



Issue Date: 14 July 2016

Case No.: 2015FRS00069

In the Matter of:

CURTIS FULLER,
Complainant,

v.

BURLINGTON NORTHERN SANTA FE RAILROAD CO.,
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, Curtis Fuller (“the Complainant”), alleges that the Respondent, Burlington Northern Santa Fe Railroad Co. (BNSF or “the Respondent”), violated the FRSA when it designated his leave of absence as Family and Medical Leave Act (FMLA) leave and suspended the accrual of time for the one-year review period for a disciplinary action that he had previously received while he was on leave.

The claim is now before me on BNSF Railway’s Motion for Summary Decision filed on February 12, 2016, accompanied by exhibits A–J (“RX”). After requesting and receiving an extension of time over the Respondent’s objection, the Complainant filed a Response in Opposition to the Respondent’s Motion for Summary Decision, also accompanied by exhibits 1–4 (“CX”), and the Respondent filed a reply. The motion is fully briefed, and ripe for ruling.

Being duly advised, I find that the Complainant released the Respondent from any future litigation against it under the FRSA on January 2, 2015, when he executed the BNSF Railway Company Release and Settlement Agreement. *See* RX C. Therefore, there are no genuine issues of material fact, and the Respondent is entitled to judgment as a matter of law.

¹ 49 U.S.C. § 20109 (2014).

² 29 C.F.R. Part 1982 (2015).

³ 29 C.F.R. Part 18A (2015).

I. PROCEDURAL HISTORY

On April 9, 2015, the Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent took adverse actions against him when it counted time off related to an injury that occurred on September 11, 2014, as FMLA leave, and also because it did not credit the time he was on medical leave toward completion of the review period of his “Level S” discipline, which was assessed for a separate, earlier, incident. OSHA issued Findings on July 21, 2015, dismissing the complaint. The Complainant served an Objection to the Secretary’s Findings and Order, and Request for De Novo Review and Hearing before an Administrative Law Judge on August 14, 2015. I held a telephone conference on September 11, 2015, during which the parties agreed to a schedule for completing discovery and proceedings on the Respondent’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 its motion, the Respondent contends that the release the Complainant executed on January 2, 2015, specifically bars this FRSA claim, and that the Complainant’s claim is time barred by the FRSA 180-day statute of limitations.

III. UNDISPUTED FACTS

The Complainant has been an employee of the Respondent for more than 13 years. On February 11, 2014, after an investigation, the Respondent assessed a Level S 30 day record

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).

suspension and a one year review period against the Complainant for exceeding a maximum authorized speed while working as a crew member on a locomotive. On September 11, 2014, the Complainant injured his knee while performing switching work. At the time of the injury he was working as a conductor / switchman. Pursuant to his doctor's orders, the Complainant was off work from September 11, 2014, through December 20, 2014. The Respondent granted the Complainant medical leave beginning September 16, 2014. The Respondent counted the Complainant's time off as FMLA leave. The Respondent also tolled the running of the Complainant's one year review period of his Level S discipline while he was on medical leave, which resulted in the Level S discipline remaining on his record until April 6, 2015, instead of February 11, 2015. The Complainant returned to work on December 21, 2014. On January 2, 2015, the Complainant executed a Release and Settlement Agreement, for which he was paid \$35,000.00.

IV. DISCUSSION AND FINDINGS

In its motion, the Respondent contends that the release the Complainant executed on January 2, 2015, specifically bars this FRSA claim. It further contends that this claim is time barred by the FRSA 180-day statute of limitations.

On January 2, 2015, the Complainant executed a BNSF Railway Company Release and Settlement Agreement. *See RX C; CX 2.* It stated in pertinent part:

1. For the sole consideration of the payment of thirty five thousand and no/100—dollars ... I, **Curtis Fuller**, release and forever discharge BNSF Railway Company (hereafter “BNSF”), and any predecessor or successor companies, affiliated, related, subsidiary, and parent companies, specifically including any officers, directors, employees or agents of said companies and their attorneys (hereinafter collectively referred to as “Releasees”) from all claims and liabilities of every kind or nature, **INCLUDING CLAIMS FOR INJURIES, CONDITIONS, SYMPTOMS, ILLNESS, & DAMAGES & AGGRAVATIONS, NATURAL PROGRESSION &/OR FURTHER DEVELOPMENT THEREOF, IF ANY, WHETHER KNOWN OR UNKNOWN TO ME AT THE PRESENT TIME**, arising out of the following:
 - A. An incident on or about **9/11/14**, at or near **Kansas City, KS**, while I was employed as a **switchman**, which incident is described in my record statement, and/or employee transcript and/or personal injury report.
2. The payment above is accepted by me in compromise settlement of disputed claims and such payment is not an admission of liability by said Releasees as to any of the aforementioned claims.
3. This release will also include any and all other claims of any kind or character and all causes of action I might have against releases. This includes but is in no way limited to: cases capable of being brought under the Federal Rail and Safety Act (FRSA), and/or 49 USC § 20109 (“Whistleblower”), and or those cases or

complaints which may be filed with the Department of Labor, OSHA, the EEOC or any other federal or state government agency/entity, and/or those which may arise pursuant to a collective bargaining agreement.

RX C; CX 2.

I concur with the Respondent that this FRSA claim is barred by the release. The unambiguous language specifically releases BNSF from any FRSA claim associated with the September 11, 2014, incident. The Complainant argues that the release does not bar this FRSA claim because a mutual mistake of fact existed at the time he executed the release. *Cl. Res. in Opp.* at 4. He asserts that the release should not bar the claim because neither he nor the Respondent knew that the FRSA claim existed at the time he executed the release. *Id.* at 7. “Before a compromise settlement will be set aside for mutual mistake, it must be established that the mistake was of such a nature that the parties were caused to do something they did not intend to do.”¹² Here, the Respondent intended for the release to absolve it of “all claims and liability of every kind or nature.” It intended that the release include “cases capable of being brought under the Federal Rail and Safety Act.” It also intended the release to absolve BNSF of liability from claims of every kind arising from the September 11, 2014, incident “**WHETHER KNOWN OR UNKNOWN.**” Because the Respondent intended the release to absolve it of all liability arising from the September 11, 2014, incident, there is no mutual mistake. It is irrelevant that neither party knew that a potential FRSA claim existed at the time the release was executed. The Respondent may not have known that a potential FRSA claim existed, but the release’s purpose is to prevent *any* FRSA claim arising out of the September 11, 2014, incident, regardless of whether the claim was known at the time the release was executed. The Complainant declared “[w]hen I signed the release on January 2, 2015, I did not know that I had an FRSA claim.” CX 1. However, there is a significant difference in not knowing whether you have a FRSA claim and understanding that you are releasing your right to bring an FRSA claim. Moreover, the Complainant not only signed the release but also wrote “I have read and understand this agreement.” The release is supported by valid consideration, and I find no evidence of fraud or a mutual mistake. The Complainant has not cited any cases holding that an FRSA claim cannot be released under these circumstances. I find that the release executed by the Complainant on January 2, 2015, specifically bars him from bringing any FRSA claim arising from the September 11, 2014, incident.

Because I have found that the Complainant is barred from bringing this FRSA claim I need not resolve the issue of whether this FRSA claim was timely filed. I find that the Respondent’s motion for summary decision should be granted because he executed a release of any and all future claims arising from the September 11, 2014, incident on January 2, 2015.

¹² *Ferguson v. Smith*, 31 Kan. App. 2d 311, 314 (Kan. Ct. App. 2003).

V. ORDER

IT IS THEREFORE ORDERED that the Respondents Motion for Summary Decision filed on February 12, 2016, 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 fourteen (14) 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).