U.S. Department of Labor

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Issue Date: 30 November 2016

Case No.: 2016-FRS-00023

In the Matter of

JOSEPH HERNANDEZ
Complainants

v.

METRO NORTH COMMUTER RAILROAD COMPANY, INC.
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

I. Statement of the Case

The above-captioned proceeding arises from a claim filed by Joseph Hernandez ("Complainant") against Metro-North Commuter Railroad Company, Inc. ("Respondent" or "Metro-North") for whistleblower protection under the Federal Railroad Safety Act ("FRSA" or "Act"), 49 U.S.C. § 20109, as amended. The FRSA and its implementing regulations, found at 29 C.F.R. Part 1982, prohibit retaliatory or discriminatory actions by railroad carriers against their employees who: (1) provide information to their employers, a Federal agency, or Congress, alleging violation of any Federal law relating to railroad safety or security, or fraud, waste or abuse of public funds intended to be used for railroad safety or security; (2) report a hazardous safety or security condition, refuse to work when confronted by a hazardous safety or security condition, or refuse to authorize use of any safety-related equipment, track, or structure in a hazardous condition; or (3) request medical or first aid treatment. *See* 49 U.S.C. § 20109(a)–(c).

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges ("OALJ") found at 29 C.F.R. Part 18, Subpart A, also apply. Reference may be made to the Federal Rules of Civil Procedure to address issues not specifically covered by the OALJ Rules of Practice and Procedure. *See* 29 C.F.R. §§ 18.10(a).

II. Procedural Background

Complainant filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Respondent retaliated against him for his reporting a co-worker's Driving Under the Influence ("DUI") arrest by denying his application to re-enter an Engineer Training Program ("ETP") he had previously failed.

By letter to Complainant dated December 11, 2015, OSHA confirmed its receipt of the complaint on September 11, 2015, but dismissed it as untimely filed. Complainant filed objections to the OSHA dismissal, along with his hearing request, and the matter was then referred to the OALJ.

On February 8, 2016, an Initial Prehearing Order and Notice of Hearing ("Hearing Order") was issued, scheduling this matter for hearing on July 13, 2016 and providing the parties with prehearing directives.

Respondent filed a Motion To Dismiss The Complaint dated April 12, 2016. Complainant, who is unrepresented, submitted his response to that Motion. An "Order Denying Employer Motion To Dismiss" was issued on May 12, 2016, finding complaint was timely filed and advising the parties that all directives outlined in the February 8, 2016 Hearing Order remained in effect.

A conference call was held with the parties on June 15, 2016 as scheduled in the Hearing Order. A Conference Summary And Order was issued on June 16, 2016, summarizing the burdens of proof and applicable law in this matter, as well as re-setting the date for filing a motion for summary disposition and for responding to such a motion; the Conference Summary And Order also re-scheduled the hearing date to September 15, 2016, in the event summary decision were denied.[1]

Respondent timely filed its Motion For Summary Decision dated July 12, 2016 with a supporting affidavit from Katherine Betries-Kendall, its Vice President, Human Resources ("Betries-Kendall Aff.") and Exhibit ("Ex.") letters A through R. Complainant was granted his request for additional time to respond, and on August 5, 2016, Complainant's "Response In Opposition To Respondent's Motion For Summary Decision" ("Complainant's Opposition") was received.

In its Motion For Summary Decision, Respondent contends that (1) Complainant did not engage in protected activity, i.e., he did not act in good faith with reasonable belief that the conduct he was reporting constituted a violation of railroad safety laws, regulations or rules under an objective and subjective standard and (2) even if Complainant's conduct constituted protected activity, such activity was not a contributing factor in its denying Complainant re-entry into the ETP.

[1] On August 15, 2016, an Order Suspending Prehearing Deadlines And Hearing Date was issued to allow due consideration of Respondent's dispositive motion and Complainant's opposition to it: prehearing submission deadlines and the hearing date were suspended until further notice.

Complainant's Opposition states that the delay in his receiving an explanation for the denial of re-entry into the ETP was "suspicious," an affidavit cannot be cross-examined and a hearing would allow Complainant to prove his claim; it further states that there are "questions of credibility" and "many potential witnesses" who have knowledge of relevant factual circumstances. No affidavits or exhibits were included with Complainant's Opposition.

The entire record includes the OSHA findings, the objections to those findings, the materials submitted with Respondent's Motion For Summary Decision and Complainant's Opposition.

As discussed below, the record does not create a genuine issue of material fact, and Respondent is entitled to judgment as a matter of law.

III. Applicable Law

a. Whistleblower protection under the FRSA

To prove unlawful retaliation under the FRSA, a complainant must show by a preponderance of the evidence that (1) he engaged in protected activity, (2) the employer had knowledge of the protected activity, (3) he was subjected to an adverse employment action amounting to discharge or discrimination with respect to compensation, terms, conditions, or privileges of employment, and (4) the protected activity was a contributing factor in the adverse employment action, 49 U.S.C. §20109. *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F. 3d 152 (3rd Cir. 2013); *Conrail v. U.S. Dept. of Labor*, 567 Fed. Appx. 334, 2014 WL 2198410 (6th Cir. 2014)(unpub). The Administrative Review Board has held that "[i]f the employee does not prove one of these elements, the entire complaint fails." *Coryell v. Arkansas Energy Services, LLC*., ARB No. 12-033, ALJ No. 2010-STA-42, slip op. at 3 (ARB Apr. 25, 2013).

Protected activity is a contributing factor if "the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision." 75 FR 53522, 53524 (Aug. 31, 2010); *Araujo*, *supra* at 158; *Hutton v. Union Pacific Railroad Co*., ARB No. 11-091, ALJ No. 2010-FRS-20, slip op. at 6 (ARB May 31, 2013). The ARB has also held that the FRSA prohibits employers from discharging, demoting, suspending, threatening discipline, reprimanding or "in any other way discriminating" against an employee who engages in protected activity. *Fricka v. Nat'l R.R. Passenger Corp*., ARB No. 14-047, ALJ No. 2013-FRS-035 (ARB Nov. 24, 2015). The ARB applied a broader standard and held that an adverse action is one that is unfavorable and "more than trivial, either as a single event or in combination with other deliberate employer actions alleged."

Even if Complainant establishes the four elements outlined above, Respondent would not be liable under the FRSA if it establishes by "clear and convincing evidence that it would have taken the same adverse action in the absence of any

protected activity." 49 U.S.C. §20109(d)(2)(A)(i); 20 CFR §1982.109(b). "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'a preponderance of the evidence' and 'proof beyond a reasonable doubt … to meet this burden, the employer must show that 'the truth of its factual contentions are highly probable.'" *Araujo, supra* at 159, citing *Addington v. Texas*, 441 U. S. 418 (1979) and *Colorado v. New Mexico*, 467 U. S. 310 (1984).

b. Standards for Summary Decision

Summary decision is appropriate in a proceeding before an Administrative Law Judge "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.72; *see also Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-1 (ARB Dec. 28, 2012). "If the complainant fails to establish an element essential to his case, there can be 'no genuine issue as to a material fact' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-60, slip op. at 3-4 (ARB Jul. 31, 2007).

When an employer asserts[in a motion for summary decision in an FRSA case] legitimate, non-discriminatory reasons for [the employer's decision and action], the employee must point to specific evidence that demonstrates a dispute still exists in spite of the respondent's proffered reasons [for the adverse employment action]. Specific evidence means evidence that: (1) the respondent's reasons are 'unworthy of credence' or (2) the protected activity was at least a contributing factor even if the respondent's reasons are true." *Hasan v. Enercon Services, Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-22 and 27, slip op. at 6 (ARB Jul. 28, 2011).

In evaluating if a respondent is entitled to a summary decision, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving complainant. *Araujo, supra* at 156; *Battle v. Seibles Bruce Ins. Co.*, 288 F.3d 596 (4th Cir. 2002) *citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). "However, even when all evidence is viewed in the light most favorable to the nonmoving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009), unpub., *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

When the information submitted for consideration with a summary decision motion, as well as the opposition to that motion, demonstrates there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, the request for summary decision must be denied. 29 C.F.R. §18.72.

Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense." *Johnson v. WellPoint Cos., Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 7 (ARB Feb. 25, 2013).

As the Administrative Review Board ("ARB") has explained:

> Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial. Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the nonmoving party, the complainant in this case.
>
> The moving party must come forward with an initial showing that it is entitled to summary decision. The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.
>
> In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.72. If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact.

Williams, *supra* at *4, *quoting Hasan*, ARB No. 10-061, *3; *see also Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012).

IV. Undisputed Relevant Facts

Respondent's Motion For Summary Decision included the transcript of Complainant's sworn deposition testimony taken by Respondent on June 1, 2016. Ex. A. [2]

For the last two years, Complainant has held the position of a carman for Respondent in Croton-Harmon. Ex. A at 8. He has worked for Respondent since 2006. Ex. A at 12. In 2013, Complainant applied and was selected as a candidate for the ETP. *Id.*

[2] All exhibits cited refer to those included with Respondent's Motion For Summary Decision.

The ETP Guidelines (which Complainant was provided in July 2013 around the time of his selection for the ETP) state, in part, that (1)ETP trainees are allowed two attempts to pass each test of the physical characteristics and (2) failure to pass on the second attempt would result in termination from the ETP. Ex. B.

On May 6, 2014, and again on June 4, 2014, Complainant received formal written warning letters from Kenneth Sciabarassi, Manager, Locomotive Engineer Training Department, stating his performance was "below the standards established by the [ETP] Guidelines." Ex. N. Specifically, the two letters cited Complainant's failure to advise his lead instructor before a scheduled class or assignment that he was "going to be unavoidably late or absent." *Id*.

In his deposition testimony, Complainant stated that, when presented with a written warning letter while an ETP candidate, he mentioned to Mr. Sciabarassi that another ETP candidate, Brian van Dorp, had a DUI arrest.[3] Ex. A at 21-22. Complainant also stated that Mr. Sciabarassi already knew of that arrest. *Id*. at 22. Complainant further stated that Mr. van Dorp had informed a group of Respondent employees, including him, shortly after his DUI arrest occurred in September 2013. Ex. A at 17.

In September 2014, Complainant failed the physical characteristics test for the New Haven Line on his first attempt. Ex. C. On September 13, 2014, Complainant failed the test on his second attempt. Ex. D. Complainant received notice on September 19, 2014 that he would be terminated from the ETP effective on that date and he was returned to his prior position as a carman. Ex. E; *see also* Ex. A at 8; 10; 42-43.

In or around February 2015, Respondent posted an online announcement that it was accepting applications for locomotive engineer trainees in the ETP. Ex. A at 45. Complainant submitted an application through the Metropolitan Transit Authority ("MTA") Business Service Center ("BSC") which handles functions relating to recruitment and hiring for Respondent. Ex. F.

Complainant received an email from the BSC inviting him to take an examination which is part of the ETP candidate selection process which he did on March 4, 2015. Ex. G; Ex. A at 43. After taking that examination, Complainant was contacted by Fred Gill, a Respondent employee in Human Resources, and told his re-entry into the ETP was invalid because he had been released from it earlier. Ex. A at 43-44.

By e-mail from BSC dated March 9, 2015, Complainant was informed that "since [he was] recently dismissed from the Locomotive Engineer Training program due to not meeting their performance standards [he was] not eligible for further consideration and would be removed from the LOE hiring process." Ex. H.

[3] Attached to Respondent's Motion For Summary Decision is a memo confirming that Metro-North Human Resources "received notification in regards to Brain [sic] van Drop's [sic] Accident" from Mr. van Dorp's father on September 18, 2013. Ex. M.

Notwithstanding that March 9, 2015 e-mail, BSC notified Complainant via e-mail dated March 13, 2015 that he passed the examination he took on March 4, 2015 and he would be subject to a background investigation in furtherance of the ETP candidate selection process. Ex. I.

After providing information for the background investigation, Complainant followed up on the status of his ETP application by calling Lorenzo Biagi, an employee in Respondent's Employee Relations department, in July 2015. Ex. A at 47-48. He met with Mr. Biagi on August 3, 2015 and asked him about the existence of a "five-year rule" precluding his re-entry into the ETP within five years of a termination from it. *Id*.

In September 2015, Mr. Biagi confirmed to Complainant that Respondent's Human Resources department did maintain a policy precluding ETP re-entry for any ETP candidate who had failed in the previous five years; he did not provide Complainant with documentation of that policy. Ex. A at 49.

Respondent's VP, Human Resources, Katherine Betries-Kendall, stated the following under oath:

> When Metro-North hires for the ETP, it requires candidates to meet certain minimum qualifications to become a locomotive engineer trainee. One of the minimum requirements is that an applicant must not have failed within a five-year period any MTA agency-sponsored training program for either the same position or a similar position requiring comparable qualifications, testing, and/or training. These qualifications are set forth in a document entitled Metro-North Railroad Locomotive Engineer Hiring Process, which is used by Talent Acquisition Specialists in the Human Resources Department responsible for recruiting and hiring for the ETP. The Hiring Process document is used internally within the Human Resources Department, but it is not provided to applicants. A copy of this document is annexed to Metro-North's Motion For Summary Decision as Exhibit F. This document reflects the process that was in place at the time [Complainant] applied to reenter the ETP in 2015. At present, Metro-North continues to disqualify any candidate who has failed the ETP or a similar training program within a five-year period.

See Betries-Kendall Aff. at ¶5.

Metro-North Railroad Locomotive Engineer Hiring Process document ("Hiring Process") referenced in Ms. Betries-Kendall's affidavit states, in part, that the MTA BSC "sends to the Recruiter a list of candidates who meet the minimum qualifications based on review of the on-line application." Ex. F at 2. The Hiring Process further states that, to meet the minimum requirements for a locomotive engineer position, both internal and external candidates [m]ust not have failed within a five-year period any MTA agency-sponsored training program for either the same position or a similar position requiring comparable qualifications, testing, and/or training…The Vice President, Human Resources, or his/her

designee, retains sole discretion whether to consider the applications of such employees following a five-year period.

See id.

V. Legal Analysis

a. Complainant did not engage in protected activity

As noted in Respondent's Motion For Summary Decision, Complainant must demonstrate that he acted in good faith with reasonable belief that the conduct he was reporting constituted a violation of railroad safety laws, regulations or rules. Complainant's reasonable belief is assessed under both a subjective and objective standard. *Hernandez v. Metro-North Commuter Railroad*, 74 F. Supp. 3d 576 (S.D.N.Y. Jan. 9, 2015). While many of the cases cited in Respondent's Motion For Summary Decision involve employee reporting of a work-related personal injury under Section 20109(a) of the FRSA, the same objective reasonableness standard is warranted for FRSA protected activities under Section 20109(b)(1)(A) such as reporting a hazardous safety or security condition.

According to Complainant's own deposition testimony, Mr. Sciabarassi was already aware of Mr. van Dorp's DUI arrest[4] when Complainant obliquely referenced it upon receiving a written warning about his performance as an ETP trainee from Mr. Sciabarassi:

> Q. When did you mention the DUI arrest of Mr. van Dorp to Mr. Sciabarassi?
>
> A. I don't recall when it was, the exact date, but I know they had brought me in for something that was, a question about something. They had written me up for something that I had called in for so that is when I told them.
>
> Q. Can you be any more specific about time? Was it before or after Christmas that year?
>
> A. I don't remember.
>
> Q. When you say they brought you in what does that mean?

[4] Contrary to the assertion in Respondent's Motion For Summary Decision, Mr. Sciabarassi's prior awareness of Mr. van Dorp's DUI arrest is immaterial to determining if Complainant engaged in protected activity. Respondent's Motion For Summary Decision at 12. The FRSA protects employees who have engaged in the *act of reporting* certain matters pertaining to railroad safety or security. *See* 49 USCS §20109(b)(1)(A)("A railroad carrier . . . shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for reporting, in good faith, a hazardous safety or security condition.").

A. I was called into the office by Mr. Sciabarassi, because there was an issue of me not being in the place that I was supposed to be.

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Based on his deposition testimony, it is clear Complainant did not make a specific safety complaint or demonstrate reasonable belief that a condition hazardous to railroad safety existed when he obliquely mentioned Mr. van Dorp's DUI arrest to Mr. Scabarassi. If Complainant held such a reasonable belief, he would have mentioned Mr. van Dorp's DUI arrest nearer to the time of its occurrence in September 2013 and not almost eight months later when he was faced with a written warning about his conduct or performance in May 2014. Therefore, the undisputed evidence supports finding Complainant did not engage in protected activity under the FRSA.

b. Complainant's reporting of his co-worker's DUI arrest was not a contributing factor in Respondent's denial of his re-entry into the ETP

Assuming Complainant's reference to Mr. van Dorp's DUI arrest to Mr. Scabarassi constituted protected activity under the FRSA, Complainant has presented no evidence which would support finding that his reference to that DUI arrest was a contributing factor in Respondent's denying him re-entry into the ETP at issue.

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *See Young v. CSX Transp., Inc.*, 42 F. Supp. 3d 388 (N.D.N.Y. Sept. 4, 2014); *see also Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014)(quoting Procedures for the Handling of Retaliation Complaints under the Federal Railroad Safety Act, 75 Fed. Reg. at 53,524). To satisfy the contributing factor element of his prima facie case, Complainant does not need to "conclusively demonstrate [an employer's] retaliatory motive." *Kuduk, 768 F.3d 786, 791* (quoting *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010)). Instead, he need only satisfy a "more lenient 'contributing factor' causation standard." *Id*. at 792.

Under this standard, Complainant must show, "by a preponderance of the evidence," that Respondent intentionally retaliated against him for "engaging in protected activity." *Gunderson v. BNSF Ry. Co.*, No. 14-0223, 2015 WL 4545390, at *8 (D. Minn. July 28, 2015) (quoting *Kuduk*, 768 F.3d at 791). "In other words, although it need not be the determinative factor," Complainant must establish that "an unlawful retaliatory motive – or 'discriminatory animus' – . . . contributed in some way to [the employer's] decision." *Id*. (quoting *Kuduk*, 768 F.3d at 791, 791 n.4).

Intentional retaliation can be shown with circumstantial evidence, including "evidence of 'a temporal proximity, pretext, shifting explanations by the employer, antagonism or hostility toward the plaintiff's protected activity, . . . or a change in the employer's attitude toward plaintiff after he/she engaged in protected activity.'" *Id*. at *9 (quoting *Kuduk v. BNSF Ry. Co*., 980 F. Supp. 2d

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it was dissatisfied with his performance and verbally counseled him about his failure to perform required job duties before he complained about alleged discrimination).

1092, 1101 (D. Minn. 2013), *aff'd*, 768 F.3d 786)); *see also DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 7 (ARB Feb. 29, 2012) (noting that "indications of pretext," "an employer's shifting explanations for its actions," and "the falsity of an employer's explanation for the adverse action taken" are among the types of circumstantial evidence that the ALJ may consider when determining whether protected activity was a contributing factor in the adverse personnel action).

Here, Complainant contends intentional retaliation can be shown through circumstantial evidence of pretext and delayed, undocumented explanations by Respondent for its denial of Complainant's re-entry into the ETP at issue. Specifically, Complainant's Opposition states the following:

> Respondent has engaged in a diversionary tactic of attempting to prove, without hearing, the existence of a five (5) year rule was the basis for its denial. This will be shown, after a full hearing, to have been a pretextual reason for the denial. The lengthy delay of offering this reason, and the lengthy confusion arising on Respondent's attempt to confirm the existence of the "rule," despite many communications with several Metro-North officials familiar with Complainant's case is one reason for suspicions to be raised that this was not the "real" reason for the denial.

Complainant's Opposition at 4.

The arguments outlined in Complainant's Opposition are unsupported by any evidence (for e.g., affidavits or exhibits). Those arguments alone are insufficient to establish a genuine issue of material fact regarding pretext. Metro-North has offered undisputed evidence that (1) the five-year rule was part of its written Hiring Process effective at the time of Complainant's application to re-enter the ETP in 2015 and (2) the written Hiring Process was not provided to ETP applicants. *See* Betries-Kendall Aff.; Ex. F.

In his deposition testimony, Complainant stated he was advised by Fred Gill in March 2015 that he was ineligible for re-entry into the ETP because of his earlier release from the ETP. Ex. A at 43. Subsequently, Complainant received a congratulatory email about his having passed an initial test offered as part of ETP candidate application process. *Id*. at 45. Complainant testified that, in their August 2015 meeting, Mr. Biagi, a Metro-North employee in Employee Relations, verbally confirmed the existence of the five-year rule which then precluded his re-entry into the ETP, but did not provide that rule in writing. *Id*. at 48-49.

It would admittedly be confusing to receive a congratulatory email after Complainant was advised of his ineligibility for re-entry into the ETP. However, no evidence has been offered to show any viable connection between

Complainant's reporting of his co-worker's DUI arrest in May 2014 and the time it took for him to receive confirmation of the five-year rule during the period from March to August of 2015.

The manner in which Respondent apprised Complainant about the five-year rule may have been inefficient or inartful, but it is not the role of the OALJ "to sit as a super-personnel department" re-examining a respondent's employment actions. *Kuduk*, 768 F.3d at 792 (quoting *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 898 (8th Cir. 2002)). In the absence of evidence connecting his reporting a co-worker's DUI arrest to the denial of his re-entry into the ETP, Complainant is not entitled to FRSA anti-retaliation relief even if a Metro-North employee relations official or other officials delayed providing him specific information about ETP candidate eligibility requirements.

Complainant has offered no evidence to support finding that the five-year rule (1) was created just to preclude his ETP re-entry in 2015 because of his reference to his co-worker's DUI arrest or, (2) was applied more favorably to any similarly situated employee who had not engaged in protected activity under the FRSA.

In his deposition testimony, Complainant stated that a Metro-North employee, Vinnie Holland, was terminated from the ETP but allowed to re-enter in fewer than five years. Ex. A at 51. Respondent however offered undisputed evidence that, in 2013, Mr. Holland was dismissed from the ETP due to "excessive absences" related to medical reasons and then allowed to re-enter once "his issues" were resolved. Ex. O. Unlike Mr. Holland, the undisputed evidence shows Complainant was terminated from the ETP based on performance, i.e., his failing a physical characteristics test on his second attempt. Ex. D. So, although Complainant was treated less favorably, he was not similarly situated to Mr. Holland in all relevant circumstances as to support any showing of intentional retaliation.

c. <u>Clear and convincing evidence shows Respondent would have taken the adverse action regardless of Complainant's protected activity</u>

Alternatively, even if there is a genuine issue of material fact regarding whether Complainant's protected activity were a contributing factor in the denial of his re-entry into the ETP at issue, Metro-North is still entitled to summary decision. Under the FRSA, if a complainant has made his prima facie case, an employer may be relieved of liability upon demonstrating, "by clear and convincing evidence, it would have taken the same unfavorable personnel action" notwithstanding the protected activity. 49 U.S.C. § 42121(b)(2)(B)(ii). "Clear evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. Convincing evidence has been defined as evidence demonstrating that a proposed fact is highly probable." *Speegle v. Stone & Webster Constr., Inc.*, ARB Case No. 13-074, ALJ Case No.

2005-ERA-00006, slip op. at 26 (ARB Apr. 25, 2014)(internal quotations omitted).

An employer may do so using direct evidence or circumstantial evidence such as:

> 1. evidence of the temporal proximity between the non-protected conduct and the adverse actions;
> 2. the employee's work record;
> 3. statements contained in relevant office policies;
> 4. evidence of other similarly situated employees who suffered the same fate; or
> 5. the proportional relationship between the adverse actions and the bases for the actions."

Id. at 27-28. *See also Franchini v. Argonne National Laboratory*, ARB No. 13-081, ALJ No. 2009-ERA-14 (ARB Sep. 28, 2015).

Here, Respondent has shown that there was a written policy requiring the denial of Complainant's ETP re-entry in 2015: under the Hiring Process, Complainant was ineligible for such re-entry because he had failed an "MTA agency-sponsored training program…for the same position" within a five-year period. Ex. F at 1. It is undisputed that Complainant had been terminated from the ETP in 2013 for not meeting its performance requirements when he failed a physical characteristics test on his second attempt.

Complainant's non-protected activity, i.e., his prior termination due to performance deficiency in the ETP in 2014, held independent significance in Respondent's action at issue in this matter; such activity was distinctly unrelated to reporting of his co-worker's DUI arrest to the ETP Training Manager in May 2014. *See e.g.*, *Gunderson v. BNSF Ry. Co*., No. 14-0223, 2015 WL 4545390, at *14 (D. Minn. July 28, 2015). In addition, Complainant's non-protected activity had greater temporal proximity to his denied re-entry into the ETP than did his mentioning his co-worker's DUI arrest to the ETP Training Manager.

The undisputed evidence clearly and convincingly indicates that Metro-North would have denied Complainant re-entry into the ETP in absence of his protected activity.

VI. Conclusion

Construing all factual allegations in Complainant's favor, the evidence fails to establish essential elements of Complainant's claim, i.e., that he engaged in protected activity or, if his activity were deemed protected under the FRSA, it was a contributing factor in Respondent's denying his re-entry into the ETP in 2015. Complainant has presented no significant probative evidence to support his position that either Respondent's explanation for denying his application to re-enter the ETP

lacks credence or that his alleged protected activity was at least a contributing factor in denying that application assuming Respondent's explanation were true. Complainant's Opposition offers only speculation and conjecture, but fails to outline specific facts that could support a finding in Complainant's favor.

Respondent is entitled to the summary decision it has requested. The undisputed evidence shows that Complainant did not engage in protected activity, but even if such protected activity occurred, such evidence further shows it was not a contributing factor in Respondent's denying Complainant's re-entry into the ETP at issue.

Even if Complainant were found to have established a prima facie case of retaliation under the FRSA, the undisputed evidence demonstrates clearly and convincingly indicates that Metro-North would have denied Complainant's re-entry into the ETP notwithstanding his protected activity.

VII. Order

Respondent's Motion For Summary Decision is **GRANTED**. The complaint is **DISMISSED**.

Digitally signed by LYSTRA HARRIS
DN: CN=LYSTRA HARRIS, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

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, 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 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).