

U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)



Issue Date: 27 February 2020

CASE NO.: 2016-FRS-00052

In the Matter of:

RANDLE NOBLE,
Complainant,

v.

**NORTHEAST ILLINOIS REGIONAL COMMUTER
RAILROAD CORP.,**
d/b/a METRA,
Respondent.

Appearances:

Jill M. Mills, *Esq.*
Law Office of Jill M. Mills
Chicago, Illinois
For the Complainant

Stephen G. Goins, *Esq.*
Thomas J. Platt, *Esq.*
Metra Law Department
Chicago, Illinois
For the Respondents

Before: John P. Sellers, III
Administrative Law Judge

DECISION AND ORDER

This matter arises out of the employee-protection provisions of the Federal Rail 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 ("9/11 Act"), Pub. L. No. 110-053 (Aug. 3, 2007), and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). The implementing regulations appear at Part 1982 of Title

29 of the Code of Federal Regulations (“CFR”). The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee, if such employee engaged in certain protected activity.

PROCEDURAL HISTORY

On November 25 2014, Randall Noble (“the Complainant”) filed a complaint under the FRSA, alleging that the Northeast Regional Illinois Regional Commuter Railroad Corporation, d.b.a., Metra (“the Respondent”) engaged in retaliatory conduct against him for reporting safety issues and a work-related illness. (ALJX 1.) Specifically, the Complainant alleged that he had engaged in protected activity by reporting safety violations in 2010, and that, due to the “severe harassment, intimidation and bullying” he sustained in retaliation, he had been placed on authorized medical leave under Metra’s Employee Assistance Program (“EAP”) since August of 2010. According to the Complainant, on or about June 2, 2014, he received clearance from his treating doctor to return to work, but rather than returning him to work, Metra had requested that he provide additional medical evidence and undergo further evaluation, “thus denying and delaying” his return to work. (*Id.*)

An investigation conducted by the Occupational Safety and Health Administration (“OSHA”) of the Department of Labor (“DOL”) followed. (ALJX 2.) In a letter dated March 31, 2016, and date-stamped April 8, 2016, the OSHA Regional Supervisory Investigator found that the evidence gathered did not support the conclusion that the Complainant’s protected activity was a contributing factor in Metra’s “decision to deny [his] return to service.” The Regional Supervisory Investigator also concluded that Metra’s decision to “deny [the] Complainant’s return to service” was “not seen as an adverse action” under the FRSA. Thus, the investigation found no reasonable cause to believe that a violation of the FRSA had occurred, and the claim was dismissed. (*Id.*)

The Complainant’s request for a formal hearing was received by this Office on May 4, 2016. (ALJX 3.) The parties thereafter participated in this Office’s Mediation Program. By Order dated January 16, 2018, a mediator was appointed. (ALJX 4.) By Order dated July 25, 2018, Chief Judge Stephen R. Henley announced that the parties had been unable to reach a settlement. (ALJX 5.)

Pursuant to a Notice of Hearing and Prehearing Order issued on October 19, 2018, the undersigned conducted a hearing on this claim on December 7, 2018, in Chicago, Illinois. (ALJX 6.) The parties were afforded an opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges.¹

ISSUES

The issues contested at the outset of the hearing by the Complainant and the Respondent were as follows:

¹ 29 C.F.R. Part 18A.

1. Whether the Complainant engaged in protected activity under § 20109 (a)(4) of the FRSA;
2. Whether the Respondent had knowledge of the protected activity;
3. Whether the Complainant suffered an adverse job action;
4. Whether the Complainant's protected activity contributed to the adverse job action;
5. Whether the Respondent can show by clear and convincing evidence that it would have discharged the Complainant absent his protected activity; and
5. Whether the Complainant is entitled to relief under the FRSA, and, if so, the appropriate measure of relief.

EVIDENCE

Overview of Events

The Complainant alleges that in 2010, he reported safety violations involving the use of alcohol by Metra engineers and the operation of trains with almost no brakes. (Tr. 27-39.) According to the Complainant, he was consequently subjected to a campaign of harassment. On August 13, 2010, while at work, he experienced chest pain and dizziness and was transported to the hospital by paramedics. (EX 1.) He was discharged twenty-four hours later with a diagnosis of an anxiety attack and a prescription to take .25 mg of Alprazolam by mouth three times a day. (*Id.*)

On August 17, 2010, Dr. Edward Bleir of Advanced Occupational Medicine Specialists noted that the Complainant had not yet obtained his prescription. (*Id.*) He further noted that the Complainant had been seen on August 16, 2010, for a psychiatric evaluation, and was subsequently referred for psychiatric outpatient evaluation. Moreover, he stated that the Complainant had been advised that he should undergo an EAP evaluation. Based on his own personal examination of the Complainant, Dr. Bleir concluded that the Complainant's diagnosis remained unclear. He stated that it would be appropriate for the Complainant to undergo a psychiatric evaluation as well as to enter the EAP. According to Dr. Bleir, the Complainant was "currently unable to return to work until he is cleared by the EAP program and the consulting psychiatrist." (*Id.*)

By letter dated May 6, 2011, Dr. Perez advised that the Complainant was still being followed for "medication management to address his anxiety and depression." (EX 3.) She further advised that the Complainant was in counseling and "continues to need ongoing medical leave due to severity of his symptoms." (*Id.*)

The Complainant was subsequently put on continuous leave under the Family and Medical Leave Act (“FMLA”), until he was finally placed on medically disqualified status on January 6, 2012. (EX 4.)

Over two years later, on a prescription form dated May 29, 2014, Dr. Perez wrote that the Complainant was fit to return to work effective Monday, June 2, 2014. (EX 5.) On August 18, 2014, Molly Blechl, Head of Medical Services in Metra’s HR Department, wrote to Dr. Perez, acknowledging her statement that the Complainant was fit to return to work, but noting that Metra’s Chief Medical Officer required “additional documentation regarding his ability to perform the essential functions of his job.” (DX 6.) Blechl noted that the Complainant worked in “a safety-sensitive industry around moving equipment and trains.” She added: “His safety and the safety of his co-workers are of utmost importance to Metra.” (*Id.*) She then provided a job analysis of the Complainant’s job title of laborer and requested Dr. Perez’s opinion addressing his fitness to perform his regular duties. She also provided the company’s policy regarding drug and alcohol, which specifically referred to the on-duty use of prescription medications. She noted that the Complainant was being asked to postpone his return to work pending Dr. Perez’s response. (*Id.*)

On September 10, 2014, Blechl sent a follow-up letter seeking to clarify whether Dr. Perez was recommending that the Complainant take medication to address his psychological issues. (EX 7.) She noted that the Complainant would most likely return to work “at the same location and with many of the same co-workers and supervisors as when he initially went on leave, pursuant to his seniority under the terms of the collective bargaining agreement.” Therefore, she observed, the Complainant would be “required to get along with his co-workers and supervisors, who he has identified as the psychosocial stressors that resulted in him leaving the workplace in the first place.” She then stated that the Complainant was again being asked to postpone his return to work, pending her response, which she asked Dr. Perez to send to Dr. Lynsey Stewart at US Healthworks.

On March 9, 2015, Blechl sent another letter to Dr. Perez, noting that Metra had not yet received a response to its earlier September 10, 2014, letter seeking clarification. (EX 8.)

On April 30, 2015, Dr. Perez responded in a letter addressed to “To Whom It May Concern.” (EX 9.) Dr. Perez stated that the Complainant was last seen on April 7, 2015, and showed “no evidence of psychosis, no periods of agitation, no suicidal thoughts[,] and no thoughts of harm to others.” She observed that there were “times when he gets tearful and anxious but has not had recent panic attacks.” She stated that he had not been on any medications since March 31, 2014, because he was “unable to afford medications,” and that he “tried to cope via his spiritual support system.” She described him as “currently...not a danger to himself and others,” and commented that he did not anticipate “a crisis” at the job, and he would follow recommended company procedures if any problems arose. (*Id.*)

The Complainant was next scheduled by Metra for a “Reinstatement physical with a non-dot drug test” to be conducted on July 6, 2015. (EX 11.) On that date, Dr. Dean Shoucair indicated that the Complainant was off work pending a “psychiatric referral + Non-DOT Drug Screen.” (EX 11; Tr. 132.)

The Complainant was then scheduled for a “fitness for duty” evaluation with Dr. Stafford C. Henry, a psychiatrist, on July 15, 2015. (EX 13.) According to the Complainant, when he reported for the appointment, he told Dr. Henry he had been “off on EAP,” which prompted Dr. Henry to make a hurried telephone call to Blechl. (Tr. 48.) The Complainant testified that he then overheard Dr. Henry tell Blechl that he could “lose my license” if he spoke to the Complainant, and then told the Complainant that “[t]his interview is over with.” (Tr. 50.)

In a letter dated the same day, however, Dr. Henry recounted an entirely different version of the appointment. (EX 13.) He stated that after “paraphrasing his understanding of the waiver of confidentiality,” the Complainant spent an hour “detailing the circumstances which initially lead him to be off service,” before discussing his view that the EAP had violated his confidentiality by forwarding his medical records to Dr. Henry. Dr. Henry then stated that the Complainant discussed his pending legal actions and his status as a “whistleblower.” Dr. Henry commented, “I should add that given his fixation on these matters, I was unable to really, even begin the assessment process.” He remarked that the “appropriate next step would be for [the Complainant] to undergo a complete neuropsychological evaluation.” After he had an opportunity to consult with the neuropsychologist, Dr. Henry added, he would be “better positioned to resume my fitness for duty assessment.”

In a letter dated August 28, 2015, Dr. Henry advised that the Complainant had “presented unannounced” to his office on that date, requesting a letter to verify that he had been seen on July 15, 2015. (EX 14.) To satisfy his request, Dr. Henry wrote that on July 15, 2015, the scheduled evaluation was “not completed, no diagnosis was made or proffered, no treatment was rendered,” and the Complainant was advised to “follow through with his employer so that the assessment could be completed.” (*Id.*)

By letter dated August 28, 2015, Blechl advised the Complainant that Metra had arranged an appointment with him on September 8, 2015, with Dr. David Hartman, a neuropsychologist. (EX 15.) The Complainant was advised that if he did not comply and fully cooperate with the directive to attend the appointment, it would “delay Metra’s ability to make an informed decision regarding your fitness for duty.” (*Id.*)

The Complainant did not keep the appointment with Dr. Hartman. (Tr. 135.) There is no record that the Complainant had any further contact with any physician in order to attempt to return to work. (*Id.*) There is no record of any request by the Complainant nor his union to arrange alternative return-to-work procedures. (*Id.*)

At the time of the hearing, the Complainant was still considered an employee on leave from Metra. (Tr. 155, 187.)

Rule 11(3) of the Collective Bargaining Agreement (CBA) provides for Metra to reexamine an employee after a break in service if it appears that the employee has “changed in some manner to the extent that he would be liable to cause injury to himself or fellow employees or cause liability to the carrier.” It also provides that if the company is not satisfied with the certificate of re-examination, it has the right to have the employee examined by its own

physician. Should there be a disagreement between the physicians as to the employee's fitness to return to work, Rule 11 provides for a third physician, the selection of which is agreed upon by both parties, to break the tie. (EX 16.)

Rule 12 provides for all claims or grievances to be presented by duly authorized local committee or their representative within 60 days from the date of the occurrence. (*Id.*)

According to Danielle Gautier, Director of Labor Relations at Metra, no grievance has been filed on behalf of the Complainant under the CBA. (Tr. 175, 181.) According to Gautier, it was her understanding that the Complainant was still an employee of Metra, and would still be afforded the procedures under Rule 11. She agreed that the Complainant could have availed himself of the procedures at any point during the period he sought to return to work, and during the years prior to the hearing. (Tr. 187-188.)

PROCEDURAL AND EVIDENTIARY MATTERS

Additional Witnesses

The Complainant was represented in this case by counsel, who made clear during her opening statement that she was representing the Claimant "pro bono because he can't pay me as a lawyer." (Tr. 20.) Perhaps because of this arrangement, the Notice of Hearing and Pre-Hearing Order issued on October 19, 2018, was not complied with. Specifically, there was no pre-hearing exchange and certainly no list of witnesses provided, by either party, to the undersigned. There was no stipulation of documents; no statement of issues. No preliminary motions were filed, and no evidence of any discovery having been undertaken by either side.

Of note, the Pre-Hearing Order noted specifically that the failure to comply with the provision requiring the parties to identify witnesses and give a short summation of their testimony prior to the hearing "may result in the exclusion of the testimony of witnesses not listed." (ALJX 6, n. 1.)

Nonetheless, despite the complete absence of any witness list, a statement of the issues, or stipulation of documents, as required by my Notice of Hearing and Pre-Hearing Order, the hearing went forward on December 7, 2018. Witnesses were called and testified, including the Complainant, who testified twice. At the close of the hearing, both sides indicated a desire to call additional witnesses. I expressed a willingness to consider that possibility, and asked that the parties put together a list of those they would still like to call. (Tr. 203-204.) As part of that discussion, I reminded counsel that neither party had provided the undersigned with a list of witnesses before the hearing, and that it did not appear that the parties had engaged in any discovery. (Tr. 202.) At that point, when counsel for the Complainant referred to the proceeding as a "meeting," I made it a point to clarify that I had conducted a hearing, not a meeting. (Tr. 202.)

On December 20, 2018, I conducted a telephone conference with counsel and both the Complainant and Metra wished to call two additional witnesses, none of whom were previously identified as witnesses. Both the Complainant and Metra wished to call two witnesses whose

testimony would have been relevant to the events in 2010. As will be discussed, *infra*, however, any complaint based on conduct in 2010 would be time-barred in the present action, as the Complainant did not file his FRSA complaint until November of 2014. Even if this were not the case, neither counsel could adequately explain why these witnesses were not identified prior to the hearing pursuant to my Pre-Hearing Order.²

Upon consideration, the undersigned disallowed any further witnesses. Again, the parties had been notified by my Pre-Hearing Order that failure to identify witnesses before the hearing, by the given date of November 19, 2018, could result in their exclusion. As the instruction to identify witnesses before hearing had been ignored, without any showing of good cause, the sanction of excluding witnesses was imposed.

Briefs

Furthermore, as part of the conference call on December 20, 2018, I set a deadline for closing briefs of March 20, 2019. Neither the Complainant nor Metra filed a closing brief.

Complainant's Post-Hearing Exhibits 9 and 10

Finally, it is noted that on January 29, 2019, counsel for the Complainant sent in copies of CX1-8 that were admitted at the hearing. She stated further that she had “added two Affidavits and hoped to have materials forward to me from Doctor Perez, but despite two telephone conversation with her, she says she is still working on this.” (ALJX 8.)

Regarding the two additional affidavits marked CX 9 and CX 10, they are as follows: CX 9 is an affidavit in which the affiant identifies herself as a “Federal Investigator” with the EEOC “during the period January 1976 until March 2017.” The affiant stated that she contacted Metra about the Complainant’s failure to attend an appointment with a neurologist after the Complainant told her that he had never received notice of the appointment. The affiant further stated that she verified the Complainant’s current address with Metra and Metra informed her that the company would attempt to reschedule the evaluation. She also attested, “According to Mr. Noble, EAP was threatened if they cooperated with EEOC’s investigation, Metra would end their contract.”

CX 10 is a post-hearing affidavit from the Claimant dated January 17, 2019. In the affidavit, the Complainant attested that Metra had “forced me on EAP and FMLA at the same time.” He again asserted that Dr. Henry peremptorily asked him to leave his office after talking to Blechl on the telephone. He alleged for the first time, meaning that he did not offer any such testimony at the hearing, that Margaret Kelly of the Metra EAP “stated to me that Metra did not want me back working for them at all because of what I said about the engineers being drunk and driving the Metra trains drunk with thousands of passengers on the train.” He added that Kelly told him that “Metra pays her office and company millions of dollars and Molly Blechl and Metra told her not to return me back to work because if she did return me that Metra would stop doing business with the EAP.”

² Counsel for Metra did indicate at the hearing that he had one more witness present, Mark Simos. (Tr. 172.)

Neither of these affidavits are admissible. The Complainant's written assertions were not testified at the hearing, although he was called twice as a witness. He cannot after the hearing make such critical assertions, in writing, not subject to cross-examination, and expect them to be accepted at face value. The same is true of the attestation of the EEOC investigator. If the Complainant wished for the investigator to give evidence, his counsel should have identified her as a witness and attempted to secure her appearance at the hearing. If the witness was unavailable, then her testimony should have been preserved through pre-trial deposition in a manner that would have provided an opportunity for cross-examination. In sum, these affidavits are not substitutes for witness testimony. Their probative value is substantially outweighed by the prejudice to the Respondent, who was not given any opportunity to challenge the affiant's statements through live testimony. They are not considered further.

APPLICABLE LAW

The Federal Rail Safety Act ("FRSA") provides for employee protection from discrimination if the employee has engaged in protected activity while employed by a railroad carrier engaged in interstate or foreign commerce. 49 U.S.C. § 20109 (a). Specifically, the FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's protected activity. 49 U.S.C. § 20109 (a). An employee engages in protected activity if, among other things, the employee in good faith, notifies or attempts to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness. 49 U.S.C. § 20109 (a)(4).

On November 9, 2015, the final rule governing the employee protection provisions of the National Transit Systems Security Act ("NTSSA"), enacted as § 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Commission Act"), and the FRSA, as amended by § 1521 of the 9/11 Commission Act, was published in the Federal Register.³ Pursuant to the 9/11 Commission Act, enacted into law on August 3, 2007, Congress transferred authority for rail employees' whistleblower claims from the National Railroad Adjustment Board to the Department of Labor under OSHA. The amendments changed the legal burdens of proof in FRSA claims, requiring they be harmonized with the Wendall H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), codified at 49 U.S.C. § 42121. OSHA's jurisdiction over such claims became effective on August 3, 2007. *Xavier A. Rosadillo v. Union Pacific Railroad Co.*, ARB Case No. 10-085 AU Case No. 2009-FRS-008.

DISCUSSION

In order to prevail on his FRSA claim, the Complainant must prove by a preponderance of the evidence that "protected activity was a contributing factor in the adverse action alleged in the complaint." 29 C.F.R. §1982.109(a). If the Complainant satisfies this burden, however, the Respondent may avoid liability by demonstrating by clear and convincing evidence that it "would have taken the same adverse action in the absence of any protected behavior." 29 C.F.R. §1982.109(b).

³ To be codified at 29 CFR Part 1982.

Adverse Action

In order to succeed on his claim under the FRSA, the Complainant must necessarily demonstrate that he suffered an adverse job action, or some measure of retaliation. The Administrative Review Board has cited the United States Supreme Court's decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), a case decided under Title VII of the Civil Rights Act of 1964. In describing the injury or harm alleged as retaliation, the Court held that: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id* at 68.

As noted, the Complainant did not file a closing brief. Consequently, the undersigned can only extrapolate from his counsel's opening statement, and the evidence itself, to discern his theory as to how he has experienced an adverse job action.

The Complainant first alleged that he suffered retaliation after he filed reports of seeing empty alcohol bottles in the engineers' cabs and refused to sign off on a train with insufficient brakes leaving the Metra terminal. (Tr. 18-19.) He testified that he was harassed, bullied, and even had a hard hat thrown at him. (Tr. 28-34.)

These actions, however, even if they occurred, happened in 2010. Under the FRSA, if an employee thinks he has been wronged in violation of the Act, he must file a complaint with OSHA "not later than 180 days after the date on which the alleged violation ... occurs." 49 U.S.C. § 20109(d)(2)(A)(ii), (d)(1); 29 C.F.R. §§ 1982.103–104.1 The Complaint in this case was filed on or about November 10, 2014. (ALJX 1.) Clearly any complaint based upon harassment directed toward the Complainant in 2010—which would have been obvious to him at the time given its alleged overt nature—would have been untimely if not filed until November 2014.

As noted, the Complainant submitted an affidavit after the hearing in which he alleged that he was forced against his will in August of 2010 to go off work under the auspices of the EAP, presumably in retaliation for his alleged reporting of safety violations. (CX 10.) As discussed above, I have refused to admit this affidavit. A review of the Complainant's testimony at the hearing shows that toward the end of the hearing, on redirect examination, the Complainant described the events that led to his panic attack and hospitalization. (Tr. 189-197.) He testified that after being hospitalized, he tried to return to work two days later, but was told that he was to "report down to the EAP." (Tr. 193.) According to the Complainant, EAP told him, "We're going to take you off work," and then selected Dr. Perez to be his treating psychiatrist. (Tr. 194.) The Complainant also testified that Metra "threatened Dr. Perez," and told her, "We want you to send Noble back to work after two years." (Tr. 196.) The Complainant testified that Dr. Perez resisted, telling Metra, "He's not well to go back to work yet," and, "You can't force me to send him back to work." (Tr. 196.)

This testimony is conflicting at it seems to suggest both that Metra forced the Complainant to be off work under the auspices of the EAP, somehow orchestrating his removal by handpicking Dr. Perez, and yet at the same time indicating that Dr. Perez resisted pressure to

return him to work. Counsel for the Complainant even went so far to suggest that Metra handpicked Dr. Perez because she would be willing to communicate with the company in violation of the EAP's policy of confidentiality. (Tr. 199.)

In any event, all these interactions took place in August of 2010, so any complaint that may have arisen as a result of the Claimant going off work under the auspices of the EAP is time-barred since the Complainant did not file the present complaint until November 2014.

There was some suggestion at the hearing that the Complainant believed that his being subsequently placed on FMLA-leave was retaliatory. Counsel for the Complainant, in her opening statement, described it as "an unusual process." (Tr. 19.) Counsel argued that "he was forced to do that in order to retain his job." (Tr. 19-20.) However, Lolita Roberts, who is Metra's Manager of Absence Management Programs, testified as follows regarding the Complainant's move to FMLA:

Q. After Mr. Noble went off on medical leave, did he apply for FMLA?

A. He really wouldn't have to apply for FMLA. When we became aware of the fact that he was off work due to a medical reason, he would automatically be placed on FMLA.

Q. Why is that?

A. It's consistent with regs, with the federal regulations. And it's Metra's practice, when a person has a health issue, either physical issue or emotional issue that takes them off work, they need to be off work for a continuous period of time, they would be put on FMLA.

Q. And was Mr. Noble placed on FMLA?

A. Yes, he was.

Q. And looking at Group Exhibit 2, are you able to tell from your review of those documents the length of Mr. Noble's FMLA leave?

A. It looks like his FMA leave began on August 17, 2010, extended through December 19, 2010.

Q. How much FMLA time are employees entitled to?

A. It's 60 days, typically, 480 hours.

(Tr. 118.)

Roberts clarified that the Complainant's FMLA leave expired on December 15, 2010, after which the Complainant "began a medical leave of absence on December 16, 2010." (*Id.*) She explained that when an employee was not able to return to work after FLMA leave has been exhausted, Metra then moved the employee to a medical leave of absence. (Tr. 118-119.) She clarified that this was done to extend the employee's time off for medical reasons. (Tr. 119.) She then reviewed the medical information Metra was receiving from Dr. Perez, which indicated that the Complainant was not yet ready to return to work. (Tr. 120-122.)

Although the Complainant's counsel suggested that there was something "unusual" in his being put on FMLA medical leave, the record simply does not support that the process was in any way unusual or nefarious. In the absence of any specific argument advanced by the Complainant as to why the process was retaliatory or discriminatory in nature, I find nothing to suggest that the Complainant being placed on FMLA leave constituted an adverse job action. Moreover, the Complainant was placed on FMLA medical leave beginning in 2010. Again, any complaint not filed until November 2014 based on his being placed on FMLA leave in 2010 would be untimely.

As noted, on a prescription form dated May 29, 2014, Dr. Perez wrote that the Complainant was fit to return to work effective Monday, June 2, 2014. (DX 5.) In the Complainant's view, Metra's failure to return him to work immediately constitutes an adverse job action. From his complaint and his counsel's opening statement, it is clear that the Complainant believes that Metra has not returned him to work due to the events that occurred in 2010. In this light, the Complainant argues, Metra's refusal to allow him to return directly to work after a four-year absence on medical leave for psychological issues must be seen as retaliatory. As noted, the Complainant filed his FRSA complaint on November 25, 2014. As the Complainant had still not been returned to work, his complaint based upon the company's failure to return him to work was timely filed.

Metra did not file a closing brief, either, so the company's counterargument must also be deduced from counsel's opening statement and the evidence produced at hearing. The Respondent's argument relies on the fact that the Complainant, as a laborer, was a member of the National Conference of Firemen and Oilers Union, and thus subject to the Collective Bargaining Agreement ("CBA"). (Tr. 21.) According to Rule 11 of the CBA, when an employee seeks to return after extended medical leave, the company has a right to have him examined for fitness prior to a return to duty. Metra argued at the hearing that the Complainant was in a safety-sensitive position; he had been off for four years due to psychological issues; there was a question of whether he was on medication which would contravene company policy; and there was concern about his return to the same work environment which had given rise to his "panic attacks and stress." (Tr. 21.) Consequently, Metra's counsel asserted, the company properly invoked its authority under Rule 11 and scheduled him for a psychiatric evaluation as part of his return-to-duty fitness evaluation. When the psychiatrist, Dr. Henry, recommended a neuropsychological evaluation to aid in his assessment, the Complainant "refused to go to that appointment," Metra argued, and, therefore, his return to work—which was still possible—had been delayed as a result of his own failure to follow the process set forth in the CBA. (Tr. 22.)

Metra's Director of Labor relations, Danielle Gautier, testified at the hearing that, as a laborer at Metra, the Complainant was subject to the CBA and specifically the procedures set forth in Rule 11. (Tr. 182) She further testified that "Rule 11 is not superseded by [Metra's] EAP policy." (Tr. 183, 186.) She also made clear that the Complainant was still considered an employee of Metra, and that, if he chose to do so, he could afford himself of the procedures set forth in Rule 11. (Tr. 187.) In other words, the Complainant could follow through with the neurophysiological evaluation requested by Dr. Henry and, if Dr. Henry concluded that he was not fit for work, the Complainant could then ask for "a neutral third-party physician" in order to act as "a sort of tiebreaker." (Tr. 179.)

As previously noted, after the hearing, counsel for the Complainant submitted an affidavit from an EEOC investigator alleging that the Complainant never received notice of the neurophysiological evaluation, and that requests to reschedule the appointment had been rebuffed by Metra. (CX 9.) I have refused this exhibit admission for reasons already stated.

Regarding the scheduling of the neuropsychological evaluation, Metra provided a letter it wrote to the Complainant on August 28, 2015, in which it advised him of the appointment scheduled on September 8, 2015. (EX 15.) At the hearing, however, the Complainant stated that he had “never seen this letter in my life.” (Tr. 189.) Indeed, he testified that the day of the hearing was the “first time” he had “heard that.” (Tr. 199.) Upon questioning from the undersigned, however, he agreed that on August 28, 2015, he was living at the address stated in Metra’s letter advising him of the neuropsychological evaluation. (Tr. 111; EX 15.) Moreover, the Complainant had testified earlier regarding his view that he was not obligated to “take another physical.” To quote the Complainant, “I said, ‘Molly [Blechl], the doctor said I passed the physical. As far as he’s⁴ concerned, I can return back to work.’” (Tr. 52.) In sum, the distinct impression the Complainant originally conveyed was that he refused any further medical evaluation after his visit to Dr. Henry, arguing vociferously against it, not that he had failed to receive notice of it. Counsel for the Complainant had the same impression of her client’s testimony. She asked him, “So after that last *refusal on your part to see the additional physical* with the other doctor [sic], what happened?” (Tr. 54.)

In sum, I find that the Complainant has not convincingly shown that he did anything other than refuse to go forward with the neuropsychological evaluation requested by the Employer, to be made part of Dr. Henry’s psychiatric evaluation of his fitness to return to work. Clearly, the Complainant felt that Metra had no right to request him to do so. He offered no explanation why he would not have received the letter from Metra (EX 15) setting up the appointment.

I also find that the weight of the evidence establishes that the CBA conferred upon Metra the right to request such examination, and for the Complainant to request a third physician to resolve any conflict between Dr. Henry and Dr. Perez should they have ultimately disagreed as to his ability to return to work. In sum, I do not find that Metra’s request to have the Complainant undergo a psychiatric evaluation by Dr. Henry, after a neuropsychological evaluation by Dr. Hartman, was an adverse job action. Rather, it appears to be among the rights conferred to Metra under the CBA. As noted, the Complainant never filed a grievance challenging Metra’s authority to have him undergo further evaluation; rather, it appears that he simply refused to do so.

Nor do I find that the Complainant has submitted any evidence to justify the conclusion that Metra’s exercise of its rights under Rule 11 constituted a form of retaliation. There is no evidence of disparate treatment, in other words, no evidence that the Complainant was treated

⁴ The Complainant was apparently referring to the physical examination that was conducted on July 6, 2015. (EX 11.) On that date, Dr. Dean Shoucair indicated that the Complainant was off work pending a “psychiatric referral + Non-DOT Drug Screen.” (EX 11;Tr. 132.)

any differently than any other employee attempting to return to work in a safety-sensitive position after a prolonged absence of almost four years due to psychological problems, with a prescription for medication, and a history of work-related issues.

As noted, in describing the injury or harm alleged as retaliation, the Supreme Court in *Burlington, supra*, held that: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse...which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id* at 68. Throughout the hearing, and listening to the arguments presented by the Complainant, it struck me that the Complainant, not Metra, had acted unreasonably regarding his return to work. In other words, it seemed a reasonable person in similar circumstances would have either cooperated with Metra's desire to have him psychologically evaluated for a return to work, in order to demonstrate his fitness, or at least consulted with a union representative and perhaps filed a grievance if it was felt that Metra was overstepping its bounds under Rule 11. Moreover, a reasonable person, it seemed, would have availed themselves of the tiebreaking procedure set forth in Rule 11 if Dr. Henry disagreed with Dr. Perez. Certainly it cannot be said that Metra's actions, which appear to have been within the CBA, were such that it might have dissuaded other employees from making or supporting a charge of discrimination.

Finally, it should be noted that there was some testimony adduced at the hearing regarding whether the EAP's rules of confidentiality had been strictly kept. (Tr. 160-170.) Given the prolonged nature of the Complainant's leave, in which he was originally on FMLA medical leave of absence, and then on medical disability, there seemed to be some confusion whether his treatment remained under the auspices of the EAP. (Tr. 144.) Roberts explained that in order to continue his medical leave, Metra required "some kind of documentation basically saying he was still sick, still needs to be off work." (Tr. 145.) She testified that she assumed that Dr. Perez provided the Complainant's medical records directly to Metra, rather than through the EPA, because Metra had "established a relationship with her." (Tr. 145.) She implied that all Metra required was "something saying that Mr. Noble is in treatment and he is compliant with his treatment," but if Dr. Perez gave more information than that to the company, "that would be more the doctor's call than ours." (Tr. 146.)

It does appear, therefore, that Dr. Perez may have, either unwittingly or not, overshared the Complainant's treatment records and diagnoses with Metra, when that information should have gone directly to the physician performing the company's initial return-to-work physical, Dr. Shoucair. (Tr. 145.) Dr. Perez was not an employee of Metra, however. One can understand why someone of the Complainant's frame of mind, who felt that he had been retaliated against by the company in 2010, may have concluded that this exchange of information was all part of a conspiracy between Metra and Dr. Perez. The record, however, does not support such a conclusion. As Roberts testified, there were other instances in which employees who started out on EAP, moved to "job-protected FMLA-leave" and then after their FMLA expired, provided medical records in order to advise the company that the person was "still having the health issue," meaning that "they still need to be off work." (Tr. 163.)

In sum, the only irregularity that the undersigned can possibly detect in the record concerning the Complainant's attempted return to work was a *possible* violation of the EAP's

confidentiality rules, but even this is subject to debate. I do not find that this possible irregularity, even if it constituted a violation of the EAP, constituted an adverse job action. Nor do I conclude that it constituted an action, which, when viewed in context, "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington, supra*, at 68. Therefore, whatever infraction there might have been of the EAP's rules of confidentiality, I do not find evidence that it was in retaliation for protected activity.

Accordingly, I make the following findings of fact and law:

1. Any claim based on an adverse job action or retaliation occurring in 2010, which includes the events that led to the Complainant's hospitalization as well as his placement on leave under the auspices of the EAP and FMLA (both of which occurred in 2010), are time-barred as the Complainant did not file his present claim until November 2014.
2. At the date of the hearing, the Complainant remained an employee of Metra's on medical disability due to psychological issues. (Tr. 187.)
3. The Complainant had been taken off work on or about August 17, 2010, after Dr. Bleir, who performed a return-to-work evaluation following the Complainant's hospitalization for a diagnosed anxiety attack, recommended that he "undergo a psychiatric evaluation as well as enter in to the EAP program." (EX 1.)
4. On the same date as Dr. Bleir's evaluation, the Complainant was placed on FMLA-leave. (EX 2.)
5. Dr. Perez, the psychiatrist chosen to treat the Complainant, extended his medical leave through November 30, 2010 (EX 2-D.) Subsequently, she extended it on December 7, 2010 (EX 2-K), May 6, 2011 (EX 3-A); June 2, 2011 (EX 3-B); June 29, 2011 (EX 3-C); August 27, 2011 (EX 3-D); November 9, 2011 (EX 3-F); January 4, 2012 (EX 3-G); and March 22, 2012. (EX 3-H.)
6. On January 6, 2012, the Complainant was moved from FMLA-leave to "medically disqualified status." (EX 4.)
7. On May 19, 2014, D. Perez wrote a note stating that the Complainant was medically fit to return to work. (EX 5.)
8. On November 25, 2014, the Complainant filed a complaint with the Secretary alleging that he had received clearance from

his treating doctor(s) to return to work, but had been requested by Metra to delay his return to work while 1) the company sought additional information from his health-care providers, and 2) he underwent a company-sponsored return-to-work evaluation. (ALJX 1.)

9. After receiving Dr. Perez's note, which was written on an RX script and did not contain any additional information other than stating that the Complainant was fit to return to work on June 2, 2014, Metra attempted to obtain additional information from Dr. Perez. These attempts lasted from August 18, 2014 (in other words before the Complainant filed his FRSA complaint) and were not successful until April 30, 2015, when Dr. Perez wrote a letter explaining why she felt that the Complainant was ready to return to work. (EX 6-9.)
10. On July 6, 2015, the Complainant underwent a return-to-work physical examination by Dr. Shoucair, who indicated that the Complainant should remain off work pending a psychiatric evaluation and "Non-DOT Drug Screen." (EX 11.)
11. Metra scheduled a psychiatric evaluation with Dr. Stafford Henry, which took place on July 12, 2015. (EX 13.) Although the Complainant appeared for the visit, Dr. Henry described the Complainant as having a "fixation" on issues concerning the confidentiality of his medical records, as well as his status as a whistleblower, which precluded Dr. Henry from assessing his fitness for work and resulted in him recommending a neuropsychological examination to aid in his assessment. (*Id.*)
12. After his visit to see Dr. Henry, the Complainant was unwilling to undergo further medical evaluation (Tr. 51-52, 54) and did not appear for the neuropsychological evaluation.
13. The Complainant's claim that he did not receive the letter scheduling the evaluation (EX 15) is unsubstantiated, and in any case does not explain why he has not as yet cooperated with a rescheduled evaluation.
14. The Complainant's position as laborer falls under the Collective Bargaining Agreement. (Tr. 182.)
15. Rule 11 of the CBA gives to the company, if "not satisfied with the certificate of re-examination," or possessed of "any doubt as to the physical condition of the employee upon his return to service after re-examination," the "right to have said employee

examined by its own physician.” (EX 16.)

16. The Complainant has failed to demonstrate that Metra’s request to have the Complainant undergo a psychiatric evaluation, including neuropsychological testing, to determine his fitness to return to work, after a prolonged absence of over four years for psychological issues, constitutes either a violation of the CBA, an adverse job action, or harassment.
17. The Complainant never filed a grievance regarding Metra’s use of Rule 11 to delay his return to work pending further psychiatric testing. (Tr. 181.)
18. As an employee of Metra, it remains the Complainant’s prerogative to undergo a psychiatric and neuropsychological evaluation, as requested by Metra, and if he should receive an unfavorable evaluation, request under Rule 11 a tie-breaking evaluation by a physician-psychiatrist mutually agreed upon by the Complainant and Metra. (Tr. 187; EX 16.)
19. Alternatively, it remains the Complainant’s prerogative to file a grievance under the CBA if the Complainant believes that Metra is overstepping its bounds by requesting a psychiatric and neuropsychological evaluation under Rule 11.
20. It remains unclear whether Dr. Perez overshared the Complainant’s medical records when Metra sought further clarification of her determination of the Complainant’s fitness to work; however, if so, there is no evidence that the exchange of information was retaliatory, and in any case, whatever irregularity occurred does not amount to the type of conduct which would dissuade a reasonable worker from making or supporting a charge of discrimination.

CONCLUSION

The Complainant has failed to establish that the delay in his return to work constitutes an adverse job action or retaliatory conduct. Based on the evidence of record, Metra has not taken any action outside of the Collective Bargaining Agreement. Moreover, based on the evidence of record, the Complainant has failed to prove that the delay in his return to work is the result of an adverse job action, including retaliation or harassment, as opposed to his own failure to move the process forward by either agreeing to cooperate with Metra’s request for further psychiatric and neuropsychological testing, or challenging Metra’s right to make such a request by filing a grievance protesting the action under Rule 11 of the CBA. Either of these two options remain open to the Complainant, as he remains an employee Metra on disqualified medical status. Nor

does the record establish definitively the rules of confidentiality that applied in the Complainant's situation, or that Metra violated such rules.

ORDER

Accordingly, having failed to establish the requisite element of either an adverse job action or retaliation, which is necessary to obtain relief under the FRSA whistleblower-protection provision, the FRSA complaint of Mr. Randal Noble is **DENIED**.

SO ORDERED.

JOHN P. SELLERS, III
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) 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).