden of proof. *See* 29 C.F.R. 18.72(c). If the non-movant fails to sufficiently show an essential element of his case, there can be no genuine issue as to any material fact; a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-23. All evidence and reasonable inference are considered in the light most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

FRSA Standard

The employee protection/whistleblower provisions of the FRSA prohibit covered employers from discharging, suspending, demoting, or otherwise retaliating against an employee because he notified, or attempted to notify, his railroad carrier or the Secretary of Transportation about a work-related personal injury. 49 U.S.C. § 20109(a)(4). Additionally, the FRSA prevents employers from disciplining, or attempting to discipline, an employee “for following orders or a treatment plan of a treating physician” 49 U.S.C. § 20109(c)(2). To prevail, a complainant must demonstrate by a preponderance of the evidence that his protected activity was a contributing factor to the adverse action alleged in his complaint. 29 C.F.R. § 1982.109(a).⁷ However, even if the complainant meets that burden, the complainant cannot prevail if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity. 29 C.F.R. § 1982.109(b).

In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152 (3rd Cir. Feb. 19, 2013), the U.S. Court of Appeals for the Third Circuit noted that, as amended, the FRSA adopted the AIR-21 burden shifting test:

Under AIR–21, an employee must show, by a preponderance of the evidence, that “(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.” *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475–76 (5th Cir. 2008). Once the plaintiff makes a showing that the protected activity was a “contributing factor” to the adverse employment action, the burden shifts to the employer to demonstrate “by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” *Id.* § 42121(b)(2)(B)(ii). The Department of Labor has promulgated regulations that adopt this burden-shifting standard to FRSA complaints filed with the Department of Labor. *See* 29 C.F.R. § 1982.104(e)(3)-(4).

Araujo, supra, slip op. at 12 (footnote omitted). The Third Circuit explained that the term “contributing factor” was a term of art and meant “any factor, which alone or in combination

⁷ To make out a prima facie case at the investigational stage of the proceedings, a complainant must show: 1) he/she engaged in protected activity; 2) the employer knew or suspected that the employee engaged in protected activity; 3) the employee suffered adverse action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action. 29 C.F.R. § 1982.104(e)(2).

with other factors, tends to affect in any way the outcome of the decision.” *Araujo*, slip op. at 14, citing *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 563, 567 (5th Cir. 2011), quoting *Allen, supra*.

ANALYSIS

Protected Activity

As noted above, protected activities under the FRSA include notifying and attempting to notify a railroad carrier of a work-related injury of an employee. See 49 U.S.C. § 20109(a)(4). Additionally, the FRSA prevents employers from disciplining, or attempting to discipline, an employee “for following orders or a treatment plan of a treating physician” 49 U.S.C. § 20109(c)(2). Complainant contends that he was engaged in protected activity by following the medical advice of Dr. Souphis, regarding his illness. Respondent argues that the protections of Section 20109(c)(2) are limited exclusively to on-duty injuries and illnesses, and following any treatment plan relating to Complainant’s illness is not protected activity because the illness was not work-related. Both parties agree that Complainant’s injury did not take place at work. However, the parties dispute whether the nature of Complainant’s injury or illness entitles Complainant to coverage under the Act. There is also an issue as to whether Complainant was under a doctor’s orders or treatment plan when he took three days off in June and July 2012.

My July 15, 2015 Order required the parties to address the impact of the Third Circuit’s recent decision in *Port Authority Trans-Hudson Corp. v. Secretary, U.S Dept. of Labor*, 776 F.3d 157 (3d Cir. 2015) (“*Port Authority*” or “*Bala II*”), which reversed the ARB decision in *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013) (“*Bala*”), and found, instead, that only on-duty injuries or illnesses were covered under the pertinent section. Respondent filed a Supplemental Memorandum in Support of its Motion for Summary Decision on August 18, 2015, and Complainant filed a response on September 16, 2015. In its Supplemental Memorandum, Respondent argues that Complainant’s absences are not protected activity because they were not work related and were therefore not actionable based upon the Third Circuit’s interpretation of the FRSA provision. Respondent noted that the Third’s Circuit’s decision was premised upon its concern that the Department of Labor’s interpretation would effectively provide railroad workers with a right to unlimited sick leave that was unprecedented in any other industry, as well as the Third Circuit’s conclusion that the legislative history supported a work-related limitation.⁸ (Resp. Supp. Mem. at 1 to 5.) In his supplemental response, Complainant argues that the Third Circuit’s decision is not binding because this case falls within the purview of the Sixth Circuit.⁹ (Comp. Supp. Mem. at 5.) Further, Complainant argues that “the Third Circuit got this issue wrong” in its decision and the decision that it reversed, and ALJ decisions that relied upon it, were correct. (*Id.* at 6-8).

Having reviewed the arguments of both parties and the authority cited, I find that the Third Circuit’s decision in *Port Authority*, while not controlling in the instant case, is nevertheless persuasive authority. Further, I find that I cannot rely upon the ARB decision in

⁸ The Third Circuit also found that the ARB’s interpretation was not entitled to deference under *Chevron*.

⁹ When this case was filed, Complainant resided in Chicago, which would make the Seventh Circuit the appropriate appellate court; however, he has apparently moved.

Bala because it was reversed and therefore lacks precedential value. Any decisions premised upon it must also fail.¹⁰

Section 20109(c) of the FRSA, titled “Prompt Medical Attention,” provides:

(c) Prompt Medical Attention.—

(1) Prohibition.— A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline.— A railroad carrier or person covered under this section 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, except that a railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty. For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

49 U.S.C. § 20109(c).

Based upon the statutory text and legislative history of the FRSA and Section 20109, the Third Circuit in *Port Authority* held:

The plain text of subsection (c)(1), which covers an “employee who is injured during the course of employment,” makes clear that its primary objective is to ensure that railroad employees are able to obtain medical attention for injuries sustained on-duty. Subsection (c)(2) furthers that objective by encouraging employees to take advantage of the medical attention protected by subsection (c)(1), without facing reprisal. Interpreting subsection (c)(2) to also cover off-duty injuries would not further the purposes of subsection (c)(1), which is explicitly limited to on-duty injuries.

¹⁰ Although administrative law judge decisions lack precedential value, they may be cited for their reasoning and persuasiveness. Inasmuch as Judge Purcell’s decision in *Williams v. Grand Trunk Western Railroad Co.*, ALJ No. 2013-FRS-33 (Aug. 11, 2014) [cited by Complainant and attached as CX 2] was based upon the discredited ARB decision in *Bala* and lacks an independent or persuasive analysis, it is entitled to no weight.

Port Authority, supra. In *Hunter v. CSX Transportation*, ALJ No. 2014-FRS-128 (ALJ March 24, 2015), Administrative Law Judge Larry W. Price quoted the above language with approval, rejected the complainant's invitation to read the statute more broadly than Congress intended, and found the Third Circuit's reasoning "both persuasive and correct." I agree. I also note that, following the issuance of *Port Authority*, other administrative law judges addressing the issue outside of the Third Circuit have similarly declined to apply subsection (c)(2) to non-work related injuries, and I agree with their conclusions as well. See *McCullough v. BNSF Railway Co.*, ALJ No. 2014-FRS-155 (ALJ Nov. 9, 2015)(Berlin); *Stokes v. CSX Transp., Inc.*, ALJ No. 2014-FRS-51 (ALJ Apr. 9, 2015)(Kirby); *Wager v. CSX Transp., Inc.*, ALJ No. 2014-FRS-30 (ALJ March 9, 2015)(Craft).

Because Complainant's claimed protected activity under 49 U.S.C. § 20109(c)(2) is based upon treatment for an off-duty injury or illness, it is not actionable under the FRSA. Accordingly, Respondent's motion for summary decision is being granted and this case will be dismissed.

ORDER

IT IS HEREBY ORDERED that Respondent's motion for summary decision be, and hereby is **GRANTED** and the above-captioned matter be, and hereby is **DISMISSED WITH PREJUDICE**.

PAMELA J. LAKES
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).