



Issue Date: 14 November 2016

OALJ Case No.: 2014-FRS-00117
OSHA Case No. 5-2700-14-001

In the Matter of:

TODD PRZYTULA,
Complainant,

v.

GRAND TRUNK WESTERN RAILROAD CO.,
Respondent.

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

This matter arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (the “Act”), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, and Section 419 of the Rail Safety Improvement Act of 2008 (the “Improvement Act”), Pub. L. No. 110-432, and the regulations issued at 29 C.F.R. Part 1982.

Todd Przytula (“Mr. Przytula” or “Complainant”) timely filed a complaint against Grand Trunk Western Railroad (“Respondent”) on October 10, 2013, alleging that he was fired in violation of the Act for “following the orders or treatment plan of a treating physician.” In response to his complaint, the Secretary conducted an investigation through the Regional Administrator for the Occupational Safety and Health Administration (“OSHA”). On May 28, 2014, the Secretary dismissed the complaint, finding that Complainant did not engage in any protected activity under 49 U.S.C. § 20109(c)(2):

While Complainant did provide evidence that he was following the orders of his treating physician not to work due to the flu, it does not appear that reasonably this [sic] is applicable to the “orders or treatment plan of his treating physician” . . . These doctor’s excuses were dated by the doctor after Complainant received the notice of formal investigation.

On June 11, 2014, Complainant objected to the Secretary’s findings and requested a formal hearing.

On April 6, 2015, Respondent filed its Motion for Summary Decision (“Respondent’s Mot.”). On April 17, 2015, Complainant filed his Response to Respondent’s Motion for

Summary Decision (“Complainant’s Resp.”). On June 4, 2015, having requested and received leave to do so, Respondent filed its Reply Memorandum in Support of Its Motion for Summary Decision (“Respondent’s Reply”). Respondent’s Mot. is ripe for ruling.

UNDISPUTED FACTS

Complainant began working for Employer as a conductor in 2003, and became qualified as an engineer in 2011. Complainant’s Resp. 7. Complainant was disciplined for absenteeism sixteen times between July 2003 and May 2013. (Przytula Dep. Exs. 5-23). Complainant’s employment was terminated on June 9, 2012, but he was permitted to return to work under a “last chance agreement” on October 8, 2012. (Tassin Aff. ¶ 4). His employment was terminated again on April 22, 2013, and he was again permitted to return to work on May 21, 2013, under a second “last chance agreement.” (Tassin Aff. ¶ 4).

Complainant called in sick on July 13, July 14, August 4, and August 5, 2013. Respondent’s Mot. 6-7; Complainant’s Resp. 8-9. Complainant suffered from “nausea” on July 13-14. Respondent’s Mot. 6; Complainant’s Resp. 8. He suffered from a headache and a stomach ache on August 4-5. Respondent’s Mot. 6-7; Complainant’s Resp. 8. It is undisputed that Complainant’s illnesses on these days were not caused by or related to his employment. (Przytula Dep. 37, 43, 49-50, 54).

Dr. Kajoor Sudhakara, who has treated Complainant for eight to ten years, testified that he saw Complainant on July 13, 2013, and on August 5, 2013, and that on both occasions he advised Complainant to refrain from working for several days. (Sudhakara Dep. 7-15). Dr. Sudhakara also signed retroactive “excuse slips” for July 13-15, on August 26, 2013; and for August 4-6, on August 16, 2013. (CX 2-3).

Employer issued a notice of formal investigation to investigate Complainant’s absences on August 13, 2013. (Tassin Aff. ¶ 5). A formal investigative hearing was held on August 26, 2013. (See EX 2). Phillip Tassin, Employer’s General Manager for the Michigan area, states that after the hearing, upon reviewing the hearing transcript and exhibits, Employer’s attendance policy, and Complainant’s work history, that Complainant’s “latest violation warranted dismissal.” (Tassin Aff. ¶ 5).

DISPUTED FACTS

The parties dispute whether Complainant’s absences were in keeping with Dr. Sudhakara’s “treatment plan” or “orders.” Complainant’s Resp. 6; Respondent’s Reply 2. The parties also dispute whether Respondent followed its internal attendance policies. Complainant’s Resp. 6-7; Respondent’s Reply 2-3.

DISCUSSION

Under 29 C.F.R. § 18.72(a), “[t]he judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” This standard is essentially the same as that found in Fed. R. Civ.

P. 56. The determination of whether facts are material is based on the substantive law upon which each claim is based. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Complainant alleges that he was terminated in violation of 49 U.S.C. § 20109(c)(2). Section 20109(c) states:

(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

(2) Discipline—

A railroad carrier or person covered under this section may not discipline . . . an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician

The parties recognize that resolution of this complainant turns on whether I adopt the Third Circuit’s decision in *Port Auth. Trans-Hudson v. Sec’y, Dep’t of Labor [Bala]*, 776 F.3d 157 (3rd Cir. 2015). *See* Respondent’s Mot. 11-14; Complainant’s Resp. 13-17. In *Bala*, the Third Circuit held that subsection (c)(2) implicitly incorporates the limitation in subsection (c)(1), and that (c)(2) therefore only prohibits an Employer from disciplining an employee for following a doctor’s orders for injuries or illnesses suffered “during the course of employment.” *Id.* Because it is undisputed that Complainant’s illnesses were not work-related, if I adopt *Bala* then the complaint falls outside the Act, and the disputes over whether Complainant’s absences adhered to Dr. Sudhakarta’s “treatment plan,” or whether Employer arbitrarily enforced its attendance policies, are not material.

In *Bala*, the Third Circuit noted that although subsection (c)(1) specifically refers to injuries that occur “during the course of employment,” subsection (c)(2) does not. 776 F.3d at 162. Application of the canon of *expressio unius* developed by the Supreme Court in *Russello v. United States*, 464 U.S. 16 (1983) might lead to the conclusion that the distinction was purposeful—and that subsection (c)(2) should therefore be read *to* cover medical treatment or a treating physician’s plan for an illness that did *not* occur at work. *Id.* at 164 (*citing Russello*, 464 U.S. at 23). But the Third Circuit ultimately rejected application of *Russello*, finding that the canon applied when subsections were “sufficiently distinct that they do not—either explicitly or implicitly—incorporate language from the other provision,” and that the question before the court was whether section (c)(2) did in fact implicitly incorporate language from (c)(1). 776 F.3d at 164. The court also found that *Russello* presupposes “careful draftsmanship,” but that § 20109 included “numerous examples of inexact drafting.” *Id.* at 164-65 (*citing City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36 (2002) and *Kapral v. United States*, 166 F.3d 565, 579 (3rd Cir. 1999) (Alito, J., concurring)). Furthermore, the Third Circuit in *Bala* found that because (c)(2) was an anti-retaliation provision that effected the purpose of (c)(1), it should be read to include the limitation included in (c)(1). 776 F.3d at 162. Accordingly, the court found that (c)(2) only provides a cause of action for railroad employees who are disciplined for following the orders or a treatment plan for injuries that occurred “during the course of employment.” *Id.* at 162-66.

This matter arose in the Sixth Circuit, and *Bala* is not binding. 49 U.S.C. § 20109(d)(4). District courts in the Tenth and Fifth Circuits have adopted *Bala*'s holding, however. See *Miller v. BNSF Ry. Co.*, 2016 WL 2866152 (D. Kan. May 17, 2016); *Jones v. Ill. Cent. R.R. Co.*, 2015 WL 5883030 (E.D. La. Oct. 8, 2015). Additionally, other Department of Labor ("DOL") Administrative Law Judges ("ALJs") have adopted *Bala*. See *Sprinkle v. BNSF Ry. Co.*, 2015-FRS-00005 (ALJ Jan 15, 2016); *Krok v. Grand W. R.R. Co.*, 2014-FRS-00058 (ALJ Dec. 28, 2015); *Casey v. Pac. Harbor Lines, Inc.*, 2015-FRS-00040 (ALJ Dec. 2, 2015); *Hunter v. CSX Transport., Inc.*, 2014-FRS-00128 and 2015-FRS-00010 (ALJ Mar. 24, 2015).

I find the Third Circuit's reasoning persuasive, and I adopt it as well. Complainant argues that the statute's "plain language" compels a finding that (c)(2) covers all injuries and illnesses. Complainant's Resp. at 14-15. But as the Third Circuit noted, the statute's "plain text" indicates that it is a retaliation provision subordinate to (c)(1), and that its "primary objective is to ensure that railroad employees are able to obtain medical attention for injuries sustained on-duty." 776 F.3d at 163. Complainant also urges application of *Russello*. Complainant's Resp. at 14. But as the Third Circuit recognized, the *expressio unius* canon developed in that case cannot be applied to the "critical question" of determining whether (c)(2) implicitly incorporates the limitation in (c)(1). 776 F.3d at 164.

Finally, Complainant argues that the Third Circuit "missed" a "crucial point," and that the decision "failed to appreciate the risk of safety this decision creates for both railroad employees and the public." Complainant's Resp. at 15-16. Complainant states "the damages associated with human factor errors in the railroad industry are potentially catastrophic." Complainant's Resp. at 17. In fact, in rejecting the DOL's arguments to interpret (c)(2) without limitation, the Third Circuit did consider the public policy implications:

Because of the "broader safety purposes behind the statute," the DOL asks us simply to assume that Congress would have wanted [(c)(2) to apply without limitation]. Aside from the separation of powers issues raised by that proposition, how do we know that Congress would not have been more concerned about potential safety issues *caused* by absenteeism, thus outweighing the potential benefits of the DOL's stance? We don't—which is one reason why this Court does not formulate public policy.

776 F.3d at 169. Following the reasoning of the Third Circuit, I decline to express an opinion as to whether Complainant's public policy concerns are valid. Even if they were, however, it is my duty to adjudicate cases under the Act as it is written. Accordingly, I find that 49 U.S.C. § 20109(c)(2) only prohibits an employer from retaliating against an employee for following a doctor's orders when those orders relate to an illness or injury that occurred "during the course of employment."

It is undisputed that Complainant's illnesses did not occur during the course of, and in no way were related to, his employment. Accordingly, the complaint falls outside the Act, and Employer is entitled to decision as a matter of law.

For the reasons stated above, the complaint in this matter is hereby **DISMISSED**.

SO ORDERED.

PAUL R. ALMANZA
Administrative Law Judge

Washington, D.C.