



Issue Date: 31 May 2018

Case No.: 2017-FRS-00077

In the Matter of:

TERRY BROOKS,

Complainant,

v.

CSX TRANSPORTATION INCORPORATED,

Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR
SUMMARY DECISION AND DISMISSING WITH PREJUDICE**

Mr. Terry Brooks, Complainant, worked for CSX Transportation. He filed a safety complaint and alleged that because of this protected activity, he was retaliated against and was terminated. Per Respondent, Complainant was terminated for allegedly bringing a loaded gun to work in violation of company rules. Complainant alleged that he was terminated in violation of the Federal Railroad Safety Act, § 49 U.S.C. 20109, et seq. ("FRSA") because he submitted various Unsafe Condition Reports (known as "PI-82s").

On August 10, 2016, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of Federal Railroad Safety Act. On June 26, 2017, the complaint was denied by the Regional Administrator, Occupational Safety and Health Administration, Atlanta, Georgia. The Complainant filed a request for hearing before an Administrative Law Judge on July 11, 2017.

Secretary's Findings June 26, 2017

The Regional Supervisory Investigator, Occupational Safety and Health Administration, investigated Complainant's complaint. The Secretary's findings were that Complainant submitted unsafe condition reports regarding railroad safety in December 2015, January 2016, and on other previous dates. On June 8, 2016, in the locker room, Complainant's supervisor found a loaded handgun in the pocket of Complainant's jacket. The supervisor and the trainmaster took photographs of the handgun and examined the weapon. The Secretary found:

Complainant was confronted and admitted to knowing that Respondent had a rule prohibiting weapons on CSX property and stated that he must have forgotten to leave his gun at home. Complainant retrieved his jacket, without seeing the weapon, and because it was the end of his shift he went home. According to Complainant, upon arriving at his residence he saw his gun in his garage and there was no gun in the jacket pocket. The next day Complainant returned to work and was told by the trainmaster that he had been placed out of service while an investigation was conducted into the incident.

The Secretary stated that on June 16, 2017, an investigative hearing was held regarding the June 8, 2016 event.

The Secretary further found:

At the hearing, Complainant alleged that he had been ‘set up’ by his supervisor and that the gun found in his jacket pocket was not his, although he owned an identical gun; and that the trainmaster told him he had not seen a gun. Complainant was asked but was unable to provide any evidence that he had been ‘set up.’ At the hearing, the trainmaster testified that he had seen the gun and denied that he told Complainant that he had not. The supervisor testified that he did not own a Ruger LCP 380. Based on the testimony and other evidence presented during the hearing, it was determined that Complainant had brought a loaded weapon onto CSX property which was a rule violation and Complainant was terminated effective July 12, 2016.

The Secretary dismissed the complaint finding that there was no evidence establishing a case of retaliation. The Secretary found protected activity, Respondent had knowledge of that activity, Complainant suffered an adverse action, but there was no evidence to establish a causal connection. The Secretary found no evidence of disparate treatment since other employees who violated the policy about guns received similar treatment. The Secretary found no evidence of animus. The Secretary found that Complainant’s bringing a loaded gun to work was an intervening event breaking any connection between protected activity and any adverse action. The Secretary found that Respondent provided sufficient evidence showing that disciplinary action against Complainant would have occurred despite any protected activity. The Secretary found that Complainant’s termination was in accordance with company rules and was supported by precedence.

Summary of Complainant’s Complaint

Summary of Respondent’s Response

Complainant alleged that finding a loaded gun in his pocket at work was a ‘set up,’ that someone planted the gun in his jacket at work, that while he owned 9 guns at that time,

including the same kind of loaded weapon found in his pocket at work, it was not his gun. Complainant alleged that his gun was at home that day on his workbench. However, when he returned home that day, he did not call the Respondent and advise any information regarding the location of his handgun. He first reported this information days later.

Respondent stated Complainant brought a loaded gun to work, knew it was against company policy and violation of company rules to bring a weapon to work, and his conduct was a violation of company rules. Respondent stated the termination was consistent with company policy and long-standing railroad industry practice as a result of bringing a loaded gun to work. However, Complainant testified at a deposition that after he returned home from work that day, he did not call his employer and advise one way or another about the gun that he claimed was left at home. Complainant made other telephone calls from home that day, but did not call his employer, the Respondent.

Respondent stated that submitting PI-82s (unsafe condition report) was not a contributing factor in Complainant's termination. Respondent stated that Complainant had no evidence connecting his submittal of PI-82s to his termination. Respondent stated that Complainant provided no statements, comments, or events connecting these occurrences. Respondent stated that there was no proximate timing, there was no evidence of pretext, there were no shifting explanations, and there was nothing to establish any animus against CSXT employees who raised safety issues. Respondent stated that without evidence to establish a contributing factor, Brooks could not prove his prima facie case and his complaint fails.

Respondent stated that it did not retaliate against Complainant because the CSXT official responsible for the decision to terminate Brooks' employment had no knowledge that Complainant submitted PI-82s. Respondent stated that the allegedly protected conduct engaged in by Complainant, reporting safety concerns, was common at CSXT. Respondent stated that, therefore, the Company would not single out and retaliate against him for it.

Respondent stated that CSXT consistently terminates employees who bring weapons to work. CSXT terminated four other employees for bringing weapons to work. Complainant responded to this argument stating that it was not his gun that fell out of his coat jacket at work, he was 'set up,' and those 4 employees brought loaded handguns to work. He argued their situations were different from his situation.

Respondent stated that the evidence proved that CSXT dismissed Complainant because he brought his loaded gun to work and not because he submitted PI-82s. Respondent stated that it did not retaliate against Complainant but properly discharged Complainant for this independent, intervening event.

On March 16, 2018, Respondent filed its Motion For Summary Decision and Memorandum In Support with supporting exhibits. Supporting exhibits included Complainant's deposition taken on January 23, 2018, submitted as Exhibit 1.

On March 27, 2018, Complainant filed his Response To Respondent Summary Motion and provided 6 exhibits listed as enclosures one through 6. Respondent's attorney called the undersigned's law clerk asking whether the Complainant filed any response, stating he had not received anything. Respondent's attorney asked that a copy be mailed to him. On May 3, 2018, the court sent Respondent's attorney a copy of Complainant's response motion and also advised Complainant that he must send a copy of all documents submitted to the court to Respondent's attorney. Complainant responded advising that he sent an initial copy to Respondent's attorney.

Summary Decision Rules of Practice and Procedure

Federal Railroad Safety Act proceedings before the Office of Administrative Law Judges are guided by the Administrative Procedure Act, 5 USC 554, et. seq., and federal regulations at 20 CFR Part 702 and 29 CFR Part 18A. Under these procedural rules, "A party may move for summary decision, identifying each claim or defense – or the part of each claim or defense – on which summary decision is sought. The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 CFR §18.72 (new Rules of Practice and Procedure, effective 6/18/15.)

Summary Decision Case Law

A "material fact" is a fact that affects the outcome of the case. A "genuine issue" exists "if the evidence is such that a reasonable [fact finder] could return a verdict for the non-moving party," Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986), after "drawing all reasonable inferences in favor of that [non-moving] party." Williams v. Utica College of Syracuse University, 453 F.3d 112, 116 (2nd Cir. 2006); Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590 (11th Cir. 1995) (per curium) citing Anderson v. Liberty Lobby, Inc., supra. While the burden is on the moving party for the summary judgment "to demonstrate the absence of any material factual issue genuinely in dispute," American Intern Group, Inc. v. London American Intern Corp. Ltd., 64 F.3d 77, 79 (2nd Cir. 1981), when the party seeking the summary judgment does not bear the ultimate burden of proof at the formal hearing, the moving party need not prove a negative on an issue the non-moving party must prove at the hearing. In such a case the moving party need only point to the absence of proof by the non-moving party to a material fact. The non-moving party may not rest upon mere allegations or denials but must present proof for the material fact so noted. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 479 F.3d 799, 802 (11th Cir. 2007), quoting Johnson v. Board of Regents, 263 F.3d 1234, 1243 (11th Cir. 2001), quoting Celotex Corp. v. Catrett, supra at 322. "If the non-moving party fails to make a sufficient showing on an essential element of [the non-moving party's] case with respect to which [the non-moving party] has the burden of proof, then the court must enter summary judgment for the moving party." Dadeland Depot, Inc. v. St. Paul Fire

and Marine Ins. Co., supra at 802, quoting Gonzalez v. Lee County Housing Auth., 161 F.3d 1290, 1294 (11th Cir. 1998), quoting Celotex Corp. v. Catrett, supra at 323.

Respondent's Motion For Summary Decision

Respondent filed its Motion For Summary Decision stating it is a Class I freight railroad with approximately 21,000 route miles of track operating in in 23 states, the District of Columbia, and the Canadian provinces of Ontario and Quebec.

Respondent stated that it hired Complainant "in July 2010 as a carman in the Company's Mechanical Department. (Dep. 9).¹ Brooks worked at CSXT's Bennett Yard in Charleston, South Carolina. (Dep. 9). In this role, Brooks was responsible for inspecting, servicing, and repairing railcars." (Dep. 14; Dep. Ex. 8, p. 12).

Respondent stated that Complainant was sent to training initially in Atlanta Georgia regarding operating and training rules. Complainant testified at his deposition that during training, they review the rules and the rulebook. (Deposition page 10) Complainant testified that he "absolutely" had heard the saying "safety is a way of life" and that the company had a policy that "if it can't be done safely, don't do it." (Deposition 19) Respondent stated that Complainant was aware that CSXT rules forbid employees from possessing weapons, including firearms, when on duty or on Company property. (Dep. 18; Dep. Ex. 7, pp. 6-7 regarding Complainant signing the operation rules book where he received the book which included rule section 103.7 (f) regarding possession of firearms on duty.) Respondent stated in its Motion that CSXT Operating Rule 103.7.f. provides that:

Employees must not:

f. Possess a firearm or other weapon when on duty, on CSX property, or when occupying facilities provided by CSX unless authorized.

(Dep. 18; Dep. Ex. 1).

Respondent stated that as a carman, Complainant was subject to the discipline policy

known as the Individual Development and Personal Accountability Policy ("IDPAP"). (Barr Decl, para 5, Ex. A).² The IDPAP provides for three levels of rule violations: the lowest level of "minor" offenses; the middle level of "serious" offenses; and the most severe level of "egregious" offenses. (Id.). The IDPAP states that for an egregious offense, "the penalty shall be removal from service prior to a hearing, and dismissal following a fair and impartial hearing under the terms of the applicable labor agreement at which the individual is proven to be at fault." (Id.). The IDPAP gives specific examples of conduct that is

considered egregious and warrants dismissal from the Company, including:

2. Reckless or willful serious endangerment (i.e., weapons on Company property, Rule G violations without bypass, etc.).

(Id.). In other words, the IDPAP expressly provides that if a carman possesses a "weapon[] on Company property," it is an egregious offense and "the penalty shall be ... dismissal ... " (Id.).

In its Motion, Respondent stated per Complainant's deposition testimony, in June 2016, he had 9 handguns and took different handguns when he traveled on his motorcycle. (Dep. 75-76). Complainant testified at his deposition that he owned a Ruger LCP .380. (Dep. 72, 75). Per Complainant's deposition testimony, he carried one of his handguns, including his Ruger LCP .380, in the inside pocket of his leather jacket when he drove his motorcycle. (Dep. 70, 75-76).

In its Motion, Respondent stated that on June 7, 2016, Complainant "drove his motorcycle to CSXT's Bennett Yard to work third shift from 11:00 p.m. to 7:00 a.m. (Dep. 14-15, 70; Dep. Ex. 7, pp. 12, 14). Respondent stated Brooks parked on CSXT property, entered the car shop, took off his leather jacket, and hung it on a coat rack in the locker room. (Dep. 87). Respondent stated Brooks went to the train yard and began his work. (Dep. 13, 89)."

In its Motion, Respondent stated that:

At approximately 3:30 a.m. on June 8, CSXT Senior General Foreman John Andrews entered the locker room of the car shop. (Dep. Ex. 7, p. 4). Andrews accidentally bumped into the coat rack and knocked Brooks' jacket onto the floor. (Dep. Ex. 7, pp. 4-5, 7, 26). Andrews noticed a handgun in the inside pocket of Brooks' jacket. (Dep. Ex. 7, p. 4). He removed the gun and saw that it was a real firearm - a Ruger LCP .380. (Dep. Ex. 7, pp. 4-5).

Andrews immediately called CSXT Trainmaster Brian McLaurin. (Dep. Ex. 7, pp. 4, 9, 27). McLaurin came to the locker room. (Dep. Ex. 7, pp. 4, 9, 27-28). Andrews and McLaurin examined the Ruger LCP .380 found in Brooks' jacket. (Dep. Ex. 7, pp. 4-6, 8-10, 24, 26, 28-29,

33). They saw that it was loaded. (Dep. Ex. 7, pp. 4, 9-10, 24, 33). They took photographs of Brooks' gun, the loaded clip, and Brooks' jacket. (Dep. Ex. 7, pp. 5-6, 8, 26, Carrier Ex. A). They put Brooks' gun back in the inside pocket of Brooks' jacket and hung the jacket on the coat rack. (Dep. Ex. 7, pp. 4, 8, 11, 24).

Andrews and McLaurin secured the locker room by waiting outside. (Dep. Ex. 7, pp. 4, 6, 8, 24-25, 28). When Brooks arrived back at the car shop, they informed him that they found a loaded gun in his jacket, and that he was in violation of Company rules. (Dep. 69; Dep. Ex. 7, pp. 4, 11, 14, 28). When questioned, Brooks did not deny to Andrews or McLaurin that he brought his loaded gun to work. (Dep. 69; Dep. Ex. 7, pp. 4-6, 14, 26). Instead, Brooks explained that he must have forgotten to take his gun out of his jacket. (Dep. Ex. 7, pp. 4, 14).

Q. Okay... You did not, at the time you were confronted by Mr. Andrews and Mr. McLaurin, you did not deny that you had a gun in your possession at that time; correct?

A. I did not deny. (Deposition 69)

In its Motion, Respondent stated that:

Andrews instructed Brooks to remove his loaded Ruger LCP .380 from Company property and go home. (Dep. 77-78, 104; Dep. Ex. 7, pp. 4, 11, 27). Brooks went into the locker room, grabbed his jacket, and put it on. (Dep. Ex. 7, pp. 4, 11, 14, 28). He patted his jacket in the area of his pocket where he kept his gun. (Dep. 70; Dep. Ex. 7, pp. 4, 7, 10). He got on his motorcycle, left the property, and went home. (Dep. Ex. 7, pp. 4, 14, 28). Brooks did not deny that his gun was in his jacket until eight days later, after he saw that the Company had no proof of the gun's serial number. (Dep. 74-75, 78; see also Dep. Ex. 7, pp.16-17, 19,35, Carrier Ex.A).

In its Motion, Respondent stated that Complainant believed that Mr. Andrews planted the gun in Complainant's jacket. Respondent referred to Complainant's deposition testimony. At his deposition, Complainant testified that he believed that Mr. Andrews planted the gun. He testified that he believed Mr. Andrews guessed which of the 9 handguns he had at the time, planted in his jacket, took the chance that he would not check his pocket when leaving, and that Mr. Andrews, if caught, would have been fired for planting a gun. (Deposition 75-77)

Respondent stated that Complainant testified at his deposition that he believed someone planted the gun, he did not know who planted it, it could have been Mr. Andrews, "somebody could have a set it in there. Anybody could have done that." (Deposition 87) He testified that he believed that whoever planted the weapon then removed it before Complainant put on his jacket. (Deposition 87) Complainant testified that he believed either Mr. Andrews or Mr. McLaurin set him up. "That's correct." Complainant testified that the evidence he believed showing knowledge that Complainant filed his PI-82s was that he believed "the two managers talking. They go out to lunch all the time." He assumed that they "complain about their subordinates,..." (Deposition 89)

Respondent stated that Complainant testified that when he went home that day, he did not talk to anyone at work about the incident. "I did not discuss this incident. But I did talk to some of my coworkers... I believe I called one of my coworkers to have him put my telephone up because I had forgot it. I left it on the charger." Complainant testified he used his wife's telephone while she was also at home. Complainant agreed in his testimony that his wife was home, had her phone with her, and he "chose not to call work and tell them that [he] found the gun [that he alleged he left at home, which was at the center of his termination]." "That's true." (Deposition 78-79)

In its Motion, Respondent stated that Complainant was charged with possessing a loaded firearm in violation of the company rules.

Consistent with the CBA, on June 8, 2016, CSXT charged Brooks with possessing a loaded firearm while on duty in violation of Company rules. (Dep. 131; Dep. Ex. 12). Because possessing a weapon on Company property is an egregious offense under the IDPAP, CSXT notified Brooks that it was withholding him from service pending the results of an on-property hearing. 3 (Id.; see also Ex. 2, Barr Decl., 15, Ex. A).

CSXT held the contractually required hearing on June 16, 2016. (Dep. 67; Dep. Ex. 7, p. 1). The Union represented Brooks, presented evidence and witness testimony, and cross-examined Company officers. (See Dep. Ex. 7). At the hearing, Andrews and McLaurin both testified that they saw a loaded Ruger LCP .380 in Brooks' jacket on CSXT property on June 8. (Dep. Ex. 7, pp. 4-6, 8-10, 24, 26, 28-29, 33, Carrier Ex. A). Brooks admitted that he owned a Ruger LCP .380 and that he did not deny bringing the gun to work when confronted by Andrews and McLaurin. (Dep. Ex. 7, pp. 13-14).

Following the hearing, then CSXT Chief Mechanical Officer Brian Barr analyzed the facts and determined that Brooks violated CSXT Operating Rule 103.7.f. by possessing a loaded gun while on duty and on Company property. (Ex. 2, Barr Decl., 13). Because Brooks' violation was an egregious offense, Barr terminated Brooks' employment by letter dated July 12, 2016. (Dep. 159; Dep. Ex. 7).

In its Motion, Respondent stated that Complainant subsequently filed a claim of retaliation with OSHA. Respondent stated:

On August 10, 2016, Brooks filed a complaint with OSHA alleging that CSXT terminated him in retaliation for "raising concerns of rail way safety." (Dep. Ex. 3). Specifically, Brooks alleged that CSXT retaliated against him for submitting PI-82s "over the past several years, with the

most recent being filed in March or April 2016." (Id.). Brooks admits he has no evidence that he submitted PI-82s after February 24, 2016, and that his February 24, 2016 PI-82s are the ones he was referring to in his OSHA complaint. (Dep. 52; see Dep. Exs. 4A, 4B).

OSHA thoroughly investigated Brooks' complaint and found no evidence of unlawful retaliation. (Dep. Ex. 8). On June 26, 2017, OSHA issued a decision dismissing Brooks' complaint. OSHA determined that the evidence failed to establish any causal connection between Brooks' submitting PI-82s and his termination. (Dep. 123; Dep. Ex. 8). According to OSHA:

Specifically, there was no evidence of disparate treatment, as other employees found to have violated Respondent's policy [prohibiting weapons on Company property] received similar punishment; there was no evidence of animus and the intervening event of Complainant bringing a loaded gun to the work site breaks the connection between the protected activity and the adverse action.

(Id.). OSHA also found that CSXT proved its affirmative defense:

Furthermore, even if a prima facie case could be supported, Respondent proffered sufficient evidence to establish that the disciplinary action taken against Complainant would have occurred despite any protected activity. Specifically, the investigation revealed that after Respondent conducted an investigation into the June 8, 2016 incident, there was sufficient evidence to justify Respondent's determination that Complainant had violated CSXT Rules 103.7. Additionally, it appears that Complainant's termination was in accordance with company rules and is supported by precedence.(Id.).

In its Motion, Respondent argued that its Motion For Summary Decision should be granted because there is no genuine issue of material fact. Respondent argued that Complainant committed an egregious offense regarding a loaded gun at work and he was properly terminated by Respondent. Respondent argued that Complainant cannot establish evidence of retaliation because no CSX team manager involved in the decision to terminate Complainant knew that he submitted any PI-82s. Respondent argued that Complainant cannot establish evidence of retaliation because his allegedly protected conduct was not a contributing factor in his termination because he had been submitting those forms for more than 5 years (Deposition 25, 47). No action was taken against him. Respondent argued that it has presented clear and convincing evidence that it would have taken the same action absent any alleged protected conduct. Respondent argued that Respondent treated Complainant exactly the same as other employees who violated company rules bringing a gun or weapon to work. Respondent stated that 4 other employees had been terminated for the same infraction. Respondent stated that it is long-standing railroad industry practice to terminate employees when they bring weapons to

work. Respondent moved for summary decision stating there is no genuine dispute as to material fact regarding Complainant's termination for bringing a handgun to work.

Complainant's Response to Respondent's Motion for Summary Decision

On March 27, 2018, Complainant submitted his response to Respondent's Motion For Summary Decision.

Complainant responded stating that "the firearms charge against me was false and unjust." He responded that, "I did not bring a firearm to work on 7 June 2016." Complainant stated that it was his belief that "Andrews was completely alone when he allegedly found firearm with no other witnesses. The chain of custody clearly was broken...." He stated there were no serial numbers identified from the gun such that "the company has no proof that the pictures submitted are of my weapon as they stated." In his deposition testimony, Complainant stated that either Andrews planted the gun or Andrews and McLaurin planted the gun, or somebody planted the gun. In Complainant's response to Respondent's Motion For Summary Decision, Complainant addressed the issue of the Ruger and his previous statement that Andrews owned a Ruger. Complainant responded that "there is no proof that I ever possessed the gun in question." Complainant stated that while he believed that Mr. Andrews owned a Ruger, "he does not have to own an LCP 380 to possess it. He could have borrowed it from a friend, either way he had possession of it."

Complainant addressed his report of safety issues and how he handled it. He stated, "I would normally make my report then check the status after a reasonable amount of time." If he felt it had not been addressed, he would "demand results." One of his safety reports involved "mis-labeled switches. The switch labels were reinstalled backwards after a derailment at the north end of the yard." He addressed the danger of mis-labeled switches and how it had "the potential of causing trains to collide." Complainant responded that he submitted these reports to Mr. Andrews, Complainant followed up, Complainant stated the track four-man did not fix it because of union rules, Complainant provided instructions on how to fix the problem, Mr. Andrews disagreed, and the matter was completed and fixed in January 2016 according to Complainant.

Complainant addressed the issue of the company rule regarding bringing a loaded handgun to work and termination. Complainant addressed the 4 other individuals who were terminated for bringing weapons to work. Complainant stated that the 4 employees and their handgun situations were different from his situation. He stated that the 4 employees were "exposing their weapons." He stated that even though a handgun fell out of a jacket at work that belonged to him, "I did not have any weapon therefore it would have been impossible for me to expose a weapon." He also stated that there was "no threatening behavior whatsoever on my part." He stated his belief that that his termination was "vindictive."

Complainant responded to Respondent's claims that the decision-makers did not know of Complainant's alleged protected activity. He argued that "the company maintains a

barrier from the craftsman and to ensure they have convenient deniability.” He stated his belief that his general foreman communicated with upper management about him. “It is a reasonable assumption that my general foreman does in fact communicate with upper management.” He cited to no evidence to support this claim other than his personal belief. He also stated his belief that “my general foreman is fully aware of my protected activity.” He cited to no evidence to support this statement other than his personal belief.

Complainant stated that Respondent had “no credible proof that I violated their firearms policy.” He stated that “anyone with access to the locker room could easily have placed a gun next to my jacket and taken pictures of it. I was not in the area.” Complainant did not address the timeline after the incident, and his response and nondenial after the gun was discovered in his jacket. Complainant did not address his claim that when he went home later that day, he claimed he found the Ruger at home but did not address why he found it at home, and was just sent home because of the Ruger, he did not immediately call his employer even though he used his wife’s phone to call his friends on the same day. Complainant did not address how it would not be a violation of company.

LAW

A. To Withstand Summary Decision, Complainant Must Present Evidence Establishing A Genuine Issue Of Material Fact

The United States Department of Labor, Office Of Administrative Law Judges, Rules of Practice and Procedure, govern all proceedings and hearings. The Rules provide that when a party believes there is no dispute regarding a material fact, that party may file a Motion For Summary Decision to have the case disposed of before a hearing. Respondent filed a Motion For Summary Decision.

The Rules provide that an Administrative Law Judge "may enter summary judgment for either party 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. Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must instead present "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 29 C.F.R. § 18.40(c). The non-moving party must present affirmative evidence to show that a genuine issue of material fact does exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,257 (1986).

To establish a claim of retaliation under the FRSA, an employee must prove by a preponderance of the evidence that: (1) he engaged in a protected activity; (2) the employer knew or suspected, actually or constructively, that he engaged in the protected activity; (3) he suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse action. See 49 U.S.C. §§ 20109(d)(2), 42121(a), 42121(b)(2)(B)(iii); 29 C.F.R. § 1982.104(e)(2); Kuduk v. BNSF Ry Co., 768 F.3d 786, 789 (8th Cir. Oct. 7, 2014); Santiago v. Metro-North Comm. Railroad Co., Inc., ARB

No. 10-147, ALJ No. 2009-FRS-II, slip op. at p. 6 (ARB July 25, 2012). A preponderance of the evidence requires "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." Brune v. Horizon Air Indus., Inc., ARB No. 04-037, slip op. at p. 11 (ARB Jan. 31, 2006).

If the employee establishes that protected activity was a contributing factor in the adverse action, the employer "is nonetheless not liable if it 'demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of [the employee's protected activity].'" Kuduk, 768 F.3d 786, 789 (quoting 49 U.S.C. § 42121(b)(2)(B)(ii)); see also Brune, ARB No. 04-037, slip op. at p. 11 (ARB Jan. 31, 2006); Barker v. Ameristar Airways, Inc., ARB No. 05-058, at p. 8 (ARB Dec. 31, 2007).

B. Respondent CSXT Terminated Complainant for a Legitimate, Non-Retaliatory Reason Regarding A Loaded Gun At Work.

The following facts are not in dispute such that there is no genuine issue as to material fact:

It is undisputed that two CSXT managers, Andrews and McLaurin, saw a loaded Ruger LCP .380 in the inside pocket of Complainant's jacket on June 8, 2016. (Dep. Ex. 7, pp. 4-6, 8-10, 24, 26, 28-29, 33). They took photos of the gun found in Complainant's jacket, the loaded clip, and Complainant's jacket. (Dep. Ex. 7, pp. 5-6, 8, 26, Carrier Ex. A). They then confronted Complainant about this weapon on Company property. (Dep. 69; Dep. Ex. 7, pp. 4, 11, 14, 28).

The following facts are not in dispute such that there is no genuine issue as to material fact. Complainant stated regarding the following:

- * It was Complainant's jacket. (Dep. 72; Dep. Ex. 7, pp. 13, 30).
- * Complainant owned a Ruger LCP .380. (Dep. 72, 76; Dep. Ex. 7, pp. 13, 21).
- * Complainant normally carried one of his weapons (including his Ruger LCP .380) in the inside pocket of his jacket when he drove his motorcycle. (Dep. 70, 76; Dep. Ex. 7, pp. 14, 17-18).
- * Complainant drove his motorcycle to work that night for that work shift. (Dep. 76; Dep. Ex. 7, p. 14).
- * Complainant did not deny bringing his loaded gun to work when confronted by Andrews and McLaurin on June 8. (Dep. 69; Dep. Ex. 7, p. 14).
- * Complainant told Andrews and McLaurin he must have forgotten to take his gun out of his jacket. (Dep. Ex. 7, p. 14).

* Complainant was immediately told to remove this gun from Company property and go home. (Dep. 77-78; Dep. Ex. 7, p. 14).

* Complainant patted his jacket in the area of his gun before leaving CSXT property. (Dep.

70).

* Complainant did not call when he got home to say that his gun was allegedly on his workbench and not in his jacket.¹ (Dep. 72; Dep. Ex. 7, p. 16).

* Complainant did not deny bringing his loaded gun to work during a separate conversation with McLaurin the next evening.² (Dep. Ex. 7, pp. 17, 19).

* Complainant waited eight days after the event until he told anyone in CSXT management about his theory that his gun was at his house and not at work. (Dep. 78, Dep. Ex. 7, pp. 12, 16-17, 19, 35).

Complainant admitted that possessing a weapon on Company property was a direct violation of CSXT Operating Rule 103.7.f. (Dep. Ex. 7, p. 30). It is an egregious offense and a dischargeable offense under the express terms of the IDPAP. (Ex. 2, Barr Decl., 5, Ex. A). CSXT, and the railroad industry as a whole, regularly terminated employees who bring weapons to work. (Ex. 2, Barr Decl., 6, Ex. B; see also PLB and NRAB awards Exs. 3-9). As a result, CSXT properly terminated Brooks. (Dep. Ex. 7).

C. Speculation

Complainant speculated that while he owns a Ruger, someone planted a Ruger in his jacket at work. Complainant admitted at his deposition that he did not know who planted the gun or how the gun may have been planted.

Brooks: ... I wasn't there. I don't know if [Andrews] planted [the gun]. I know he took pictures. And I want to make sure it's clear he could have planted it,

¹ Complainant admitted that although he did not have his phone, his wife was home and he could have used her phone. (Dep. 72). Complainant admitted he used his wife's phone that day to make other calls. (Dep. 79).

² Complainant claimed McLaurin told him he did not see a gun. However, McLaurin consistently stated that he saw Complainant's gun and that it was loaded. (Dep. Ex. 7, pp. 4, 8-9, 24, 28-29, 33). Regardless, even if Complainant's claim were true, it did not create a genuine issue of material fact sufficient to defeat summary decision. Complainant admitted he did not submit a PI-82 or otherwise report a safety concern to McLaurin. Complainant presented no evidence that McLaurin (a manager in a different department at CSXT) had any knowledge of Complainant's allegedly protected conduct or any motivation to retaliate against Complainant for submitting PI-82s. (Dep. 91-92, 128-129).

somebody could have set it in there. Anybody could have done that.... Somebody did. I don't know who.

Pure speculation does not defeat summary decision. Holloway v. Soo Line Railroad Co., 2018 WL 488259, *15 (N.D. Ill. 2018) (recognizing that "[i]t is well-settled

... that inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion"); see also Dafoe v. BNSF Railway Co., 164 F.Supp.3d 1101, 1115 (D. Minn. 2016) (holding that the plaintiffs "speculative and unsupported allegations alone cannot give rise a genuine factual dispute" to defeat summary judgment).

Complainant speculated that one way Andrews or McLaurin could have planted the gun in question was because Andrews allegedly owned a Ruger LCP .380. (Dep. 79; Dep. Ex. 7, p. 22). That is not true -Andrews did not own a Ruger LCP .380. (Dep. Ex. 7, pp. 24, 26; Andrews Decl., 12).³ In addition, Complainant claimed that his Ruger was not as "dirty" as the gun that Andrews and McLaurin photographed, but Complainant stated at his deposition that this "was a silly comment for me to make." (Dep. 74; Dep. Ex. 7, p. 16). Complainant testified that he had 9 handguns, owned a Ruger, and that was the gun he normally carried

Q..... At the time you had approximately nine handguns; correct?

A. Yes.

Q. And you took various handguns with you when you traveled, in your motorcycle; correct?

A. Yes.

Q. So how did Mr. Andrews know to plant the Ruger .380 rather than one of your other handguns?

A. He could have done either one....

Q. But when you got home, you saw the Ruger .380 on there; correct?

A. Yeah. That's the one I thought it would be because that's the one I normally carry.

Q. You just said under oath you carry various handguns; correct?

³ The sworn declaration of CSXT Senior General Foreman John Andrews was also submitted by Respondent in its Motion as Exhibit 11.

A. Correct.

Q. Okay. So you contend in this case that Mr. Andrews guessed correctly one of nine handguns you had at the time and decided to plant that handgun in your jacket. That's what you contend; correct? Am I correct or not?

A. Correct.

Q. Okay. And - and you - you also contend that - that Mr. Andrews also took the chance that you wouldn't check your pocket to see if the gun was present as you were leaving; correct? I'm right; correct?

A. Correct.

Q. Okay. So - so not only did Mr. Andrews take the chance of getting one in nine handguns correct, he also took the chance that you wouldn't check to make sure that the gun was present, and you know that Mr. Andrews would have been fired if he got caught planting a gun on you; correct?

A. Correct. (Dep. 75-77).

Complainant's speculation that an unknown person planted the gun in his jacket does not create a genuine issue of material fact.

Findings of Fact and Conclusions of Law

After deliberation on the material submitted for consideration in a light most favorable to the Complainant, this Administrative Law Judge finds, that:

The undisputed facts are that Complainant owned 9 guns, Complainant owned a Ruger, a Ruger was found in his jacket at work, Complainant did not deny that the Ruger was his gun that evening, Complainant did not deny that the Ruger was his gun until 8 days later. Respondent CSXT has rules stating that bringing a loaded weapon to work results in termination. Complainant was aware of the CSXT rule. Four CSXT employees have been terminated for bringing a loaded handgun to work. Complainant was terminated in violation of company rules regarding bringing handguns to work.

Complainant must present affirmative evidence to show that a genuine issue of material fact does exist. Complainant has submitted no evidence to dispute the above facts.

There is no genuine issue of material fact regarding the above. These facts are undisputed.

The undisputed evidence shows that Respondent CSXT acted in good faith in terminating Complainant based on its reasonable belief that Complainant brought a loaded gun to work.

There is no genuine issue of material fact that Respondent's decision to terminate Complainant was legitimate and non-retaliatory.

While Complainant submitted unsafe condition reports regarding railroad safety in December 2015, January 2016, and on multiple other previous dates, it was not in close proximity to the June 8, 2016 event in the locker room with a loaded gun or to Complainant's July 12, 2016 termination. Complainant submitted no evidence of retaliation. While there may have been protected activity, Respondent had knowledge of that activity, Complainant suffered an adverse action, but there was no evidence to establish a causal connection. Complainant submitted no evidence of disparate treatment since other employees who violated the no gun policy at work received similar treatment. Complainant submitted no evidence of animus. Complainant's bringing a loaded gun to work in violation of CSX rules was an intervening event breaking any connection between protected activity and any adverse action. Respondent provided sufficient evidence showing that disciplinary action against Complainant would have occurred despite any protected activity. Complainant's termination was in accordance with company rules and was supported by precedence.

ORDER

In view of the foregoing, it is hereby ordered that:

1. Respondent's Motion For Summary Decision and Motion to Dismiss with Prejudice is **GRANTED**.
2. Complainant's complaint is **DISMISSED with prejudice**. 4

SO ORDERED.

Dana Rosen
Administrative Law Judge

DR/mjw
Newport News, Virginia

4 A **dismissal with prejudice** is dismissal of a case on merits after adjudication. The party is barred from bringing an action on the same claim. **Dismissal with prejudice** is a final judgement and the case becomes *res judicata* on the claims that were or could have been brought in it.

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).