



Issue Date: 24 March 2015

CASE NOS.: 2014-FRS-00128
2015-FRS-00010

In the Matter of:

DESMOND HUNTER,
Complainant

v.

CSX TRANSPORTATION, INC.
Respondent

BEFORE: **LARRY W. PRICE**
Administrative Law Judge

**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AMENDED
COMPLAINT AND DENYING COMPLAINANT'S MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

The present matter arises under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, and its implementing regulations at 29 C.F.R. § 1982, brought by Desmond Hunter (Complainant) against CSX Transportation, Inc. (Respondent).

Presently before the Court is Respondent's Motion to Dismiss Complainant's Amended Complaint and Complainant's Motion for Leave to File Second Amended Complaint. The parties have been afforded ample opportunity to brief the issues and the Third Circuit's recent decision in *Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Dept. of Labor (Bala)*, ___ F.3d ___, No. 13-4547, 2015 WL 178459, 2015 U.S. App. LEXIS 676 (3rd Cir. 1/15/2015).

I. PROCEDURAL HISTORY

On June 27, 2014, Complainant filed his first OSHA complaint. The Secretary issued findings on July 2, 2014, dismissing the complaint. Complainant requested *de novo* review on July 8, 2014. On October 21, 2014, Complainant filed a second OSHA complaint relating to another termination letter. OSHA dismissed the complaint to allow consolidation of Complainant's two complaints. Complainant requested *de novo* review on October 27, 2014.

On September 29, 2014, Respondent filed a Motion to Dismiss, asserting that Complainant failed to state a claim under the FRSA because a social worker is not a treating physician under Section (c)(2). On October 22, 2014, Complainant filed his Opposition, arguing

that Complainant's treatment with the social worker should be afforded the same protection as treatment with a physician. Complainant argues that his treatment was part of a treatment plan by his primary care physician and the Employee Assistant Program offered by Respondent. Complainant's opposition encompassed the allegations filed in both his OSHA complaints.

As Complainant had two separate actions pending, namely, Case No. 2014-FRS-00128 and Case No. 2015-FRS-00010, the Court consolidated the cases, denied Respondent's Motion to Dismiss without prejudice, and ordered Complainant to file an amended complaint merging his two claims. Complainant did so on December 9, 2014.

On December 30, 2014, Respondent re-urged its Motion to Dismiss. Shortly thereafter, the Third Circuit issued its decision in *Port Authority Trans-Hudson Corp. v. Sec'y, U.S. Dept. of Labor (Bala)*, ___ F.3d ___, No. 13-4547, 2015 WL 178459, 2015 U.S. App. LEXIS 676 (3rd Cir. 1/15/2015). On January 20, 2015, Complainant sought leave to file a second amended complaint, which alleged a violation of 49 U.S.C. § 20109(b)(1)(B). The Court issued a briefing order in light of the parties' respective motions and the *Bala* decision. On January 30, 2015, Respondent submitted its supplemental brief. Complainant submitted his supplemental brief on February 12, 2015.

II. COMPLAINANT'S ALLEGATIONS

A. First OSHA Complaint

Complainant worked for Respondent as an engineer for approximately 19 years. On August 30, 2012, Complainant's wife passed away from Lupus. Complainant was left to care for his two children. He was referred to a grief counselor, Ms. Jennie Allee-Walsh (LCSW), through Respondent's Employee Assistance Program (EAP). He began therapy on September 17, 2012.

On December 17, 2013, Respondent charged Complainant with violating the minimum availability requirement, which states that employees unavailable for two or more days in a rolling four-week period will be subject to review. Complainant was disciplined in the form of two days of overhead for six months. Complainant alleged that he provided letters from his counselor for the missed days.

On January 30, 2014, Respondent again charged Complainant with violating the minimum availability requirement. He was suspended for five days from March 17 through March 21, 2014. Complainant alleged that he provided documentation of his continued treatment with the social worker at the time of his work absences.

On March 10, 2014, Respondent charged Complainant with violating the minimum availability requirement. In a letter dated April 25, 2014, Complainant was terminated from his employment. Complainant alleged that he was terminated for treating with the EAP counselor.

Complainant alleged that he was subject to unfavorable personnel actions on March 14 and April 25, 2014 in the form of suspension and termination. He claimed that the adverse

actions were caused in whole or in part by his engaging in the protected activity of following orders or a treatment plan of a treating counselor in violation of Section 20109(c)(2).

B. Second OSHA Complaint

In addition to the grief counselor, Ms. Allee-Walsh, Complainant also sought treatment through his primary care physician, Dr. Jennifer Bertsch, for anxiety. His treatment began in October 2011 and related to his wife's worsening illness. Dr. Bertsch diagnosed Complainant with generalized anxiety disorder. Complainant continues to treat with Dr. Bertsch for anxiety.

On March 28, 2014, Complainant sought treatment with Dr. Bertsch for lightheadedness and elevated blood pressure. He claimed that he could not work on March 25 and 26, 2014, due to his symptoms. Dr. Bertsch issued a note, which noted that Complainant was under her care on March 26-28 and allowed Complainant to return to work on March 31.

Following Complainant's absences on March 25 and 26, 2014, Respondent charged him with violating its absenteeism policy. During the course of Respondent's investigation, the Trainmaster and Crew Availability Specialist acknowledge receipt of Dr. Bertsch's return to work certificate. Nonetheless, Respondent issued a letter on May 23, 2014, terminating Complainant's employment.

In this second OSHA complaint, Complainant alleged that he was terminated for following the treatment plan of Dr. Bertsch in violation of Section 20109(c)(2).

C. Complainant's First Amended Complaint

Pursuant to the Court's Order, Complainant merged his first and second OSHA complaints into an Amended Complaint filed on December 9, 2014. The Amended Complaint alleged that the adverse actions suffered by Complainant were caused in whole or in part by Complainant's engaging in the protected activity of following orders or a treatment plan of a treating physician and licensed clinical social worker and being subjected to adverse discriminatory treatment in violation of 49 U.S.C. § 20109(c)(2).

D. Complainant's Second Amended Complaint

On January 20, 2015, Complainant sought leave to file a second amended complaint. He alleged that the adverse employment actions taken against him violated the provisions of 49 U.S.C. § 20109(b)(1)(B). Complainant also alleged that his "mental and [emotional] condition was of such urgency that the only way for him to eliminate the danger posed by his condition was to in good faith refuse to carry out his job duties...."

III. DISCUSSION

Complainant does not allege any on-duty injuries. The issues before the Court are whether Section 20109(c)(2) applies to treatment of off-duty injuries and whether Complainant should be permitted to amend his complaints to allege a violation of Section 20109(b).

A. Respondent's Motion to Dismiss

Complainant alleges that his discipline and termination violated Section 20109(c)(2) of the FRSA. Respondent urges this Court to adopt the Third Circuit's reasoning in *Bala* and determine that Section 20109(c)(2) relates only to on-the-job injuries. Complainant argues that this Court is not bound by *Bala* because there is no inter-circuit *stare decisis*. The present matter comes within the purview of the Fifth Circuit Court of Appeals, and *Bala* is a Third Circuit case. I recognize that *Bala* is not binding authority. However, I find the reasoning persuasive and agree with the Third Circuit that Section 20109(c)(2) relates only to on-duty injuries.

Section 20109(c), 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).

It is well established that when construing a federal statute, the "task is to give effect to the will of Congress." *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). Because "Congress's intent is most clearly expressed in the text of the statute, we begin our analysis with an examination of the plain language of the relevant provision." *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3rd Cir. 2012) (citation and internal quotation marks omitted); *see also Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute."). "When the words of a statute are unambiguous, then, this first canon [of statutory interpretation] is also the last: judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In *Bala*, the Third Circuit examined the statutory text and legislative history of the FRSA and Section 20109. Given that, *Bala* 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.

Bala, No. 13-4547 at *14.

The Third Circuit rejected arguments that would extend subsection (c)(2) beyond subsection (c)(1) and create an independent objective relative to off-duty injuries. *Id.* at *15. Complainant advances similar arguments here. *Bala* found that such an interpretation would provide “an entire industry’s workers a right to unlimited sick leave” and was not willing to presume that Congress decided to enact such a substantial policy undertaking. *Id.* at *27-28.

Section 20109 was intended to prohibit railroad employers from interfering with medical treatment for on the job injuries and from retaliating against employees from obtaining such medical treatment. I reject Complainant’s invitation to read the statute more broadly than Congress intended. The Third Circuit’s reasoning in *Bala* is both persuasive and correct.

Accordingly, Respondent’s Motion to Dismiss Complainant’s Amended Complaint is hereby **GRANTED**.

B. Complainant’s Motion for Leave to File Second Amended Complaint

Complainant presently seeks to amend his complaint to include allegations under Section 20109(b)(1)(B). That section reads:

(b) Hazardous Safety or Security Conditions.—

(1) A railroad carrier engaged in interstate or foreign commerce, or an officer or employee of such a railroad carrier, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for—

...

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties, if the conditions described in paragraph (2) exist....

(2) A refusal is protected under paragraph (1)(B) and (C) if—

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the railroad carrier of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced....

49 U.S.C. § 20109(b).

“[If] the administrative law judge determines that the amendment is reasonably within the scope of the original complaint,” he may “allow appropriate amendments to complaints.” 29 C.F.R. § 18.5(e). While amendments are generally to be “freely granted,” the grant or denial of an opportunity to amend is within the discretion of the court. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Complainant’s original complaints alleged that he was retaliated against for following the treatment plan of a physician and therapist. He now seeks to amend his complaint to include an allegation that his absences from work constituted a good faith refusal to carry out essential job duties due to concerns that his grief and anxiety would not allow him to perform his work safely. (Comp.’s Motion for Leave, p.3). I find that this new allegation is not reasonably within the scope of the facts upon which Complainant originally based his complaints with OSHA.

The ARB has consistently refused to allow amendments of pleadings where, although no new facts were alleged, the complainants sought to assert new legal theories. *See Jay v. Alcon Laboratories, Inc.*, No. 08-089 (ARB Apr. 10, 2009); *Coates v. Southeast Milk, Inc.*, No. 05-050 (ARB Jul. 31, 2007). Here, Complainant seeks to amend his complaint to include additional facts—i.e., that his grief and anxiety caused a hazardous work condition and that his calling in sick to work constituted a good faith refusal to carry out his work duties—as well as a new legal theory under Section 20109(b).

Complainant did not raise the hazardous condition claim before OSHA. The OSHA investigation was limited to whether Complainant suffered adverse employment actions for following orders or treatment plans of his social worker and treating physician. Where a complainant fails to raise claims before OSHA, an ALJ has no power to adjudicate those claims. *Coates*, slip op. at 8, n.3.

Complainant cites *Winch v. CSX Transportation, Inc.*, 2013-FRS-14 (Dec. 4, 2014) to support his argument. However, as Respondent notes, *Winch* is currently under review by the ARB and, as such, “inoperative unless and until the ARB issues an order adopting the decision...” 29 C.F.R. § 110(b). In any case, the ALJ in *Winch* acknowledged that a hazardous condition claim under Section 20109(b) asserts a new legal theory and implicates factual questions not presented by a Section 20109(c) claim. *Winch*, slip op. at 11. I recognize that the ALJ in *Winch* found the hazardous condition claim reasonable within the scope of the original complaint. However, the original complaints in this case do not extend so far.

Prior to seeking amendment to his complaint, Complainant never before alleged that his refusal to work owed to some “hazardous condition caused by his inability to safely operate a locomotive engine while suffering from severe grief and anxiety.” His complaints, the OSHA investigation, and this litigation thus far centered entirely on whether Complainant was subjected to adverse employment actions in retaliation for following the orders and treatment plans of his therapist/social worker and treating physician. I cannot and do not find that the hazardous condition claim Complainant now seeks to pursue is reasonable within the scope of his original complaints.

Respondent further argues that any such amendment, even if reasonable within the scope of Complainant’s original complaints, would be futile as Complainant’s new allegations do not state claim under Section 20109(b). I agree.

To state a claim under Section 20109(b), Complainant must allege facts that 1) a hazardous safety condition relating to the performance of his duties existed, 2) he refused in good faith to perform his duties and no reasonable alternative to the refusal was available, 3) the hazardous condition presented an imminent danger of death or serious injury, and 4) the urgency of the situation did not allow sufficient time to eliminate the danger without such refusal. Furthermore, a complainant must, where possible, notify his employer about the danger. 49 U.S.C. § 20109(b); 29 C.F.R. § 1982.102(b)(2). Complainant’s proposed Second Amended Complaint only alleged that his “mental and [emotional] condition was of such urgency that the only way for him to eliminate the danger posed by his condition was to in good faith refuse to carry out his job duties...” He did not state any facts or put forward any allegations that no reasonable alternative to his refusal was available, that his condition presented an imminent danger of death or serious injury, that the urgency of his illness did not allow sufficient time to eliminate the danger, or that he notified his employer about the danger other than to call in sick. The absence of any such allegations is detrimental to Complainant’s claim. Even if Complainant were allowed to file his Second Amended Complaint, the complaint fails to allege sufficient facts to state a claim for relief under Section 20109(b).

Moreover, nothing in the statute indicates that the “hazardous condition” extends beyond work-related safety conditions under the rail carrier’s control and covers personal, non-work illnesses. As the Third Circuit reasoned in *Bala*, extending the FRSA’s protection to personal illnesses would essentially provide “an entire industry’s workers a right to unlimited sick leave,” and it is highly improbable that Congress decided to enact such a substantial policy undertaking. *Id.* at *27-28. Thus, even had Complainant alleged sufficient facts to state a Section 20109(b)

claim in any of his complaints, his personal, non-work related illness does not constitute a hazardous condition under the Act.

Accordingly, Complainant's Motion for Leave to File Second Amended Complaint is hereby **DENIED**.

IV. ORDER

For the foregoing reasons and based upon the record as a whole, Respondent's Motion to Dismiss is hereby **GRANTED**. It is further ordered that Complainant's Motion for Leave to File Second Amended Complaint is hereby **DENIED**. Case Nos. 2014-FRS-00128 and 2015-FRS-00010 are hereby **DISMISSED**.

So ORDERED.

LARRY W. PRICE
Administrative Law Judge