



Issue Date: 14 January 2020

Case No.: 2020-FRS-00001

In the Matter of:

LEE M. HAYES,

Complainant,

v.

CSX TRANSPORTATION, INC.,

Respondent.

Appearances:

For the Complainant:

Brian Reddy, The Reddy Law Firm

For the Respondent:

Thomas Chiavetta, Jones Day

**DECISION AND ORDER GRANTING SUMMARY DECISION FOR RESPONDENT
AND DENYING COMPLAINT**

This case arises under the employee protection provisions of the Federal Railroad Safety Act, U.S. Code Title 49, Section 20109, as amended (“FRSA”), and its implementing regulations at 29 CFR Part 1982. Pursuant to 29 CFR § 1982.107, this proceeding is subject to the rules of practice and procedure set forth in federal regulations at 29 CFR Part 18, Subpart A (29 CFR § 18.10 to § 18.95).

This proceeding arises from a complaint of retaliation under the FRSA. The FRSA and its implementing regulations prohibit retaliatory or discriminatory actions by railroad carriers against their employees who, *inter alia*, report an injury or request medical or first aid treatment.¹

¹ 49 U.S.C. § 20109 provides, in relevant part:

(a) In General.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done—

Procedural History

Complainant Lee Hayes filed a complaint with OSHA on January 12, 2018, alleging that he was fired through correspondence mailed on January 8, 2018, in violation of the FRSA. On August 29, 2019, the Secretary's Findings were issued in this matter. The Secretary found that Complainant had suffered an injury at work in October 2015, and had been under medical care and out of work since that time. On January 8, 2018, Respondent CSX Transportation, Inc. sent Complainant a letter advising him that he forfeited his seniority and was considered out of service for failing to provide medical documentation and failing to notify Respondent of absences from work. On January 9, 2018, Respondent sent Complainant a second letter rescinding the January 8, 2018 letter, which Respondent stated had been sent in error. Complainant received the second letter on January 22, 2018. The Secretary found there is no evidence that Complainant suffered an adverse action for reporting a work related injury, and dismissed the complaint.

On October 3, 2019, Complainant filed a Statement of Objections and Request for Hearing with OALJ. The case was docketed with OALJ and assigned to me. On October 18, 2019, I issued two documents: a Notice of Assignment, and an Order to Show Cause Why Summary Decision Should Not Be Granted. The Show Cause Order stated that Complainant's Objections to the Secretary's Findings repeated the arguments from his complaint nearly verbatim, challenging him "being fired," and did not address the Secretary's finding that the January 8 letter had been rescinded by a January 9 letter, thus Complainant did not suffer an adverse employment action. The Show Cause Order stated that "the question whether Complainant suffered an unfavorable personnel action may not be genuinely in dispute," and ordered Complainant to show cause why summary decision should not be entered in Respondent's favor.

* * *

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

* * *

(c) Prompt Medical Attention.—

(1) Prohibition.—

A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline.—

A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Complainant filed his Response to Order to Show Cause and in Opposition to Summary Decision on November 8, 2019. Respondent filed its Response to Order to Show Cause in Support of Summary Decision on November 22, 2019.

The parties also filed a Joint Scheduling Report and a Joint Motion to Stay pending a ruling on the show cause issue. I issued an Order Granting Stay on December 10, 2019.

The FRSA

This proceeding arises from a complaint of retaliation under the employee protection provisions of the FRSA.² The FRSA and its implementing regulations³ prohibit retaliatory or discriminatory actions by railroad carriers against their employees who engage in certain protected activities, including notifying the railroad of a work-related personal injury. 49 U.S.C. § 20109(a)(4). The FRSA also prohibits a railroad carrier from interfering with the medical treatment of an employee who is injured during the course of employment. *Id.* § 20109(c)(1). In this case, the Complainant alleged Respondent violated Section 20109(a)(4) and (c)(1) of the FRSA when it sent the January 8, 2018 letter stating that Complainant had forfeited seniority and was considered out of service due to continued absence without proper documentation or notification.⁴

The FRSA permits an “employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section” to seek relief under Section 20109 by filing a complaint with the Secretary of Labor. *Id.* § 20109(d)(1). The proceedings initiated by the complaint are governed by the rules, procedures, and legal burdens of 49 U.S.C. § 42121(b) (the AIR 21 statute). *Id.* § 20109(d)(2).

² 49 U.S.C. § 20109.

³ 29 C.F.R. Part 1982.

⁴ The relevant parts of the statute provide:

(a) In General.—A railroad carrier engaged in interstate or foreign commerce ... may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s lawful, good faith act done, or perceived by the employer to have been done or about to be done—

* * *

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

* * *

(c) Prompt Medical Attention.—

(1) Prohibition.—

A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment....

(2) Discipline.—

A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician For purposes of this paragraph, the term “discipline” means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.

Section 42121(b) provides that, upon receipt of a complaint filed under the employee protection provisions of the FRSA, the Secretary of Labor will allow the person named in the complaint to respond and conduct an investigation. The Secretary must “determine whether there is reasonable cause to believe that the complaint has merit,” and notify the complainant and the respondent of the Secretary’s findings.⁵ The statute specifically requires the complainant to make a prima facie showing that his protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint”; upon a finding that the complainant has made the required showing, the statute requires the employer to demonstrate “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of” the protected activity. 49 U.S.C. § 42121(b)(2).

Therefore, to prevail on an FRSA complaint, a complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity; (2) his employer took an adverse employment action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *Fricka v. National Railroad Passenger Corporation*, ARB No. 14-047, ALJ No. 2013-FRS-00035 (Nov. 24, 2015).

Question Presented and Parties’ Arguments

The question presented here is whether there is a genuine dispute of fact as to whether Complainant suffered an unfavorable personnel action. It is undisputed that the January 8 disciplinary letter was rescinded by Respondent in a January 9 letter. The question is whether Complainant has shown that a genuine dispute on this element nevertheless exists.

Complainant contends that although Respondent sent a letter on January 9 rescinding the January 8 letter, the fact remains that “Respondent did notify the Complainant that he was dismissed,” and “[t]here can be no doubt that a dismissal from employment is an adverse action.” (Complainant’s Response at 1 (emphasis in original)). Complainant asserts that “[o]nce an adverse action is taken, and assuming there was protected activity that played a role in the adverse action, then the [FRSA] is violated.” *Id.* at 1-2. Complainant argues that an employer “cannot escape responsibility for such a violation by later admitting it was wrong to engage in the adverse action in the first place.” He asserts that he “may not have suffered a loss of income or benefits as a result of the January 8, 2018, letter, however he was dismissed, even if for a limited time, and offers proof that this adversely affected him emotionally.” *Id.* at 2. Complainant cites *Vernace v. PATH Rail* and *Fricka v. National Railroad Passenger Corp.* as support for his contention that being notified that he was considered out of service and dropped from the seniority roster “is not a trivial matter to an injured employee.” *Id.* at 2-4. He concludes that he “has presented proof that he did suffer an adverse action,” and requests that summary decision not be granted in favor of Respondent. *Id.* at 4. Complainant submitted an Affidavit marked as Complainant’s Exhibit 1 (CX 1) with his Response.⁶

Respondent argues that the January 8 letter was sent by mistake and rescinded by a letter “that was mailed to Hayes—and emailed to his union representatives—the very next day.”

⁵ Either party may file objections to the findings and request a hearing; if no such request is filed, the Secretary’s findings become the final order.

⁶ The contents of the Affidavit are discussed below.

(Respondent's Response at 1). Respondent states that the January 9 rescission letter was sent before Complainant or his representatives had to take action to challenge the seniority forfeiture, and because Complainant was out on medical leave, the January 8 letter that was rescinded on January 9 "had no effect whatsoever on Hayes' pay or benefits." Respondent also contends that a "one-day, temporary forfeiture of seniority" is not a termination of employment as Complainant alleged. Respondent argues that Complainant's claim of stress and anxiety from receiving the January 8 letter is not enough to show he suffered an unfavorable personnel action, and that even if it were sufficient, Complainant waived that argument by failing to object specifically to OSHA's finding that there was no adverse action. Respondent submitted six exhibits (RX) with its Response: the January 8, 2018 letter (RX 1); the January 9, 2018 letter (RX 2); the email header and the USPS label with tracking number used to deliver the January 9 letter (RX 3); the USPS Tracking Results for the January 9 letter sent to Complainant (RX 4); the Secretary's Findings dated August 29, 2019 (RX 5); and Complainant's Statement of Objections and Request for Hearing (RX 6).

Summary Decision Standard

Motions for summary decision are governed by 29 C.F.R. § 18.72. Under 29 C.F.R. § 18.72(f), an administrative law judge may "[c]onsider summary decision on the judge's own after identifying for the parties material facts that may not be genuinely in dispute." By Order issued October 18, 2019, I provided notice that I would consider summary decision on my own and identified the question of whether Complainant suffered an unfavorable personnel action as a material fact that may not be genuinely in dispute.

On summary decision,

A party asserting that a fact ... is genuinely disputed must support the assertion by:

- (i) Citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (ii) Showing that the materials cited do not establish the absence ... of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

29 C.F.R. § 18.72(c)(1).⁷

Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The party opposing the motion for summary decision must "establish the existence of an issue of fact which is both material and genuine, material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged

⁷ Rule 18.72(c)(1) mirrors the language of Federal Rule of Civil Procedure 56(c)(1) (Summary Judgment – Supporting Factual Positions).

factual dispute.” *Buck v. Gen. Dynamics Corp.*, 37 BRBS 53, 54 (2003) (citing *O’Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61 (2d Cir. 2002)). To determine whether a genuine issue of material fact exists, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A judge should not make credibility determinations or weigh the evidence on summary decision. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

Summary decision 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 of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “In such a situation, there can be no genuine issue as to any material fact,” because the failure to establish an essential element of the nonmoving party’s case “necessarily renders all other facts immaterial.” *Id.* at 323 (internal marks omitted).

Discussion

In this case, as discussed further below, the parties do not contest the facts relevant to whether a prohibited adverse personnel action occurred. Rather, they dispute *the legal significance* of those facts; that is, whether the undisputed facts establish a prohibited adverse personnel action under the FRSA.

The following facts are either undisputed or taken in the light most favorable to Complainant for purposes of summary decision⁸:

1. Complainant was injured on October 6, 2015 while working at Respondent’s locomotive repair facility. At the time of the relevant events in this case, he was under medical care and had not returned to work. (RX 5). Although Complainant had been unable to work due to his work-related injury, as a disabled employee he still qualified for health insurance. (CX 1).

2. By letter dated January 8, 2018, Respondent advised Complainant as follows:

Due to your continued absence, failure to provide medical documentation, and failure to notify the proper authority regarding your absence, you have **forfeited seniority** under Agreement Rule 14(c)(2) In accordance with this rule, you are considered out of service and dropped from the seniority roster. If you or your General Chairman dispute the application of Rule 14(c)(2), a hearing may be requested **within fifteen days** of this letter date.

(Emphases in original). (RX 1).

3. The January 8 letter was sent to Complainant’s home address via the United States Postal Service (USPS), and Complainant received it on January 9, 2018. (RX 1; CX 1). The letter was also sent to Complainant’s union representatives via email on January 8, 2018. (RX 1).

⁸ The facts regarding the content, mailing, and receipt of the letters is not disputed. Complainant’s statements in his Affidavit regarding his understanding of and reaction to the letters are accepted as true for purposes of summary decision only.

4. By letter dated January 9, 2018, Respondent advised Complainant as follows:

Reference the letter to you dated January 8, 2017, regarding your name being removed from the seniority roster as provided by Rule 14(c)(2) of the IAM Agreement unless you requested a seniority hearing.

Please disregard the aforementioned letter as it has been rescinded.

(RX 2).

5. The January 9 letter was sent to Complainant's home address via USPS "Priority Mail 1-Day" with Signature Confirmation Service. (RX 3). USPS attempted delivery of the letter at Complainant's home address at 12:34 p.m. on January 10, 2018, and left a notice because "no authorized recipient" was available. (RX 4). Complainant signed for and took delivery of the January 9 letter at 12:10 p.m. on January 22, 2018. (RX 4).

The January 9 letter was also sent to Complainant's union representatives via email on January 9, 2018, at 12:32 p.m. (RX 2; RX 3).

6. On January 10, 2018, Complainant emailed Mr. Brian Barr, the author of the January 8 letter, and stated: "After receiving the certified letter ... from you dated January 8th 2018 my family is devastated and emotionally distraught. I request a hearing immediately." Complainant also mailed a signed copy of this email to Mr. Barr on January 10, 2018, via certified mail. He did not receive a response to his request for a hearing.

7. On January 12, 2018, Complainant filed a complaint with the U.S. Department of Labor, OSHA, alleging retaliation in violation of the FRSA.

8. Complainant stated that when he "was notified on January 9, 2018^[9] that I was dismissed as an employee, because CSX claimed I had not provided proof of my disability, I was concerned that this would mean I could not claim future wage loss in my FELA claim and I also understood that this would mean I would lose any benefits I continued to be entitled to as an employee." (CX 1).

9. The accusations in the January 8 letter that Complainant was off work without notifying the proper authority and failed to provide medical documentation were untrue. He was off work due to a work-related injury that CSX knew about, and he had already attended a deposition where he was questioned by counsel for CSX about his injuries and his inability to work. The false accusations "added to [his] already stressful situation and anxiety." (CX 1).

10. Complainant did not receive the January 9 letter until January 22, 2018. Complainant stated the fact that CSX provided the January 9 letter, advising Complainant to disregard the January 8 letter, "did nothing to relieve the stress and anxiety [he] had already experienced by

⁹ Complainant is referring to his receipt of the January 8, 2018 letter; he received that letter on January 9.

the false accusations and the notification of [his] dismissal contained in the January 8, 2018 letter.”

Complainant argues that these facts establish an adverse personnel action, because the very issuance of the January 8 letter is an adverse employment action that violates the FRSA when it results from protected activity, and the letter’s dismissal of him from employment,¹⁰ “even if for a limited time ... adversely affected him emotionally.” Respondent argues that these facts do not establish a prohibited adverse personnel action, because the January 8 letter was rescinded the very next day and had no effect on Complainant’s pay or benefits. Respondent argues the fleeting stress and anxiety alleged by Complainant is not sufficient to establish a materially adverse personnel action.

Thus, the question in dispute is whether the January 8 disciplinary letter constitutes a prohibited adverse personnel action under the FRSA when it was rescinded by a second letter issued January 9. The parties do not dispute the contents and mailing of the January 8 letter or the contents and mailing of the January 9 letter; they dispute whether Respondent’s actions constitute an adverse employment action for purposes of the FRSA.

Complainant relies upon *Vernace v. PATH* and *Fricka v. National Railroad Passenger Corporation* to argue that the facts in this case are sufficient to establish an adverse personnel action. In *Vernace*, the complainant alleged that her employer retaliated against her in violation of the FRSA after she reported an injury. *Vernace v. Port Authority Trans-Hudson Corporation*, ARB No. 12-003, ALJ No. 2010-FRS-018 (Dec. 21, 2012). The employer (“PATH”) had sent a charging letter to the complainant after the injury, stating that she had failed to utilize safe work practices to prevent injury when she sat in a chair without inspecting it first (leading to her injury). PATH argued it took no adverse action against the complainant, because the charges were ultimately withdrawn and no discipline occurred.¹¹ There was no dispute that a charging letter dated April 24, 2009 was sent to the complainant, an investigative hearing was rescheduled or postponed on three occasions, and after an informal meeting on February 17, 2010, the charges were dropped, with a letter to that effect dated March 1, 2010 sent to the complainant.¹² The complainant argued that filing charges and scheduling a disciplinary hearing constituted an unfavorable personnel action, even though the charges were later withdrawn; the employer argued that no unfavorable action took place because the complainant was not ultimately discharged, demoted, reprimanded, or disciplined in any way. The ARB summarily affirmed, emphasizing that the broad reach of the FRSA includes “threatening discipline” as a prohibited action, and finding substantial evidence to support the conclusion that a “disciplinary investigation stretching one year in this case qualifies as discrimination under the regulations” and the statute.

¹⁰ Complainant stated in his Affidavit that if he is “not on the union seniority roster and am removed from service, this means I am discharged from employment.” (CX 1).

¹¹ The employer also argued that the filing of an injury report was not a contributing factor to the charges filed against the complainant. The ARB rejected that argument as well.

¹² The ARB adopted and affirmed the ALJ’s findings and added “limited discussion”; accordingly, these facts are taken from the ALJ decision.

In *Fricka v. National Railroad Passenger Corporation*, ARB No. 14-047, ALJ No. 2013-FRS-00035 (Nov. 24, 2015), the complainant was injured in a motorcycle accident while on travel for the employer and alleged that the employer retaliated against him after his injury. On appeal, the ARB addressed whether three specific activities constituted unfavorable personnel actions under the FRSA: Amtrak's refusal to pay the complainant's medical bills after reclassifying his injury as not work-related, and the complainant's performance appraisals in 2011 and 2012. The ARB noted the ALJ's reliance on a "test" derived from *Burlington Northern v. White*, 548 U.S. 53 (2006), which evaluated whether an employer's action constituted an unfavorable personnel action under the FRSA by examining whether it "would dissuade a reasonable employee from reporting an injury as 'work-related.'" The ARB stated this test is one of several tests or factors used to determine what constitutes adverse action, but it was not determinative in *Fricka*. Instead, as the ARB had held in *Menendez v. Halliburton, Inc.*, ARB No. 09-002 and 09-003, ALJ No. 2007-SOX-005 (Sept. 13, 2011), the appropriate measure was "the *Williams* standard of actionable adverse actions," under which "'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka*, ARB No. 14-047, quoting *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004 (Dec. 29, 2010).¹³ The ARB further stated that the FRSA's prohibition on discriminating "in any other way" against an employee who engaged in protected activity "explicitly proscribed non-tangible activity," and thus a tangible or material impact on an employee's terms or conditions of employment is not required to establish an unfavorable personnel action. Applying the *Williams* standard, the ARB found that two of the challenged actions by the employer were unfavorable and more than trivial, and thus constituted adverse personnel actions.¹⁴

Complainant highlights a portion of the ALJ's decision in *Vernace* in which the ALJ stated that the filing of charges against an employee is not a *de minimis* harm, because the charges are the first step in a disciplinary process that has the potential to culminate in punishment. The ALJ in *Vernace* rejected the railroad's argument that no adverse action occurred because the complainant was never actually disciplined, and found that the filing of charges which carried the potential for future discipline was an unfavorable personnel action. Complainant's Response at 2, quoting *Vernace v. PATH Rail*, ALJ No. 2010-FRS-00018 (Sept. 23, 2011), at 24-27. Complainant argues that a threat of discipline is sufficient to establish an adverse personnel action under the FRSA, as recognized in *Vernace*, making the January 8 letter in this matter an adverse personnel action under the FRSA. Complainant argues he suffered emotional harm from receiving the letter, which is sufficient under *Fricka*'s holding that an adverse personnel action need not have a tangible or material impact on the employee's terms of employment. Complainant thus contends that "being notified that 'Due to your continued absence, failure to provide medical documentation, and failure to notify the proper authority regarding your absence ... you are considered out of service and dropped from the seniority roster' is not a trivial matter to an injured employee." Complainant's Response at 4. He argues that Respondent "cannot escape responsibility for such a violation by later admitting it was wrong to engage in the adverse action in the first place." *Id.* at 2.

¹³ In *Williams*, the ARB had adopted that standard for AIR 21 cases; in *Menendez*, the ARB adopted the *Williams* standard for SOX cases; and in *Fricka*, the ARB adopted the *Williams* standard for FRSA cases.

¹⁴ The ARB found there were insufficient fact findings to make a determination regarding the third alleged action.

Respondent argues that an unfavorable personnel action must be “more than trivial,” and that an adverse action is “more than trivial” when it is “materially adverse so as to dissuade a reasonable worker from protected activity.”¹⁵ Respondent’s Response at 5 (internal marks and bracketing omitted). Respondent argues that the January 8 letter had no effect on Complainant’s pay or benefits, and his stress and anxiety “would not be enough to establish that the seniority forfeiture letter sent by mistake and rescinded the next day was an unfavorable personnel action.” *Id.* at 6. Respondent asserts that *Vernace* and *Flicka* are distinguishable: in *Vernace*, the employer pursued a formal disciplinary investigation for a year over multiple hearing settings before the charges were dropped, and in *Fricka*, the employer did not pay medical bills totaling almost \$300,000 and issued the lowest performance rating to the complainant he had ever received. *Id.* at 6-7. Respondent argues those cases “do not support the contention that an employment action taken by mistake and rescinded the very next day, and which had no effect on the employee’s pay or benefits, rises to the level of an unfavorable personnel action.” *Id.*

The question here is not whether the January 8 letter, standing alone, would constitute an adverse personnel action for purposes of the FRSA; the critical question is the effect of its rescission on January 9. Complainant contends the sending of the January 8 letter itself is sufficient under the FRSA, even if the letter was later rescinded (just as the charges were later dropped in *Vernace*). Respondent contends that, because the January 8 letter was rescinded the very next day, and had no effect on Complainant’s pay or benefits, it is not an adverse personnel action under the FRSA. The facts in this case are distinguishable from *Vernace* in important ways. There, the charges were scheduled (and rescheduled) for a disciplinary hearing and were not dropped until 10 months after the charging letter was sent. Here, the January 8 disciplinary letter was rescinded the next day, before any action by Complainant. While Complainant requested a hearing by email and mail on January 10, 2018, Respondent had already rescinded the January 8 letter by the January 9 letter, which was emailed and mailed out on January 9, 2018. That is, the rescission of the January 8 letter was immediate and unprompted—two facts that were not present in *Vernace*, where the ARB found that the “disciplinary investigation stretching one year” qualified as an adverse personnel action.

The circumstances here are much closer to those in *Smyth v. Johnson Controls World, Inc.*, ARB No. 99-043, ALJ 1998-ERA-023 (Jun. 29, 2001). There, the complainant had worked for Johnson Controls, a subcontractor at the Los Alamos National Laboratory, which was operated by the University of California. He had filed a previous complaint of retaliation against the university after a lay-off, and in the process of settling that complaint, Johnson Controls sent a letter dated December 8, 1997, which offered the complainant re-employment within two departments. Johnson Controls subsequently withdrew the December 8 letter and provided a December 16 letter offering re-employment without the departmental restrictions. The complainant alleged the December 8 letter constituted a new act of retaliatory discrimination by Johnson Controls. The ALJ, noting that the ERA protects employees against a broad range of

¹⁵ Respondent cites *Estabrook v. Fed. Express Corp.*, ARB No. 2017-0047, ALJ 2014-AIR-00022 (Aug. 8, 2019) for this proposition, but the ARB in *Estabrook* was quoting *Zavaleta v. Alaska Airlines*, ARB No. 15-080, ALJ 2015-AIR-016 (May 8, 2017), in this passage. In the relevant part of *Zavaleta*, the ARB reiterated its holding from *Williams* that the test of whether an action would dissuade a reasonable worker (the *Burlington Northern* test) was one measure of an adverse personnel action, but not the only one and not the determinative one under the AIR 21 statute.

discriminatory adverse actions, including non-monetary losses, found that the rescission of the letter “does not alter the fact that the action itself was adverse,” and “is more properly considered in assessing the damages to which Complainant might be entitled.” The ARB disagreed. It noted that while the ERA “protects employees against a broad range of discriminatory adverse actions,” including non-financial losses, “the complained-of action must rise to some threshold level of substantiality in order to be cognizable.” The ARB stated that the December 8 letter “had no effect whatsoever on [the complainant’s] employment status,” and “was removed a week later on December 16.” The letter was not announced to the public or to the complainant’s fellow employees, and thus did not affect his professional reputation. The ARB found the complainant “suffered, at most, temporary unhappiness” that did not have an adverse effect on his employment conditions for purposes of the ERA. The ARB concluded: “In sum, we find under the facts of this case that the December 8 letter did not constitute an adverse action under the ERA.” Complainant’s position in this case echoes the ALJ’s finding in *Smyth*: he argues the rescission of the January 8 letter “does not alter the fact that the action itself was adverse.” However, like the ARB in *Smyth* (which rejected the ALJ’s finding), I find that the complained-of action here does not meet the threshold level to be cognizable. The January 8 letter was rescinded by Respondent on January 9. The rescission was done immediately (the next day, prior to the 12:32 p.m. email sending the rescission letter to Complainant’s union representatives) and unilaterally (before any complaint or challenge by Complainant), and it rescinded the January 8 letter *in toto*. I find *Smyth* persuasive in its analysis of the effect of rescission, and conclude that the January 8 letter, rescinded on January 9, does not meet the threshold level of “substantiality” to be cognizable.

I acknowledge that the “threshold” is different under the FRSA than it was in the *Smyth* case (which arose under the ERA). As the ARB stated in *Fricka*, the FRSA protects employees against an “even broader” range of discriminatory adverse actions than AIR 21 (or the similarly worded ERA). However, it is not disputed (at least for purposes of summary decision) that the January 8 letter threatened, proposed, or initiated discipline that would come within the scope of the FRSA; the parties’ dispute is over the role of the January 9 rescission of the January 8 letter. On that question, I find *Smyth*’s analysis persuasive, and find it appropriate to consider the effect of the January 8 letter *in combination with* its rescission on January 9, versus considering the January 8 letter as an adverse employment action in and of itself with the January 9 letter relevant only to damages. As discussed above, considering the January 8 letter together with its immediate unilateral rescission on January 9, I find Complainant has not established a cognizable adverse personnel action.

Complainant’s reliance on his increased stress and anxiety after receiving the January 8 letter does not help him meet his burden. While the FRSA does not require that an adverse employment action have a tangible or material impact on an employee’s “terms or conditions of employment,”¹⁶ it still requires that an adverse employment action be “more than trivial.” See *Fricka*, ARB No. 14-047 (applying the *Williams* definition of adverse personnel action to FRSA

¹⁶ Compare 49 U.S.C. § 20109 (the FRSA provides that a railroad “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” due to the employee’s protected activity) with 49 U.S.C. § 42121 (the AIR 21 statute provides that an air carrier may not “discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment” due to the employee’s protected activity).

claims).¹⁷ In *Vernace*, the ARB held that even though disciplinary charges were eventually dropped, a “disciplinary investigation stretching one year” qualified as an adverse personnel action under the FRSA, which includes “intimidating” and “threatening” actions as prohibited discrimination. As discussed above, however, the facts in this case are plainly distinguishable from *Vernace* in critical ways, and lead to a different result. Here, Complainant did not languish under disciplinary proceedings and their threat of eventual punishment for almost a year; the January 8 letter was immediately rescinded the day after it was sent. The harm from the January 8 letter and its January 9 rescission was *de minimis*, even accounting for the stress and anxiety Complainant felt upon receiving the January 8 letter.¹⁸ The emotional effect of the letter on Complainant is not sufficient to render the January 8 letter and its next-day rescission an adverse personnel action under the FRSA.

Based upon the foregoing discussion, I find that Respondent’s immediate, unprompted, unilateral rescission of the January 8 letter renders the complained-of action here trivial and insufficient to establish an adverse personnel action under the FRSA.

Because the existence of an adverse personnel action is an essential element of a claim of retaliation under the FRSA, on which the Complainant has the burden of proof, a failure of proof on that element entitles Respondent to summary decision in its favor.

Conclusion

Based on the foregoing, I find that summary decision is appropriate as the parties do not dispute the relevant facts underlying the legal question of whether there was an adverse personnel action in this matter. I find that Complainant has not established an adverse personnel action under the FRSA. Accordingly, Respondent is entitled to summary decision in its favor, and the complaint must be denied.¹⁹

¹⁷ In *Williams*, the ARB stated that “the term ‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged,” and “isolated trivial employment actions that ordinarily cause de minimis harm or none at all to reasonable employees” are excluded from coverage. *Williams*, ARB No. 09-018 (slip op. at 15).

¹⁸ This is true whether one focuses upon the 1-day period between Respondent’s actions of sending the January 8 letter and sending the January 9 rescission letter (which was sent via “Priority Mail 1-Day” service for expedited delivery to Complainant, although that was thwarted), or the 13-day period between Complainant’s receipt of the January 8 letter (on January 9) and his actual receipt of the January 9 rescission letter (on January 22). Either period of time (1 day or 13 days) is very brief and not at all comparable to the nearly year-long investigation at issue in *Vernace*.

¹⁹ 49 U.S.C. § 42121(b)(3)(A) provides that “the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint.”

ORDER

For the reasons set forth above, **IT IS ORDERED**:

1. Summary Decision is **GRANTED** in favor of Respondent CSX Transportation, Inc., and
2. The complaint filed by Lee M. Hayes under the FRSA is **DENIED**.

SO ORDERED.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA

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).