



Issue Date: 09 March 2015

Case No.: 2014-FRS-30

In the Matter of:

CURTIS J. WAGER,
Complainant,

v.

CSX TRANSPORTATION, INC.,
Respondent.

**DECISION AND ORDER GRANTING THE RESPONDENT'S MOTION
FOR SUMMARY DECISION, DISMISSING THE CLAIM**

This proceeding arises from a claim of whistleblower protection under the Federal Rail Safety Act (FRSA), as amended.¹ The statute and implementing regulations² prohibit retaliatory or discriminatory actions by railroad carriers against their employees who engage in activity protected by the Act. The Rules of Practice and Procedure for Hearings before the Office of Administrative Law Judges (OALJ Rules)³ also apply. In this case, the Complainant, Curtis J Wager, alleges that the Respondent, CSX Transportation, Inc. (CSX), violated the FRSA when it fired him because he missed work for a doctor's appointment.

The claim is now before me on CSX's Motion for Summary Decision filed on October 1, 2014, accompanied by a memorandum in support and exhibits ("RX"). Mr. Wager filed a memorandum in response, also accompanied by exhibits ("CX"), on December 22, 2014. CSX filed a reply on January 20, 2015. The motion is fully briefed, and ripe for ruling.

Being duly advised, I find that Mr. Wager cannot establish a *prima facie* case, because he cannot establish that he engaged in protected activity of which CSX had knowledge. Thus, protected activity played no role in his termination. Moreover, even were Mr. Wager able to establish a *prima facie* case, CSX has established by clear and convincing evidence that he would have been fired even absent protected activity. There are no genuine issues of material fact, and CSX is entitled to judgment as a matter of law.

¹ 49 U.S.C. § 20109 (2013).

² 29 C.F.R. Part 1982 (2014) .

³ 29 CFR Part 18A (2014).

I. PROCEDURAL HISTORY

On May 10, 2013, Mr. Wager filed a timely complaint with the Occupational Safety and Health Administration (OSHA) alleging that CSX Corporation terminated him from his job as a result of activities protected under the FRSA. OSHA issued Findings on November 8, 2013, dismissing the complaint. Mr. Wager served an Objection and Request for a Hearing before an Administrative Law Judge on December 6, 2013. I held a telephone conference on January 28, 2014, during which the parties agreed to a schedule for completing discovery and proceedings on CSX Corporation's anticipated motion for summary decision.

II. APPLICABLE STANDARDS

The standard for summary decision under the OALJ Rules is similar to the standard that governs summary judgment in federal courts under Fed. R. Civ. P. 56.⁴ The Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise ... show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."⁵ A material fact is one whose existence affects the outcome of the case.⁶ The nonmoving party creates a genuine issue of fact by producing sufficient evidence to require a hearing to resolve the parties' differing versions.⁷ The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case."⁸ The burden then shifts to the nonmoving party, who must go beyond the pleadings and present affirmative evidence to show a genuine issue of material fact exists.⁹ If I find that there is a genuine issue of material fact, I must set the case for hearing.¹⁰ In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party.¹¹

In order to prevail on his case Mr. Wager must show that: 1) he engaged in a protected activity; 2) CSX had knowledge of the protected activity; 3) Mr. Wager suffered an adverse action, and 4) the protected activity was a contributing factor in the adverse action.¹² Some decisions formulate this standard as containing only three elements, omitting the employer's knowledge as a separate element,¹³ but a complainant cannot establish that the protected activity was a contributing factor to adverse action if the employer did not know of it. If these elements are satisfied, the burden shifts to CSX to show that there is clear and convincing evidence that the adverse action would have been taken regardless of the protected activity.¹⁴ Thus CSX can prevail if it demonstrates either that Mr. Wager cannot establish one of the four listed elements,

⁴ *Saporito v. Central Locating Services, Ltd.*, ARB No. 05-004, slip op. at 4 (Feb. 28, 2006) (Clean Air Act case).

⁵ 29 C.F.R. § 18.40(d); see also Fed. R. Civ. P. 56(c), incorporated by reference into the OALJ Rules by 29 C.F.R. § 18.1.

⁶ *Reddy v. Medquist, Inc.*, ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (Sarbanes Oxley case) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁷ *Id.*

⁸ *Celotex v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

⁹ *Anderson, supra*, 477 U.S. at 257.

¹⁰ 29 C.F.R. § 18.41(b).

¹¹ *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

¹² 49 U.S.C. § 42121(b)(2)(B)(i).

¹³ See, e.g., *Bala v. Port Authority trans-Hudson Corp.*, 2013 WL 5872050 at *4 (ARB Sept. 27, 2013).

¹⁴ 49 U.S.C. § 42121(b)(2)(B)(ii).

or that it would have taken the action it did regardless of his protected activity. In its motion, CSX Corporation contends that Mr. Wager cannot establish that protected activity was a contributing factor to his termination, and, even if he can, there is clear and convincing evidence that he would have been terminated even absent the protected activity.

III. UNDISPUTED FACTS

Curtis Wager worked for the railway (at first for a predecessor of CSX) since May 1978 as a trackman and machine operator. In 2011 and 2012, he worked on the T4 Tie Team, which traveled to replace worn rail ties and resurface track. He was discharged from his employment with CSX on January 8, 2013, for missing work without permission from his supervisor, Brian Holder. Mr. Holder is a CSX management employee, and as Mr. Wager's supervisor, could approve his taking a day off. Steve Martin was the foreman for Mr. Wager's team; he is a union employee responsible for tracking job assignments and employee payroll. Mr. Martin did not have the authority to authorize a day off work. All three were deposed during the proceedings on the current claim, and also testified during an investigation by CSX in December 2012. Excerpts from Mr. Wager's deposition are found in RX 1 and CX 1. Excerpts from Mr. Holder's deposition are found in RX 2. Excerpts from Mr. Martin's deposition are found in RX 3 and CX 3. The transcript from the CSX investigation is found in Exhibit B to RX 4 ("RX 4B"); a less legible copy was also attached as an exhibit to Mr. Wager's complaint to OSHA, found in RX 5. Exhibits from the CSX investigation hearing are found in Exhibit C to RX 4 ("RX 4C"). Mr. Wager and Mr. Martin are the key witnesses in this case, because Mr. Wager spoke only to Mr. Martin about needing a day off. Except for minor differences in the sequence of events which are not material, the testimony by Messrs. Wager and Martin in both forums was consistent with each other, and with this statement of undisputed facts.

Mr. Wager had been disciplined and discharged for missing work without permission in 2011. He was charged with violating CSX attendance policies for missing work without proper authorization from his supervisor. He had used the days he missed work for vacation and sick days. After arbitration under a collective bargaining agreement, he was reinstated on a "last chance" basis. RX 1 at 32-56 and Exhibits 1-3 and 5. The award of reinstatement stated,

Therefore, the Board finds and holds the Claimant is to be reinstated to service on a "last chance" basis with seniority intact and all other rights unimpaired with no back-pay. The discipline is reduced and the appeal/claim is partially sustained. The Board also forewarns the Claimant that he needs to protect his assignment and diligently follow all instructions and directives upon reinstatement.

Exhibit 5 to RX 1 at 3. During his deposition, Mr. Wager said that he understood that a "last chance" reinstatement meant that he would be terminated for another attendance violation. RX 1 at 56-57, 87.

In early October 2012, Mr. Wager developed a cough. During the week of October 22, 2012, he made an appointment to see a doctor on Thursday, November 1, 2012, during scheduled work time. RX 1 and CX 1 at 61-62. When he made the appointment, he thought the cough might be work-related, but he did not tell that to anyone at CSX, and after he saw the doctor, the

doctor did not say that the cough was work-related. RX 1 and CX 1 at 65–66, 68–69, 70–71, 75–76; RX 4C (“Brotherhood Ex 2,” “Brotherhood Ex 2a,” and “Brotherhood EX 2b”). Mr. Wager notified his foreman, Mr. Martin, about the appointment; he thought that Mr. Martin had notified Mr. Holder that he would need to be absent from work. RX 1 and CX 1 at 75–76, 80, 95; RX 4B at 30, 31. Mr. Martin told Mr. Wager that he needed to talk to Mr. Holder, and arranged for a substitute to perform Mr. Wager’s work on the day he would be absent. RX 1 and CX 1 at 102–103, 106–107; RX 3 at 18–20, 52; RX 4B at 19, 21, 23, 27; RX 4C (“Carrier’s Ex 3”). Mr. Wager met with the substitute the day before his doctor’s appointment. RX 1 and CX 1 at 110; RX 4B at 26. He conceded that he did not talk to Mr. Holder or obtain his permission to miss work. RX 1 and CX 1 at 80, 84–85, 86, 96–97, 103, 106, 109–110; RX 4B at 6, 12, 28, 30, 31. Mr. Wager missed an entire day of work in order to attend the doctor’s appointment because his work site was in Terre Haute, Indiana, two hours away from his home town and the doctor’s appointment. RX 1 and CX 1 at 63–65.

After Mr. Wager missed work on November 1, CSX charged him with failure to protect his assignment, and failure to obtain appropriate permission from proper authority prior to absenting himself from his assignment. After investigating the charges, CSX terminated his employment. This time, his discharge was upheld after arbitration. Exhibit 9 to RX 1.

IV. DISCUSSION AND FINDINGS

In its motion, CSX contends that Mr. Wager cannot establish that he engaged in protected activity, that it knew of any protected activity, or that the requisite causal link exists between protected activity and the decision to terminate his employment. It further contends that even if he can establish a causal link, CSX has established by clear and convincing evidence that it would have terminated him for violating his “last chance” agreement by committing an additional attendance policy violation. Mr. Wager contends that he was dismissed in retaliation for attending a doctor’s appointment after duly notifying his foreman in compliance with the requisite attendance policies and training his replacement, and that attending a doctor’s appointment is protected activity.

The FRSA prohibits a railroad carrier from discharging, demoting, suspending, reprimanding, or otherwise discriminating against an employee for engaging in activity protected by the Act. Specifically, the FRSA provides:

§ 20109. Employee protections

(a) IN GENERAL.—A railroad carrier engaged in interstate or foreign commerce ... or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done—

...

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

...

(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.¹⁵

The implementing regulations track the language of the statute.¹⁶

Both parties cite to another FRSA case to support their positions on this motion— a claim brought by Christopher Bala against the Port Authority Trans-Hudson Corporation. But while Mr. Wager relies on the decision of the Administrative Review Board (ARB) finding in Mr. Bala's favor in that case,¹⁷ CSX relies on the more recent contrary decision from the Third Circuit Court of Appeals remanding the case to the ARB with instructions to dismiss Mr. Bala's claim.¹⁸ Mr. Bala's claim is distinguishable on its facts, and Mr. Wager's claim arises in the Seventh Circuit rather than the Third Circuit. Nonetheless, the decisions in Mr. Bala's case are instructive in the case at hand.

The facts underlying Mr. Bala's claim are described in both decisions. Mr. Bala was a signal repairman employed by a rapid transit railroad. He injured his back at work, reported his injury, and was ordered off work for three months while undergoing treatment by an orthopedist. He later reinjured his back while at work, and was ordered off work for an additional six weeks for treatment. A month after he returned to work for the second time, he experienced sharp back pain when lifting at home. He called in sick and went to his family doctor, who ordered him off

¹⁵ 49 U.S.C. § 20109.

¹⁶ 29 C.F.R. § 1982.103(b).

¹⁷ *Bala v. Port Authority Trans-Hudson Corp.*, 2013 WL 5872050 (2013).

¹⁸ *Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Department of Labor*, 776 F.3d 157 (2014).

work for an additional month. He reported the injury and his doctor's orders to his supervisor. His supervisor ordered an evaluation by another doctor, who in turn confirmed that Mr. Bala was not fit for duty, and directed him to schedule another orthopedic evaluation. While he was off work, Mr. Bala was charged with violating his employer's attendance policy, which required him to maintain a satisfactory attendance record. The charge was triggered by his off-duty back injury. After a hearing, the charge was sustained, and Mr. Bala was suspended for six days, with three days to be held in abeyance for one year. An Administrative Law Judge (ALJ) found that Mr. Bala's employer violated the FRSA and awarded him back pay for his time on suspension.¹⁹ On appeal, the ARB held that the prohibition against disciplining an employee for following a physician's orders in subsection (c)(2) of the FRSA (quoted above) applies to off-duty injuries, and that the ALJ's decision was supported by substantial evidence. On further appeal, however, the Third Circuit agreed with Mr. Bala's employer that subsection (c)(2) applies only to injuries occurring while the employee is on-duty.

Turning to the case at hand, there is no competent evidence that Mr. Wager was suffering from a work-related injury. Although he testified that he *thought* his cough might be related to a work-related hernia, or work-related dust exposure, his doctor did not confirm that it was in any way related to his work. RX 1 and CX 1 at 65–66, 68–69, 70–71, 75–76; RX 4C (“Brotherhood Ex 2,” “Brotherhood Ex 2a,” and “Brotherhood Ex 2b”). Moreover, Mr. Wager admitted that he never told Mr. Martin or anyone else at CSX of his belief that the cough might be work-related. RX 1 and CX 1 at 71, 76, 78. Thus, Mr. Wager cannot establish that he attempted to notify CSX of a work-related injury, activity protected by subsection (a)(4) of the FRSA. In addition, if the Third Circuit's decision in *Bala* applies to this case, Mr. Wager's claim must fail under subsection (c)(2), because he cannot establish that his cough is work-related. But even if the Third Circuit's decision does not apply, and the protection of subsection (c)(2) applies to any on- or off-duty injury or disease, Mr. Wager still cannot establish a *prima facie* case.

The parties have cited attendance rules from two different sources which are applicable to this case, CSX general rules, and a Special Production Team policy which also addresses attendance. CSX's General Regulations provide in pertinent part:

GR-1. Employees must report for duty at the designated time and place. Without permission from their immediate supervisor employees must not:

1. Absent themselves from duty, or
2. Arrange for a substitute to perform their duties.

Employees subject to call for duty must be at their usual calling place or furnish information as to where they are located. When they wish to be absent or if they are unable to perform service, employees must notify the proper authority. They must not wait until a call for duty is received to request permission to be marked off. ...

GR-2. All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not:

- ...
6. Willfully neglect their duty.

...

¹⁹ *Bala v. Port Authority Trans-Hudson Corp.*, ALJ No. 2010-FRS-026 (Feb. 10, 2012).

Exhibit 6 to RX 1 at 4; RX 4C (“Carrier’s Ex 2”). Mr. Wager was familiar with these rules; he had a copy, and he received yearly training on them. RX 1 and CX 1 at 81–82, 84. CSX also has an attendance policy for System Production Teams which applied to Mr. Wager. That policy provides in pertinent part:

Background: First, it should go without saying that daily attendance is not only a requirement of service, it is essential to the success of CSXT. Each and every one of you performs a critical function on your Team, and when you are not at work your Team mates have to do your work in addition to their own. That means they have to do more, either by working harder or longer hours. When an employee is absent without advising his supervisor, the problem is worse, because there is no way to plan how to perform the work when the Team does not know who is going to be there.

Second, the current collective bargaining agreement and the IDPAP are not less restrictive than previous agreements and policy. Section (a) of Rule 26 requires an employee who is unable to report to work to notify his supervisor as soon as possible. Absences of less than 14 days will be addressed through the IDPAP, beginning with counseling, then progressing up to and including disciplinary action, if necessary. In fact, Rule 26(b) contains a stiffer penalty for being absent without permission than under the old agreement, in that an employee who is absent in excess of fourteen consecutive days without notifying his supervisor will forfeit his seniority. No investigation is required under Rule 26(b); forfeiture of seniority requires only a letter. There is no appeal, no basis for reinstatement, if an employee forfeits his seniority.

Please be governed accordingly: An employee unable to report for work for any reason must notify his supervisor as soon as possible. An employee calling his supervisor and leaving a message is not considered an excused absence unless the supervisor of the team approve why the employee was absent. As soon as you know that you will not be able to attend work the next scheduled workday, you must notify either your supervisor, or your foreman. Note that calling on Monday morning to say you will not be there on Monday is not in compliance with Rule 26 or these instructions. SPT employees who fail to notify their supervisors in a timely manner that they are not able to report to work, and employees who are regularly absent, will subject themselves to the steps set out in the IDPAP, up to and including investigations and disciplinary action.

In the past, there has been a discussion of the trade-off between what is expected of Team members and what Team members can expect in return. Attendance is the most basic expectation of employees. In order for your Team, System Production, the Engineering Department and CSXT to be successful, you are expected to be at work every day unless you are sick, disabled, on vacation, observing a holiday, bonus day, rest day, or personal leave day.

Finally, under the terms of the 1981 National Agreement, “personal leave days... May be taken upon 48 hours’ advance from the employee to the proper carrier officer, provided,

however, such days may be taken only when consistent with the requirements of the carrier's service." Failure to provide adequate advance notice may result in your request for personal leave being denied, and you may be considered absent without permission, without pay. Again, if an employee is absent without permission, it will be addressed under the Individual Development and Personal Accountability policy, and under the terms of the collective bargaining agreement.

Exhibit 7 to RX 1; CX 2; RX 4C ("Brotherhood Ex 1").

CSX contends that the General Rules govern, and that because Mr. Wager never sought permission from Mr. Holder to be absent, he was in violation of the General Rules, and, it follows, in violation of the last chance agreement under which he was reinstated after his discharge in 2011. Mr. Wager concedes that he was aware of this rule, and of his obligation not to violate it under his last chance agreement. RX 1 at 56–57, 87–88, 97. He knew it was important for him to notify his supervisor. RX 1 at 44. He had no personal or vacation days available to him at the time. CX 1 at 97–98. Mr. Wager contends that he complied with the System Production Teams policy by notifying Mr. Martin. But as CSX points out, the System Production Teams policy allows for notification of a foreman, but also mentions the requirement to contact a supervisor, and does not state that an employee does not need permission from his supervisor to miss work. Mr. Wager conceded these points during his deposition. RX 1 at 91–96. Mr. Wager also concedes that at some point before he took the day off, Mr. Martin told him he had to speak to Mr. Holder. RX 1 and CX 1 at 102–103, 106–107. But according to his own testimony, despite several opportunities to do so, Mr. Wager chose not to speak to Mr. Holder because he did not trust him. RX 1 and CX 1 at 102–103, 106–108; RX 4B at 12, 28. Through Mr. Wager's testimony, CSX has established that Mr. Wager's cough did not constitute an emergency, and he chose the date and location of his doctor appointment for his own convenience. RX 1 and CX 1 at 61–62, 63, 66–68. He made no attempt to determine whether it could be scheduled at some other time or place. RX 1 and CX 1 at 63–64, 66–68, 77, 98–99. Nor was he following a treatment plan when he made the appointment. RX 1 and CX 1 at 62. Under these circumstances, there can be no reasonable inference that Mr. Wager engaged in good faith protected activity when he missed work on November 1 without seeking permission from Mr. Holder.

Furthermore, even if Mr. Wager could establish a *prima facie* case, CSX has established by clear and convincing evidence that Mr. Wager would have been fired even absent protected activity. Unlike Mr. Bala, Mr. Wager was employed under a "last chance" agreement, by the terms of which he would be terminated for any violation of CSX attendance policies. Nonetheless, Mr. Wager deliberately violated company policy when he missed work on November 1 without seeking advance permission from his supervisor. He would have been subject to discharge without regard to the reason for his absence.

I find that CSX's motion for summary decision should be granted because Mr. Wager cannot establish a *prima facie* case, and CSX has provided clear and convincing evidence that he would have been discharged even absent protected activity, because he violated his last chance agreement when he took time off for any reason without first seeking authorization from his supervisor.

V. ORDER

IT IS THEREFORE ORDERED that the Respondents Motion for Summary Decision filed on October 1, 2014, is **GRANTED**. This claim is **DISMISSED**.

Alice M. Craft
Administrative Law Judge

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).

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.

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, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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).