

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 February 2019

Case No.: 2016-FRS-00076
OSHA No.: 6-2450-16-072

In the Matter of:

YVONNE ASTON-COLE,
Complainant,

v.

UNION PACIFIC RAILROAD CO.,
Respondent.

Appearances:

For Complainant:
James Ferguson, Esq.
North Little Rock, Arkansas

For Respondent:
Fred Wilson, Esq.
Sierra Poulson, Esq.
Dallas, Texas

DECISION AND ORDER DISMISSING THE COMPLAINT

This is a claim arising out of the employee-protection provisions of the Federal Railroad Safety Act (“FRSA” or “the Act”), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007).

Yvonne Aston-Cole (“Complainant,” “Aston-Cole or “Cole”) seeks damages from her former employer, Union Pacific Railroad Company (“Respondent,” “Union Pacific” or “UP”), alleging she was suspended without pay and subsequently fired after reporting a work-related injury. Her claim was initiated with the Office of Administrative Law Judges (“OALJ”) on July 29, 2016, when OALJ received Complainant’s timely objections to findings issued by the Occupational Safety and Health Administration (“OSHA”) on June 30, 2016 dismissing the

complaint. After five continuances, a *de novo* formal hearing was held in Dallas, Texas on June 26, 2018. All parties were present and Administrative Law Judge Exhibits (“ALJX”) 1-10 (Tr. 8-9)¹ and Respondent’s Exhibits (“RX”) A-Z (Tr. 7) were admitted into evidence. Six witnesses, including Complainant, testified.² For the reasons stated below, Complainant’s FRSA complaint is DISMISSED.

Findings of Fact

The Union Pacific Railroad Company is a freight-hauling railroad operating approximately 8,500 locomotives in about 23 mid-western and western states. Complainant began working for Union Pacific in 2006 as a clerk before becoming a timekeeper in 2009 for about 460 Union Pacific employees working out of the Fort Worth, Texas locomotive facility.³ In December 2014, Complainant married Terry Cole, another UP employee, and one of the many employees for whom Complainant had been entering, changing, updating and approving time records. Shortly before the wedding, Complainant’s then-supervisor, J. Russell Lowe, verbally advised her that she “probably shouldn’t” enter or approve time anymore for Mr. Cole.

Tamra Walz is a Director of Regional Operations for UP and became Complainant’s supervisor in or around June 2015. Diane Anderson is Director of Administrative Processes for UP, and Walz’s higher level supervisor. In or around June 2015, Anderson learned of some irregularities at the Fort Worth locomotive shop involving timekeepers’ approval of relatives’ time.

Anderson and Walz met with Complainant and another UP timekeeper, Sylvia Cano, on June 25, 2015 in the Fort Worth locomotive facility where they stressed to them the importance of not touching a relative’s time and verbally instructed Cole and Cano not to approve any family member’s time cards, and that someone else should do it. At the time of the meeting, Cano’s son was a laborer at the Fort Worth locomotive facility. Complainant understood she was not to do anything with her now-husband’s time records.

On or about July 7, 2015, Walz ran a report to determine if Cole was still approving her husband’s time. She was.

¹ On May 5, 2017, Respondent moved to dismiss the complaint arguing that, while Complainant did engage in protected activity when she reported a work related injury, she could not establish a causal connection between it and her termination, the alleged adverse action in the case. On June 15, 2017, I issued an order denying Respondent’s motion to dismiss (ALJX 5) finding a genuine factual dispute existed as to whether Complainant’s protected activity was a contributing factor in her termination.

² At the beginning of the hearing, and while not seeking a delay or reassignment to another Administrative Law Judge (“ALJ”), Complainant and Respondent both requested to preserve the right to challenge the status of my ALJ appointment on appeal. (Tr. 5). See *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018). I granted the request to preserve the objection, although I also indicated that I believe the Secretary of Labor’s ratification of my appointment on December 15, 2017 cured any constitutional defect for any actions taken on or after that date and that any actions taken in the case by the undersigned before that date were either ratified, ministerial in nature, or not material to the case.

³ Complainant also served as a yardmaster for about six weeks in between these two jobs.

Complainant began suffering from carpal tunnel syndrome (“CTS”) in January 2009 and started treatment in May 2009.

On August 6, 2015, Complainant filed a formal workplace injury report with Tamra Walz stating that she sustained carpal tunnel from repetitive computer operation during the course of her employment with Union Pacific. Complainant had not informed Union Pacific of the CTS diagnosis prior to August 6, 2015. In accordance with company policy, Walz filed the report and forwarded it to UP headquarters in Omaha, Nebraska.

Between January 2015 and September 2015, Complainant approved her husband’s timesheet at least eleven times. At least three of those occasions occurred after June 25, 2015.

On or about September 21, 2015, Tamra Walz informed Complainant she was being withheld from service without pay pending the outcome of a company investigation for insubordination and failure to follow instructions for approving her husband’s time.

Complainant grieved the suspension and exercised her right under the collective bargaining agreement to go to a hearing. The hearing occurred on October 29, 2015, and resulted in Union Pacific terminating Complainant’s employment for insubordination, effective November 9, 2015. The decision to terminate Complainant was made by the investigating officer, John Parker. Complainant did not raise the issue of her August 6, 2015 personal injury report at the hearing and, at the time he issued his findings and decision on November 9, 2015, Parker had no knowledge of Complainant’s August 6, 2015 report or that Complainant suffered from any on-the-job illness or injury.

Complainant appealed the termination to a three-member arbitration board. On February 21, 2018, the board unanimously affirmed the finding of a Rule 1.6 violation but determined the penalty excessive, reinstating Complainant and converting the dismissal to a suspension without back pay. By this time, timekeeper positions had been eliminated throughout the company. Accordingly, there was no timekeeper position for Complainant to return to. As of June 26, 2018, the hearing date in this case, Complainant was pending a bump for a position in the Ft. Worth supply department.

Union Pacific General Code of Operating Rule 1.6: Conduct, provides, in pertinent part, “Employees must not be insubordinate. Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.”

A UP employee must be held from service without pay pending an investigation involving an allegation of insubordination under Rule 1.6.

The mandatory remedy for a substantiated finding of Rule 1.6 insubordination is dismissal.

Complainant had no prior disciplinary record prior to her suspension and subsequent termination.

Complainant did not falsify her husband's timesheets and she never approved a timesheet for her husband with the intent to defraud Union Pacific. In other words, Terry Cole earned what he was paid by UP.

Complainant made no attempt to seek other work from November 9, 2015 through her reinstatement on February 21, 2018.

To cover the reduction in income caused by the termination, Complainant and her husband sold a house they were using for rental income and their individual interest in a piece of family-owned land.

Discussion

The FRSA, under which Mrs. Aston-Cole brings her claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including, as is relevant here, reporting a work-related injury or work-related illness. 49 U.S.C. § 20109(a)(4).

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that she engaged in a protected activity that was a "contributing factor" in respondent taking an adverse employment action against her. Thereafter, a respondent can only rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB April 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (complainant must prove by a preponderance of the evidence that she engaged in protected activity, respondent knew of the protected activity, complainant suffered an unfavorable personnel action,⁴ and the protected activity was a contributing factor in the unfavorable decision, provided that the complainant is not entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet her burden of proving a claim under the FRSA, Complainant must prove by a preponderance of the evidence that: (1) she engaged in protected activity, (2) UP knew of the protected activity, (3) she suffered an unfavorable personnel action,

⁴ An adverse employment action must actually affect the terms and conditions of a complainant's employment. *Johnson v. Nat'l Railroad Passenger Corp. (AMTRAK)*, ARB No. 09-142, ALJ No. 2009-FRS-6, slip op. at 3-4 (ARB Oct. 16, 2009). *See also Simpson United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31 (ARB Mar. 14, 2008); *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip op. at 4 (ARB Nov. 30, 2005).

and (4) such protected activity was a contributing factor in the unfavorable personnel action.⁵ *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).⁶

Did Complainant Engage in Protected Activity?

Yes. The August 6, 2015 report of a work related injury is a protected activity under the Act.

Did Complainant Suffer an Adverse Employment Action?

Yes. There are two adverse actions: the notice of investigation and suspension without pay on September 21, 2015 and the termination on November 9, 2015.

⁵ Although I list the knowledge requirement as a separate element, I note the ARB has repeatedly reiterated that there are only three essential elements to an FRSA whistleblower case – protected activity, adverse action and causation, and that the final decision-maker’s “knowledge” and “animus” are only factors to consider in the causation analysis. See *Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-25 (ARB Apr. 30, 2013). See also *Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013-FRS-3 (ARB July 17, 2015) (knowledge is not a separate element but instead forms part of the causation analysis). It is noted, however, that federal court FRSA precedent tends to view the decision maker’s knowledge of the protected activity as a distinct element of a whistleblower claim. See, e.g., *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1213 (10th Cir. 2018), joining “those courts that have concluded an FRSA plaintiff advancing a retaliation claim must demonstrate the decision maker had knowledge of the protected activity.” (citing *Conrad v. CSX Transp., Inc.*, 824 F.3d 103, 107-08 (4th Cir. 2016); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014); *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016); *Head v. Norfolk S. Ry. Co.*, 2017 WL 4030580, at *16 (N.D. Ala. Sept. 13, 2017) (citing in turn, an 11th Circuit decision); *Cyrus v. Union Pac. R.R. Co.*, 2015 WL 5675073, at *10 (N.D. Ill. Sept. 24, 2015)).

⁶ In *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013), the court held that the employee “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination, not the sole or even predominant cause.” In addition, an employee “need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.” *Marano v. Dep’t of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). See also *Menendez v Halliburton, Inc.*, ARB Nos. 09-002,-003; ALJ No. 2007-SOX-5 (ARB Sept. 13, 2011), at 31-32; see also *Kudak v. BNSF Railway Company* 768 F.3d 786, 791 (8th Cir. 2014) (“[a] prima facie case does not require that the employee conclusively demonstrate the employer’s retaliatory motive. But the contributing factor the employee must prove is intentional retaliation prompted by the employee engaging in protected activity”). “A contributing factor is *any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. It just needs to be a factor; the protected activity need only play some role, and even an ‘insignificant’ or ‘insubstantial’ role suffices. If the ALJ believes that the protected activity and the employer’s non-retaliatory reasons both played a role, the analysis is over and the employee prevails on the contributing-factor question.” *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, at 11 (Jan. 6, 2017) (internal citations omitted).

Was the Protected Activity a Contributing Factor in the Adverse Action?

Suspension without pay. Complainant filed her personal injury report with Tamra Walz on August 5, 2015. Walz did not say anything to Complainant about the report or try and convince her not to file it. There is no evidence Walz harbored any personal animus towards Complainant. There is no evidence that UP supervisors were evaluated on the number injury reports filed by subordinates. Consistent with company regulations, Walz immediately forwarded the report to company headquarters. Some six weeks later, on September 21, 2015, Walz made the decision to suspend Complainant pending investigation into allegations that she continued to approve her husband's timesheet.

The evidence demonstrates that UP was concerned about timekeeping irregularities and the appearance of impropriety associated with company timekeepers approving their relative's time well before Complainant's initial report of injury on August 6, 2015. In fact, UP notified her in December 2014 and June 2015 not to have any involvement with her husband's time. Additionally, Complainant was not singled out. At the same June 25, 2015 meeting where Complainant was instructed not to have anything to do with her husband's time, UP directed another timekeeper with a UP relative not to have anything to do with that relative's time. Despite working for UP since 2006, and suffering from CTS since 2009, Complainant did not file an injury report until August 6, 2015, two months after Tamra Walz informed Complainant not to have anything to do with her husband's time and one month after Walz had already run a report confirming that Complainant was still approving her husband's time.

While there is some temporal proximity between Complainant's filing of the injury report with Walz on August 5, 2015 and Walz's decision to suspend Complainant without pay on September 21, 2015, it is substantially outweighed by the fact that Walz identified timekeeping irregularities in the Fort Worth facility well before August 5, 2015, that Walz was already aware that Complainant was still approving, albeit inadvertently, her husband's time after being told in December 2014 and June 2015 not to, that Complainant was not singled out, Walz's lack of animus towards Complainant, and that Complainant waited until after being told not to touch her husband's time before filing the injury report, despite having a diagnosis of and receiving treatment for CTS in 2009. Viewing the evidence as a whole, I find the protected activity played no role in Walz's decision to suspend Complainant without pay.

Termination. As to the Parker's decision to dismiss Complainant, he was not aware of the August 6, 2015 injury report and had no knowledge that Complainant had carpal tunnel syndrome or suffered from any other work-related injury or illness.⁷ Thus, I find the protected activity played no role in this adverse action.

⁷ Knowledge of protected activity by a respondent's decision maker on adverse employment action may not be simply imputed or assumed. *Conrad v. CSX Transportation, Inc.*, 842 F.3d 103 (4th Cir. 2016).

Would Union Pacific Have Taken the Same Adverse Action(s) Notwithstanding the Protected Activity?

While it is true Walz was aware of Complainant's personal injury report, UP regulations provide a supervisor with no discretion, and any employee charged with insubordination must be held out of service without pay pending completion of the investigation. Accordingly, assuming arguendo that Cole's report of injury to Walz played a role in Walz's decision to file a charge of insubordination against Cole, Cole would have been held out of service without pay whether or not she had notified UP of the work-related injury. UP regulations further require dismissal of any employee found to have been insubordinate. Accordingly, Respondent has demonstrated by clear and convincing evidence that it would have taken the same adverse actions, notwithstanding the personal injury report.

Conclusion

From all accounts, Yvonne Aston-Cole was a model employee with no prior disciplinary record before her suspension and termination for actions related to approving her husband's timesheet. Respondent's decision to dismiss her from service does appear to have been excessive. However, whether this court would have made the same decision is not the issue as "federal courts do not sit as a super-personnel department that re-examines" employment decisions. *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014).⁸

What is clear is that Complainant's August 6, 2015 injury report played absolutely no role in UP's decision to hold her out of service on September 21, 2015 or in its decision to dismiss her on November 9, 2015. In other words, viewing the evidence as a whole, I find Complainant did not establish by a preponderance of the evidence that her reporting of a workplace injury contributed in any way to UP's decision to initially suspend and ultimately fire her. Assuming arguendo that it did, UP would have taken the same actions as UP regulations require an employee to be held out of service pending investigation for a Rule 1.6 violation and dismissal upon a finding of insubordination. Respondent is therefore not liable under the FRSA.

ORDER

Accordingly, it is hereby **ORDERED** that the relief sought is **DENIED** and the complaint is **DISMISSED**.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁸ The STAA does not forbid unfair employment actions; it forbids retaliatory ones. *See, e.g., Collins v. Am. Red Cross*, 715 F.3d 994 (7th Cir. 2013); *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1106 (7th Cir. 2012).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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, 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 filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).