



Issue Date: 23 October 2018

Case No.: 2018-FRS-00010

In the Matter of:

JUSTIN JOHNSON,
Complainant,

v.

GRAND TRUCK WESTERN RAILROAD CO.,
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DECISION, CANCELLING HEARING AND DISMISSING CLAIM**

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053 (July 25, 2007), and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008) ("FRSA" or "Act"). The implementing regulations appear at Part 1982 of Title 29 of the Code of Federal Regulations ("C.F.R."). The FRSA prohibits an employer from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee for engaging in certain protected activities.

PROCEDURAL HISTORY

On November 4, 2015, Justin Johnson (the "Complainant") filed a timely complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Grand Truck Western Railroad Co., (the "Respondent") violated the FRSA by suspending him for 50 days in retaliation for previously filing a complaint under the FRSA. OSHA issued a decision on October 30, 2017, stating that more than sixty days had passed since the Complainant filed his complaint and that the Complainant had requested that it terminate its investigation and issue a determination. Based on the information it gathered, OSHA stated that it was unable to conclude that there was reasonable cause to believe that the Respondent violated the FRSA. Therefore, OSHA dismissed the Complainant's complaint. On November 3, 2017, the Complainant filed objections to OSHA's findings and requested a hearing.

Pursuant to a Notice of Hearing issued on December 12, 2017, a hearing in this case was set for July 18, 2018, in Ann Arbor, Michigan. On May 14, 2018, I issued an Order Granting Agreed Motion to Continue Trial Date and the hearing was set for October 3, 2018. On September 5, 2018, I issued an Order Vacating the Hearing Date and Setting New Hearing Date and Associated Deadlines, which continued the hearing until November 28, 2018. On August 31, 2018, the Respondent filed a Motion for Summary Decision (“Mot. for SD”).¹ On September 28, 2018, the Complainant filed a Memorandum in Opposition to Motion for Summary Decision (“Complainant’s Response”).² On October 9, 2018, the Respondent filed Leave to file a Reply Memorandum in Support of Summary Decision with attached memorandum. On October 11, 2018, the Complainant filed a Response to the Respondent’s Letter Requesting Leave to file a Reply Brief.³

APPLICABLE STANDARDS

Pursuant to 29 C.F.R. §18.72 any party may move for a summary decision on all or any part of the proceeding. Summary decision shall be granted “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.”⁴ The moving party bears the burden of showing that no genuine issue of material fact exists.⁵ The burden of showing the absence of a material fact is a heavy one.⁶ In determining whether a genuine issue of material fact exists, the evidence must be viewed in the light most favorable to the non-moving party.⁷ Accordingly, an administrative law judge must draw all inferences in favor of the nonmoving party.⁸ In opposing a motion for summary decision, the non-moving party may not rest upon the mere allegations or denials of such pleading, but must “set forth specific facts showing that there is a genuine issue of fact for the hearing.”⁹

¹ The following Respondent’s Exhibits (“RX”) were attached to the Motion for Summary Decision: Exhibit 1, excerpts from the Complainant’s deposition with attachments; Exhibit 2, excerpts from James Golombeski’s Deposition with attachments; Exhibit 3 the Public Law Board’s ruling; and an affidavit from Constance Valkan with attachment.

² The following Complainant’s Exhibits (“CX”) were attached to the Response: (1) the Decision and Order Approving Settlement Agreement and Dismissing Complaint from the prior FRSA claim; (2) the settlement agreement from the Complainant’s prior claim; (3) the transcript of the Investigation Hearing from April 28, 2015 with attachments; (4) a May 18, 2015 letter notifying the Complainant that he was being suspended for 50 days; (5) the Respondent’s responses to the Complainant’s Requests for Admission; (6) the Complainant’s deposition transcript with attachments; (7) the transcript of James Golombeski with attachments; (8) the transcript of William Miller with attachments; (9) a copy of OSHA’s findings in the Complainant’s prior claim; (10) the Respondent’s response to the Complainant’s appeal of his suspension; (11) the Affidavit of Robert B. Thompson; and (12) e-mails regarding the claim.

³ As noted in the Complainant’s October 11, 2018 Response, the Respondent did not have permission from me to file a response under 29 C.F.R. § 18.33(d). I will not consider either the Respondent’s proffered Reply Brief or the Complainant’s Response to the Reply Brief, but will rely on the parties’ arguments contained in the Respondent’s initial Motion for Summary Decision and the Complainant’s Memorandum in Opposition.

⁴ 29 C.F.R. §18.72(a).

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

⁶ *Pitts v. Shell Oil Co.*, 463 F.2d 331 (5th Cir. 1972).

⁷ *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

⁸ *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

STATE OF THE RECORD

The Complainant has been employed by the Respondent as a conductor since 2011. (CX 3 at 9). The Complainant injured his thumb at work in February of 2013. The Respondent subsequently issued a letter of reprimand on April 9, 2013, stating the Complainant failed to follow company safety procedures. The Complainant filed a complaint with OSHA arguing that the letter of reprimand was in retaliation for reporting a work related injury. (CX 9). OSHA issued a determination on February 18, 2014, finding that the Respondent violated the FRSA. *Id.* The Respondent appealed but the parties reached a settlement agreement before a hearing was held. (CX 2). The settlement agreement was approved and the claim was dismissed on July 16, 2014. (CX 1). As part of the settlement, the Respondent agreed to expunge the April 9, 2013 letter of reprimand from the Complainant's work record. (CX 2).

On May 18, 2015, the Complainant was suspended for 50 days following an investigative hearing regarding an incident that occurred on April 6, 2015. On that date, the Complainant was on-call for duty when he was called in to work at 7:37 p.m. According to the Complainant's phone records, he received the call at 7:38 p.m. (CX 3 exhibit #16). Also at 7:38, the Complainant initiated a call to the Respondent's Attendance Management Center ("AMC") to place himself on FMLA leave. *Id.* The Respondent's attendance policy requires employees to provide two hours notice if they are unable to work. (CX 6 at 22). The Complainant was approved to take FMLA leave whenever he had a "flare-up" of a non-work related medical condition and had permission to call-off without giving two hours notice. *Id.* However, because the Complainant's call to take FMLA leave coincided with his call into work, the matter was brought to the attention of the AMC Manager, Rolando Jimenez, and proceeded to hearing on April 28, 2015. The hearing was overseen by Lance Osmond.

At the hearing, Paul Langford, a trainmaster with the Respondent, testified that the IVR, the automated messaging system that calls employees into work, attempted to call the Complainant at 19:37 on April 6, 2015. (CX 3 at 12). He stated that the Complainant called the AMC at 19:41 to mark-off as needing FMLA leave. (*Id.* at 12-13). He stated that the Complainant was put on a leave of absence at 19:46. (*Id.* at 15). An AMC administrator, Michael Wolski, testified that he called the Complainant on April 8, 2015 to ask about his April 6th mark-off. According to Mr. Wolski, the Complainant informed him that he was not feeling well when he woke up but was "watching the boards" to see if he would be called into work and was surprised by how quickly his name came up. (*Id.* at 65-66). The Complainant denies that he made that statement to Mr. Wolski. (*Id.* at 63, 67). The Complainant testified that he did not look at the conductor extra boards and did not know he was being called into work prior to placing the call to the AMC to take FMLA leave. (*Id.* at 36, 38-39). Mr. Jimenez testified that the Complainant failed to follow the proper mark off procedures because he did not mark off as soon as he knew he was unable to work. (*Id.* at 56, 58-59).

As part of the hearing, the Complainant's personal work record was included as an exhibit. (*Id.* at 21). The Complainant's union representative, Mr. Miller, objected and noted that

the record contained the April 9, 2013 letter of reprimand for a failure to work safely. Mr. Miller stated that the Complainant had a FRSA case that went to court and that ruling was “overturned.” (*Id.* at 23). After reviewing the hearing transcript, Mr. James Golombeski, a superintendent with the Respondent, suspended the Complainant for 50 days from May 18, 2015 through July 6, 2015. (CX 4). The letter informing the Complainant of his suspension states that the decision regarding the amount of discipline to assess was based on a proven rule violation and the Complainant’s past discipline record. *Id.*

The Deposition of Justin Johnson Taken August 15, 2018

The Complainant was deposed on August 15, 2018. (CX 6). He testified that he injured his thumb in February of 2013 while employed with the Respondent and was issued a letter of reprimand for violating company safety rules. (*Id.* dep. at 7). He stated that he filed a complaint with OSHA on June 28, 2013 and that the claim settled. (*Id.* dep. at 8-9). He testified that he did not talk to anyone at work about his complaint or the settlement. (*Id.* dep. at 9). He stated that he had no reason to believe that Mr. James Golombeski, Mr. Lance Osmond, Mr. Rolando Jimenez or Mr. Michael Wolski knew anything about the settlement agreement. (*Id.* dep. at 9-10). He stated that he had no reason to think that those four men knew about his prior OSHA complaint. (*Id.* dep. at 10).

The Complainant stated that he became aware the letter of reprimand was still in his file at the April 28, 2015 hearing. (*Id.* dep. at 15). He stated that his union representative informed the hearing officer that the letter had been “overturned.” (*Id.* dep. at 15-18). He stated that after the hearing he did not ask the company to remove the letter from his file but stated that he did try to obtain a copy of his work history but was never provided with it. (*Id.* dep. at 19-20). He testified that he had approved FMLA leave for a non-work related condition that allowed him to call off work with less than two hours notice. (*Id.* dep. at 22). He stated that on April 6, 2015 he was on the extra board for conductors and could have been called into work if he was needed. (*Id.* dep. at 27). He noted that an individual can check their place on the board at home and can make an educated guess on whether or not they will be called into work. (*Id.* dep. at 27-28). He stated that he could not recall if he looked at the extra boards on April 6, 2015. (*Id.* dep. at 28). He stated that if he marked off for work before being called in he would not be paid for that day. (*Id.* dep. at 28-29).

The Complainant stated that Mr. Wolski’s version of the April 8, 2015 conversation was “not truthful” because he did not remember telling Mr. Wolski that he was looking at the boards. However, he could state any reason why Mr. Wolski would have made that statement up. (*Id.* dep. at 30-31). Asked if Mr. Wolski’s supervisor, Mr. Jimenez, would have any reason to lie about the conversation to get the Complainant “in trouble,” he stated that he could not see any reason for that. (*Id.* dep. at 31-32).

Asked about Mr. Golombeski’s decision to suspend him for 50 days, the Complainant stated that he did not know if Mr. Golombeski actually considered the letter of reprimand but stated that he felt it played a role in his discipline. (*Id.* dep. at 38-39). Asked why he felt the letter played a role in Mr. Golombeski’s decision he replied, “I guess I don’t have a solid answer for that. I feel like that could have been taken into account for reprimand towards – I don’t

know.” (*Id.* dep. at 39). He stated that at the April 28, 2015 hearing, Mr. Osmond did not remove the letter of reprimand from his work history and stated that it may be used in determining what discipline he would be assessed. (*Id.* dep. at 40-41). Asked why he was pursuing this claim he stated that it was because he felt the Respondent did not hold up its end of the 2014 settlement agreement. (*Id.* dep. at 42). He stated that he did not believe that the 50-day suspension was retaliation for anything that he had previously done. (*Id.* dep. at 43).

The Deposition of James Golombeski Taken August 15, 2018

Mr. Golombeski was deposed on August 15, 2018. (CX 7). He testified that he was a Superintendent at the Flint, Michigan office. (*Id.* dep. at 3). He stated that in April 2015, there was no written policy regarding the amount of discipline supervisors would assess but that he used a “progressive discipline” process where he tried to assess more stringent discipline each time. (*Id.* dep. at 4-5). On April 6, 2015, a trainmaster e-mailed Mr. Osmond regarding the Complainant’s untimely mark-off for FMLA leave and Mr. Osmond had Mr. Jimenez inquire about the call off. (*Id.* EX 1). Mr. Golombeski responded in the e-mail chain stating that the Complainant called off a lot just prior to starting his shift and stated that he did not buy the Complainant’s excuse. *Id.* At the deposition, he stated that he meant that he did not believe the Complainant had a medical flare-up. (*Id.* dep. at 14-15). He stated that he had never met the Complainant but knew who he was because his frequent call-ins disrupted operations by delaying trains. (*Id.* dep. at 15-17). He stated that he was not involved in the decision to proceed to a hearing and that his decisions or beliefs about the Complainant’s FMLA usage did not factor into the decision to hold an investigative hearing. (*Id.* dep. at 46-48).

Mr. Golombeski testified that in February of 2013 he was working in Flat Rock and was not aware of the investigation that resulted in the 2013 letter of reprimand. (*Id.* dep. at 19). He stated that Ms. Valkan has never informed him of the findings of any Department of Labor case. (*Id.* dep. at 20). He testified that he read the transcript of the April 28, 2015 hearing and then found the Complainant guilty of not following proper procedures when he called in to mark off work. (*Id.* dep. at 22-23). He stated that when employees take FMLA leave, they are not paid. (*Id.* dep. at 25). He stated that if a person on the extra board is not called in by midnight, they are paid for that day of work. (*Id.* dep. at 27).

Asked about the letter of reprimand in the Complainant’s work history, Mr. Golombeski stated that he believed Mr. Miller’s comment that it was not supposed to be in the record but added that he did not inquire about it because the letter was not “anything significant” and would not have changed his decision. (*Id.* dep. at 30-31). He stated that he gave the Complainant a 50-day suspension because it was more stringent than his most recent discipline of a 30-day suspension.¹⁰ (*Id.* dep. at 36-37). He testified that the letter of reprimand did not contribute in any way to his decision to issue a 50-day suspension. (*Id.* at 49). He stated that his predecessor would consider an employee’s work history for the past three years when assessing discipline, but that he did not do that. (*Id.* at 40). He stated that the 50-day suspension letter that states an employee’s past discipline record was considered was a form letter and that he never customized a letter to state that only the most recent discipline was considered. (*Id.* dep. at 44-45).

¹⁰ The Complainant was suspended for 30 days on June 17, 2014 for failing to obey an order to slow down while operating a train. (CX 6 Exhibit 3).

The Deposition of William Miller Taken August 28, 2018

The Complainant's union representative, Mr. Miller, was deposed on August 28, 2018. (CX 8). Mr. Miller testified that when he was assessed discipline for having his cell phone at work, Mr. Golombeski told him he would look at his work history for the past three years to see what discipline would be assessed. (*Id.* dep. at 16). He stated that every time he spoke to Mr. Golombeski about discipline, Mr. Golombeski told him he considered the last three years of an employee's work history. (*Id.* dep. at 70-71). He also noted that not all discipline was progressive and that the Complainant had two subsequent disciplines that were not as severe as the 50-day suspension. (*Id.* dep. at 82-83).

Mr. Miller stated that he was aware of the incident in February 2013 where the Complainant injured his thumb because he was informed of the subsequent investigation. (*Id.* dep. at 34). Once the Complainant was disciplined for the incident, Mr. Miller stated he told him he could file a complaint. (*Id.* dep. at 37-38). He stated that he spoke to the Complainant about filing a complaint a couple of times because the Complainant was afraid he would lose his job or that the company would come after him. (*Id.* dep. at 38). He stated that from that time forward the Complainant would tell him that he was being targeted. (*Id.* dep. at 38-39). He stated that the Complainant felt he was being targeted because he had FMLA and would take off when he had flare-ups. (*Id.* dep. at 40). He stated that several superintendents expressed displeasure over how often the Complainant would take FMLA leave. (*Id.* at 40-42).

ARGUMENTS OF THE PARTIES

The Respondent contends that it is entitled to summary decision for several reasons. Primarily, it argues that the Complainant is bringing a breach of contract claim and is seeking to enforce the 2014 settlement agreement and that I have no jurisdiction to hear such claims as they do not arise under the FRSA. Alternatively, the Respondent argues that the Complainant cannot meet its burden under the FRSA as he cannot establish that he engaged in protected activity, he cannot establish that the 50-day suspension was in retaliation for any alleged protected activity, and he cannot establish that the April 3, 2013 letter of reprimand played any role in his 2015 50-day suspension.

Conversely, the Complainant argues that the Respondent improperly considered the 2013 letter of reprimand that was not expunged from the Complainant's record in violation of a settlement agreement. The Complainant contends that he engaged in protected activity when he filed his first FRSA claim in 2013. He maintains that the 2015 50-day suspension is the second adverse action caused or contributed to by his protected activity dating back to 2013. Further, the Complainant argues that the Respondent should not be allowed to benefit from its failure to comply with the 2014 settlement agreement.

DISCUSSION AND FINDINGS

The FRSA contains a whistleblower protection provision that prohibits railroad carriers from, discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if it is due, in whole or in part, to the employee filing a complaint or proceeding relating to the enforcement of the Act or related to railroad safety.¹¹

The parties initially disagree about whether or not I have jurisdiction over the claims that the Complainant has brought. The Complainant states that this cause of action stems from the Respondent's failure to comply with the 2014 settlement agreement, which required the Respondent to remove an April 9, 2013 letter of reprimand from the Complainant's work file. The Complainant asks that I require the Respondent to comply with the previous settlement agreement and find that its failure to comply with the settlement agreement led to additional damages and causes of actions under the FRSA. The Respondent does not contest that it failed to remove the letter of reprimand from the Complainant's work file.¹² Rather, the Respondent argues that this Office has no jurisdiction to enforce the prior settlement agreement or an action that is essentially a breach of contract claim.

The Respondent is correct that I have no jurisdiction to enforce the prior settlement agreement. The regulations state that "[i]f a person fails to comply with an order issued by the Secretary of Labor [including settlement agreements], the Secretary of Labor may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred."¹³ The Administrative Review Board ("Board") has held almost identical language in the Surface Transportation Assistance Act to mean that only a federal district court has jurisdiction to enforce a settlement agreement.¹⁴ Based on the nearly identical statutory language, I find it reasonable to extend a similar holding to claims for enforcement of a settlement agreement brought under the FRSA. Therefore, I find that the federal district court has jurisdiction to enforce compliance of the 2014 settlement agreement.

However, this does not end the analysis in the case, because even though I have no jurisdiction to enforce the parties to comply with the 2014 settlement agreement, the Board has noted that a violation of a settlement agreement can potentially form the basis of a new complaint for claims of discrimination that arose subsequent to the settlement.¹⁵ In *Carter*, the Board held that the respondent's failure to remove negative reports from a nationwide safety database, in violation of a settlement agreement, may have given rise to a new complaint for discrimination and held that the ALJ had jurisdiction to decide whether the complainant had

¹¹ 49 U.S.C. § 20109; 29 C.F.R. § 1982.102.

¹² The record contains an August 30, 2018 Declaration from Constance Valkan, in which she affirms that the April 9, 2013 letter of reprimand has since been removed from the Complainant's work file.

¹³ 49 U.S.C. § 20109(d)(2)(iii).

¹⁴ See *White v. J.B. Hunt Transportation, Inc.* ARB No. 06-063 ALJ No. 2005-STA-065 9ARB May 30, 2008); *Taylor v. Greyhound Lines*, ARB No. 06-137 ALJ No. 2006-STA-019 (ARB Apr. 30 2007). The Surface Transportation Act states that "[i]f a person fails to comply with an order issued under [the Act], the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred." 49 U.S.C. §31105(e).

¹⁵ *Carter v. Marten Transport, LTD.*, ARB No. 09-117 ALJ No. 2009-STA-031 (ARB July 21, 2011).

asserted a new claim for discrimination that arose after the settlement agreement. Upon remand from the Board, the ALJ reviewed the record to determine whether the respondent's activities following the settlement agreement, *i.e.* the continued retention of the negative comments in the database, were due in part to the complainant's protected activity.¹⁶ As noted by the Board in *Carter*, I have jurisdiction decide whether the Complainant has asserted a new claim for discrimination that arose after the 2014 settlement agreement. Thus, I will review the record to determine if the Complainant can establish that he has a new cause of action.

The regulatory burdens of proof under the FRSA are the same burdens set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").¹⁷ The regulations implementing the Act provide that a "determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint."¹⁸ A contributing factor is "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."¹⁹ It need not be "significant, motivating, substantial[,] or predominant," it merely needs to be a factor.²⁰ If the complainant satisfies his burden, then the burden shifts to the Respondent to demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity."²¹

I. WHETHER THE COMPLAINANT ENGAGED IN PROTECTED ACTIVITY

The Respondent disputes whether the Complainant engaged in protected activity in 2015. However, it does not dispute that the Complainant filed a complaint with OSHA in 2013 regarding an injury that he sustained in February of 2013. Filing a complaint with OSHA is a protected activity under the Act. Therefore, I find that the record does not create reason to dispute that the Complainant engaged in protected activity under the Act when he filed his first claim in 2013.

II. WHETHER THE RESPONDENT TOOK ADVERSE ACTION AGAINST THE COMPLAINANT

The Respondent does not dispute that following an investigation into the Complainant's call-in activities on April 6, 2015, the Complainant was suspended for 50 days. The Board has stated that "some actions are per se adverse (e.g., termination of employment, suspensions, demotions) without any need to ask whether a reasonable employee would be dissuaded from engaging in protected whistleblowing."²² Therefore, the record does not provide any basis to dispute that the Complainant suffered an adverse job action.

¹⁶ *Carter v. Marten Transport, LTD.*, 2009-STA-031 (ALJ Mar. 11, 2013).

¹⁷ 49 U.S.C. § 42121(b)(2)(B)(iii) and (iv); *Palmer v. Canadian National Railway/Illinois Central Railroad Co.*, ARB No. 16-035, ALJ No. 2014-FRS-154, (ARB Sep. 30, 2016) (*en banc*) (reissued with full dissent Jan. 4, 2017).

¹⁸ 29 C.F.R. § 1982.109.

¹⁹ *Palmer*, ARB No. 16-035; *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011).

²⁰ *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

²¹ 29 C.F.R. § 1982.109(b); *Palmer*, ARB No. 16-035.

²² *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (ARB Dec. 29, 2010).

III. WHETHER THE COMPLAINANT'S PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR IN THE RESPONDENT'S DECISION TO SUSPEND HIM

Although the Complainant engaged in protected activity and the Respondent took an adverse personnel action against her, the evidence must also create a triable issue as to whether the Complainant's protected activity contributed to his suspension. As the Board in *Palmer* explained, the administrative law judge must first answer the following question: "did the employee's protected activity play a role, any role, in the adverse action?"²³ On that question, the Board specified that the Complainant has the burden of proof, by a preponderance of the evidence, to show "based on a review of all the relevant, admissible evidence, that it is more likely than not that" the Complainant's "protected activity was a contributing factor in the employer's adverse action."²⁴ As discussed above, the Respondent's actions since the settlement agreement may have given rise to a new claim for retaliatory discrimination. Thus, I will review the record regarding the Respondent's actions following the settlement agreement to determine whether they were due in part to the Complainant's protected activity.

The Complainant may meet his burden with direct or circumstantial evidence. Direct evidence is evidence that conclusively links the protected activity and the adverse action.²⁵ Under this approach, the Complainant must produce evidence that directly links his protected activities and suspension. The Board has described direct evidence as "smoking gun" evidence that "conclusively links the protected activity and the adverse action and does not rely on inference."²⁶ Having reviewed the record, I cannot find any evidence of this nature, nor does the Complainant assert any evidence of this nature.

Alternatively, the Complainant may provide circumstantial evidence to prove by a preponderance of the evidence that retaliation was the true reason for his suspension. For example, the Complainant may show that the respondent's proffered reason for the adverse action was not the true reason, but instead "pretext."²⁷ If a complainant proves pretext, it may be inferred that her protected activity contributed to the suspension.²⁸ Proof of animus towards protected activity may be sufficient to demonstrate discriminatory motive.²⁹ "[R]idicule, openly hostile actions or threatening statements," may serve as circumstantial evidence of retaliation.³⁰ Additionally, close temporal proximity between the protected activity and the adverse action may raise the inference that the protected activity was the likely reason for the adverse action.³¹ "Temporal proximity is just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that

²³ *Palmer*, *supra* at 52.

²⁴ *Id.*

²⁵ *Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 4-5 (ARB Jan. 30, 2008).

²⁶ *Williams v. Domino's Pizza*, ARB No. 09-092, slip op. at 6 (ARB Jan. 31, 2011).

²⁷ *Riess v. Nucor Corp.*, ARB 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010).

²⁸ *Id.*

²⁹ See *Sievers*, *supra*, slip op. at 27.

³⁰ *Timmons v. Mattingly Testing Services*, 1995-ERA-00040 (ARB June 21, 1996).

³¹ *Kovas v. Morin Transport, Inc.*, 92-STA-41 (Sec'y Oct. 1, 1993) (citing *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987)).

retaliation was a motivating factor in the adverse action.”³² However, while such proximity is not dispositive, “the closer the temporal proximity is, the stronger the inference of a causal connection.”³³ In *Palmer*, the Board addressed the concept of temporal proximity as it relates to circumstantial evidence and stated:

When determining whether protected activity was a contributing factor in an adverse personnel action, the ALJ . . . must make a factual determination and must be persuaded—in other words, must believe—that it is more likely than not that the employee’s protected activity played some role in the adverse action. So, for example, even though we reject any notion of a per se knowledge/timing rule, an ALJ *could* believe, based on evidence that the relevant decisionmaker knew of the protected activity and that the timing was sufficiently proximate to the adverse action, that the protected activity was a contributing factor in the adverse personnel action. The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity. But, before the ALJ can conclude that the employee prevails at step one, the ALJ must *believe* that it is more likely than not that protected activity was a contributing factor in the adverse personnel action and must make that determination after having considered all the relevant, admissible evidence.

Palmer, supra at 56.

As an initial matter, I find that there is no evidence in the record to support a finding that the retention of the 2013 letter of reprimand in the Complainant’s work file was done in retaliation for the filing of the 2013 OSHA complaint. Ms. Valkan stated in her Declaration that she “inadvertently” failed to inform human resources to have the letter of reprimand removed after the execution of the settlement agreement.³⁴ She also stated that she instructed human resource to remove the letter upon learning that it had not been expunged. Although the Complainant appears suspicious of Ms. Valkan’s statement, he has produced no evidence to dispute it. He has also failed to produce any evidence that the Respondent intentionally let the letter of reprimand remain in his work file for any reason. Thus, I find that the failure to expunge the letter of reprimand was the result of human error and not done in retaliation for engaging in protected activity by filing the 2013 OSHA complaint.

The Complainant has argued that the Respondent unlawfully considered the 2013 letter of reprimand when assessing the 2015 50-day suspension. However, if the Respondent did consider the letter of reprimand, its actions would have been unlawful only because they violated the previous settlement agreement, which required it to expunge the letter of reprimand from the

³² *Id.* (quoting *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 6 (ARB May 26, 2010)).

³³ *Warren v. Custom Organics*, ARB No. 10-092, slip op. at 11 (ARB Feb. 29, 2012) (STA) (citing *Reiss v. Nucor Corp.*, ARB No. 08-137 (ARB Nov. 30, 2010) (STA)).

³⁴ See footnote 12.

Complainant's work file. As noted above, I do not have jurisdiction to enforce a previous settlement agreement or hear a cause of action for damages arising from a failure to execute said contractual agreement. The only issue I can decide is if the Respondent's adverse action, the 50-day suspension, was motivated by or contributed to in any way by the Complainant's protected activity, which in this claim is his previously filed 2013 OSHA complaint.

There is no evidence in the record that the 2015 50-day suspension was contributed to in any way by the Complainant's 2013 OSHA complaint. The Complainant was injured in February of 2013 and filed a complaint with OSHA shortly thereafter. The claim was settled in July of 2014. The Complainant was suspended for 50 days in May of 2015. Therefore, almost two years elapsed between the prior filing of a complaint with OSHA and the adverse action taken against the Complainant. I find that there is insufficient temporal proximity to support an inference of causality.

Additionally, there is scant evidence in the record to show that the individuals involved in disciplining the Complainant were aware of his prior complaint or the outcome of it. Ms. Valkan affirmed in her declaration that she did not discuss the 2013 OSHA claim or subsequent settlement agreement with James Golombeski, Rolando Jimenez or Michael Wolski. The Complainant testified that he did not talk to anyone at work about his complaint or the settlement. (CX 6 dep. at 9). He stated that he had no reason to believe that James Golombeski, Lance Osmond, Rolando Jimenez or Michael Wolski knew anything about the settlement agreement or his prior OSHA complaint. (*Id.* dep. at 9-10). Mr. Golombeski testified that in February of 2013 he was working in Flat Rock and was not aware of the investigation that resulted in the 2013 letter of reprimand. (CX 7 dep. at 19). He stated that Ms. Valkan has never informed him of the findings of any Department of Labor case. (*Id.* dep. at 20). At the April 28, 2015 hearing, the Complainant's union representative noted that the letter of reprimand should be removed from the work history because it was "overturned" in an FRSA case that went to court. (CX 3 at 23).

Based on this evidence, there is no indication that Mike Wolski or Rolando Jimenez ever had any knowledge of the Complainant's prior OSHA complaint or subsequent settlement agreement. Thus, there is no evidence that the Complainant's prior protected activity played any role in the initial investigation of his April 6, 2015 call-in done by Mr. Wolski or the decision to recommend the matter proceed to a formal hearing made by Mr. Jimenez. Lance Osmond initially had Mr. Jimenez investigate the April 6, 2015 call-in. However, there is no evidence to suggest that he knew about the prior FRSA claim until the investigative hearing and there is no evidence in the record to suggest that he had any role determining the Complainant's discipline.

Rather, the sole decision maker in determining the Complainant's 50-day suspension was Mr. Golombeski. He testified that he was not a party to the investigation in 2013 that resulted in the letter of reprimand and that Ms. Valkan had not informed him of the prior claim, as was routine. (CX 7 dep. at 19-20). While Mr. Golombeski would have seen in the April 28, 2015 hearing transcript that the Complainant had a prior FRSA claim that was overturned, there is nothing in the record to suggest that his knowledge of that occurrence factored into his decision to discipline the Complainant. Mr. Golombeski testified that the reason he disciplined the Complainant was that he found him guilty of not following proper procedures when he called in

to mark off work. (CX 7 dep. at 22-23). The Complainant also testified that he did not believe that the 50-day suspension was retaliation for anything that he had previously done. (CX 6 dep. at 43).

Mr. Miller did testify that the Complainant had informed him that he felt “targeted” since he filed his previous complaint but added that the Complainant felt like he was being targeted because he had FMLA and would take off when he had flare-ups. (CX 8 dep. at 38-40). He stated that several superintendents expressed displeasure over how often the Complainant would take FMLA leave. (*Id.* at 40-42). Mr. Golombeski acknowledged that he questioned the Complainant’s frequent use of FMLA leave and testified that he did not always believe that the Complainant was calling in because he legitimately had a flare-up. (CX 7 dep. at 14-15). Thus, the record suggests that Mr. Golombeski was frustrated with the Complainant’s frequent call-ins and use of FMLA leave. However, there is nothing in the record to suggest a similar frustration with the Complainant’s past filing of a complaint with OSHA. Based on the evidence in the record, I find that there is no evidence that Mr. Golombeski displayed any animus towards the Complainant because of his protected activity of filing an OSHA complaint. I find that the only decision maker in the case who had knowledge of the Complainant’s prior protected activities was James Golombeski. However, I find that the record does not establish that Mr. Golombeski’s knowledge of the Complainant’s protected activity contributed in any way to his decision to suspend the Complainant for 50 days.

Overall, I find that the record does not support a finding that the Complainant’s protected activity contributed in any way to the decision to suspend him. Although the Complainant argues that he has been damaged due to the Respondent’s failure to abide by their previously agreed-upon settlement agreement, I have no jurisdiction to proceed with this claim unless there is evidence that the Respondent’s actions in 2015 were due, at least in part, to the Complainant’s filing of the prior OSHA complaint or to some other protected activity. The evidence in the record before me does not suggest that this is the case. There is no evidence to suggest that the Respondent’s failure to remove the letter of reprimand from the Complainant’s work file was due to his protected activity. There is also no evidence to show that the Complainant’s protected activity contributed to the decision to suspend him. The temporal proximity between the protected activity and the decision to discipline the Complainant is too great to support an inference of causation. Further, many of the individuals involved in the disciplinary process had no knowledge of the Complainant’s past protected activity. The main decision maker, Mr. Golombeski, had some knowledge of the past complaint, but there is no evidence in the record to show that he considered that information when deciding to suspend the Complainant. In sum, in response to the Respondent’s motion for summary decision, the Complainant has not presented any significant evidence that his protected activity from 2013, or any other protected activity, played any role in the Respondent’s decision to suspend him in 2015.

CONCLUSION

The Complainant has not demonstrated the existence of a genuine issue of material fact with respect to the motion for summary decision. The evidence establishes that the Complainant engaged in protected activity and suffered an adverse employment action. However, he has not presented any direct or circumstantial evidence sufficient to oppose the Respondent’s evidence that his protected activity was not a contributing factor in its decision to suspend him for 50 days.

Accordingly, based on the materials presented, viewing them in a light most favorable to the Complainant, I find that there is no issue of material fact for hearing and the Respondent is entitled to summary decision in its favor.

ORDER

The Respondent's Motion for Summary Decision is **GRANTED**. Justin Johnson's claim is hereby **DISMISSED**. The hearing scheduled on November 28, 2018, in Ann Arbor, Michigan, is **CANCELLED**.

LARRY A. TEMIN
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).