U.S. Department of Labor

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Issue Date: 03 April 2013

CASE NO: 2009-FRS-00009

In the Matter of:

KENNETH G. DEFRANCESCO,
Complainant,

v.

UNION RAILROAD COMPANY,
Respondent.

APPEARANCES:

D. Aaron Rihn, Esq.
For the Complainant

Michael P. Duff, Esq.
For the Respondent

BEFORE: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter arises under the employee protection provisions of the Federal Rail Safety Act ("FRSA" or "the Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of FRSA are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

PROCEDURAL BACKGROUND

Kenneth G. DeFrancesco ("Complainant") filed a complaint with the Occupational Safety and Health Administration (OSHA) of the Department of Labor on February 11, 2009, alleging that Union Railroad Company ("Respondent") violated Section 20109(a)(4) of FRSA by assessing against him a 15-day suspension in retaliation for his reporting of a work-related personal injury.

The Secretary of Labor, acting through the Regional Administrator for OSHA, investigated the complaint. The "Secretary's Findings" were issued on May 15, 2009. OSHA determined that there was reasonable cause to believe that Respondent violated FRSA and ordered relief for Complainant. On June 23, 2009, Respondent filed its objections to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges (OALJ).

A *de novo* hearing was held in Pittsburgh, Pennsylvania, on February 4, 2010, exhibits were admitted into evidence, and post-hearing briefs were received from Respondent on May 10, 2010 and from Complainant on May 11, 2010. The undersigned Administrative Law Judge (ALJ) issued a decision and order on June 7, 2010 ("ALJ D&O") denying Complainant's complaint on the grounds that he had failed to show that his protected activity was a contributing factor in Respondent's decision to take the adverse employment action of disciplining him. (ALJ D&O at 9-16). Complainant filed a petition for review with the Administrative Review Board (ARB), which was docketed as of July 13, 2010. On February 29, 2012, the ARB issued a decision and order of remand ("ARB D&O") reversing the ALJ D&O's dismissal of the complaint, concluding that Complainant engaged in protected activity under the FRSA which contributed to his suspension, and remanding the case to this office for further proceedings on the issue of whether Respondent avoided liability under the FRSA by proving by clear and convincing evidence that it would have disciplined Complainant even absent his protected activity. (ARB D&O at 8-9). I now address this issue.

BRIEF SUMMARY OF FACTS

The findings from the ALJ D&O are hereby incorporated by reference except to the extent that they are inconsistent with the ARB's decision.

Complainant was an employee of Respondent within the meaning of the FRSA, and on December 6, 2008, while directing a railroad car into a steel mill during the course of his job duties for Respondent, he slipped and fell on a snowy, icy walking surface despite the Respondent-issued shoe grips he was wearing. (ALJ D&O at 2-3). He immediately used his radio to contact a supervisor and report that he had fallen and needed medical attention. He was subsequently diagnosed with a strained lower back muscle. (ALJ D&O at 2). There were no other reports of this incident and no eyewitnesses.

After an investigation, Respondent's transportation supervisor and foreman of engineers completed an incident report concluding that the walking surface was the cause of the accident. (ALJ D&O at 3). However, another investigation, this time by transportation department superintendent Robert J. Kepic and train rules examiner Ronald A. Sieger, included a review of a video of the incident (captured by a camera mounted on the locomotive which Complainant was directing), and concluded that Complainant was at fault in the incident in that he was not taking "short, deliberate steps" and was otherwise walking carelessly, which constituted a violation of Respondent's safety rules. (ALJ D&O at 4). Kepic and Sieger did not inspect the scene of the accident or interview Complainant or any of the other witnesses. They reviewed Complainant's disciplinary file and determined that there was a pattern of unsafe behavior. Due to his violation of the safety rules on December 6, 2008, they decided to bring disciplinary charges against him. (ALJ D&O at 4-5).

Complainant was given a notice of investigation summoning him to a disciplinary hearing, from which he gathered that he was being charged with failing to wear non-slip footwear, and that he would be terminated if the hearing officer (a man he understood to be a "hanging judge") found him to have violated the safety rules. (ALJ D&O at 5, 11). Kepic and Sieger communicated to Complainant's union representative, J.J. Tierney, that Complainant could waive the hearing and accept the charges against him along with a 15-day suspension; Tierney told Complainant that several members of management had given him the impression that Complainant would be dismissed if he proceeded with the hearing. (ALJ D&O at 5). Complainant therefore signed an acknowledgement and waiver on January 12, 2009, leading Sieger to find him guilty of violating Safety Rule 5.20 and General Rule B, and suspend him for fifteen days from January 24 through February 7, 2009. (ALJ D&O at 5-6).

GOVERNING LAW

FRSA prohibits railroad employers from disciplining or otherwise discriminating against employees who engage in certain enumerated protected activities. As stated at 49 U.S.C. §20101, FRSA was enacted for the purpose of promoting safety in every area of railroad operations and reducing railroad-related accidents and incidents.

Applicable Provisions

Complainant alleges that Respondent violated 49 § 20109(a)(4), which provides:

> A railroad carrier […] may not […] suspend […] an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done […] 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 […]

49 U.S.C. § 20109(a)(4).

Elements of FRSA Violation & Burdens of Proof

Actions brought under FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR-00011, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR 21, and thus FRSA, means "prove by a preponderance of the evidence." *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving his

case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121 (b)(2)(B)(iii)(iv).

ISSUE PRESENTED

The sole issue on remand is whether Respondent's evidence "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the complainant's protected] behavior." 49 U.S.C. 42121(b)(2)(B)(ii).

DISCUSSION AND CONCLUSIONS OF LAW

The ARB did not question the findings regarding the Respondent's explanations which I made in the ALJ D&O. In that decision and order, I credited the testimony of Kepic and Sieger that Complainant's injury report was not a factor in the decision to discipline him; the testimony of Sieger that, at the time the discipline decision was made, he had reviewed enough material to reach that decision; the consistent testimony of Kepic that Complainant was charged with failure to take short and deliberate steps rather than failure to wear shoe grips; and the testimony of Kepic that the hearing officer was selected because other officers were unavailable rather than because of his reputation as a "hanging judge." (ALJ D&O at 12). Also, I did not credit Complainant's assertion that Respondent has engaged in a pattern of retaliation against employees who report safety violations. (ALJ D&O at 15-16). Because the Board did not question my findings of the credibility of Respondent's witnesses and the veracity of Complainant's assertion of a pattern of retaliation, I here adopt my earlier finding that Respondent's articulated legitimate, nondiscriminatory motive for disciplining Complainant – to wit, Complainant's unsafe walking which precipitated his injury, superimposed on his safety and discipline record – was its true motivation.

However, the ARB's decision in this case focuses on Complainant's report of his injury and whether his report was a contributing factor to his suspension. The ARB sets forth a pure but-for standard. The ARB reasons that but for Complainant reporting his injury, Employer would not have known of Complainant's unsafe movement and pattern of safety rule violations and thus would not have suspended Complainant. Specifically, the ARB reasoned:

> If [Complainant] had not reported his injury as he was required to do, Kepic would never have reviewed the video of [Complainant's] fall or his employment records. Kepic admitted this at the hearing, testifying that such a review was routine after an employee reported an injury and that the purpose of the review was to determine "the root cause." Kepic stated that after seeing the video he reviewed [Complainant's] injury and disciplinary records to determine whether there was a pattern of safety rule violations and what corrective action, if any, needed to be taken.
>
> While [Complainant's] records may indicate a history and pattern of safety violations, the fact remains that his report of the injury on December 6 triggered

> Kepic's review of his personnel records, which led to the 15-day suspension. If [Complainant] had not reported his fall and Kepic had not seen the video, Kepic would have had no reason to conduct a review of [Complainant's] injury and disciplinary records, decide that he exhibited a pattern of unsafe conduct, and impose disciplinary action. (footnotes deleted).

(ARB D&O p. 7).

Respondent has argued that it would have disciplined Complainant for the safety violations preceding his injury even if Complainant had never engaged in the protected behavior of reporting his injury. In support of this contention, Respondent points to its record of disciplining employees for safety violations even when the employees did not report injuries; Mr. Kepic's testimony that he would have disciplined Complainant if he had witnessed the safety violation even if Complainant had never reported the injury; and the evidence that Complainant was indeed violating Respondent's safety policy at the time of his injury. In short, even if Respondent had learned of Complainant's unsafe conduct through means that had nothing to do with protected activity, Respondent still would have disciplined Complainant for the unsafe conduct.

Complainant, on the other hand, argues on remand that Respondent cannot prove that it would have taken the same unfavorable personnel action in the absence of his protected behavior, because, even if Respondent was indeed motivated only by a desire to punish a safety violation and not the protected behavior, Respondent would not have known about the safety violation to punish it in the absence of the protected behavior. In other words, it makes no difference in this case whether Respondent would have punished Complainant if it had learned of his unsafe conduct by some means other than protected activity, for the simple reason that in this case, that *is* how Respondent found out about the unsafe conduct.

Complainant is correct. The ARB's concern is not with Respondent's reasons for taking the unfavorable personnel, that is, Complainant's engaging in unsafe conduct, but with whether Respondent would have known about Complainant's unsafe conduct without Complainant reporting his injury. By the logic of the ARB, Respondent may avoid liability by showing, by clear and convincing evidence, that it received notice of the unsafe conduct by means other than Complainant's injury report, not by showing its motivation for assessing the suspension. Respondent cannot, on the facts of this case, meet its burden of rebuttal as articulated by the ARB.

Under the ARB's reasoning, Respondent's nondiscriminatory motives are immaterial as long as the adverse employment action logically and literally would never have come about but for the protected activity. The counterfactual scenario of what Respondent would have done if it had somehow learned of the conduct and injury through means other than a report by Complainant is of no relevance. Under the Board's binding interpretation, the FRSA effectively immunizes a railroad employee from employer discipline for unsafe conduct as long as that employee reports any resulting injury, and the report is the only avenue by which the employer learned of the unsafe conduct.

I accordingly find that Respondent has not met, and indeed cannot meet, its burden of showing by clear and convincing evidence that it would have taken the adverse employment action of disciplining Complainant even absent Complainant's protected activity of reporting his injury.

CONCLUSION

Based on the foregoing, because Respondent has not met its burden of showing by clear and convincing evidence that it would not have taken the adverse employment action absent Complainant's protected activity, I find that Respondent violated the anti-retaliation provisions of the FRSA in disciplining Complainant.

REMEDIES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. § 20109(e)(2)(C). Punitive damages up to $250,000 are also authorized. § 20109(e)(3).

In this case, Complainant has argued that he is entitled to expungement of his record, an award of back pay for his 15-day suspension, punitive damages up to $250,000, and reasonable attorney's fees and costs.

Expungement

To make Complainant whole, he is entitled to have his disciplinary record expunged of any reference to the charges arising from the filing of the injury report, including his suspension. Complainant is further entitled to be restored to the same seniority status that he would have had but for the discrimination. 49 U.S.C. § 20109(e)(2)(A).

Back Pay

Complainant is entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(2)(B). In the ALJ D&O, I found that Complainant had been suspended without pay for 15 days, from January 24 through February 7, 2009. Complainant is entitled to back wages for that period, as well as prejudgment interest to be paid for the period following Complainant's suspension on January 24, 2009 until the date of this Decision and Order, and post-judgment interest to be paid thereafter, until the date payment of back pay is made. 49 U.S.C. § 20109(e)(2)(B).

Punitive Damages

Punitive damages are intended to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility

or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). "Punitive damages are appropriate for cases involving reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

As for the first factor, in this case, Respondent's reprehensibility or culpability is nearly nil. As explained above, my findings regarding Respondent's true motivations for disciplining Complainant were not questioned by the Board, and I found that those motivations were legitimate; to wit, I found that Respondent disciplined Complainant because it wanted to punish the unsafe conduct which caused the injury, rather than the protected activity constituted by Claimant's report of the injury. There is nothing "reprehensible" or "culpable" in attempting in good faith to punish or deter unsafe conduct by railroad employees. As to the second factor, there was very little discussion or argument on the subject of the effect this disciplinary suspension had on Complainant; however, Complainant has repeatedly asserted that other railroad employees are afraid to make safety complaints because of alleged similar behavior by Respondent.

The third factor requires that I examine the sanctions imposed in other cases for comparable misconduct. For the most part, where extensive punitive damages have been awarded, the ALJ has found egregious and systematic deterrents against the protected activity in question, or has at least found an absence of predictable procedures to ensure the rights of whistleblowers. See, e.g., Anderson v. Amtrak, ALJ No. 2009-FRS-00003 at 26-27 (Aug. 26, 2010) ($100,000 in punitive damages awarded where employer gave decisionmaker in disciplinary process no guidance, no review, a company policy of finding an employee to blame for every accident, monetary incentives to keep injury reporting down, and no correction after finding he'd "gone too far"); Bowie v. New Orleans Public Belt Railroad, ALJ No. 2012-FRS-00009 at 27 (Oct. 19, 2012) ($25,000 in punitive damages awarded where employer had no objective discipline criteria, no required review of discipline decisions, no implementation of their optional plan for review, wage incentives tied to injury reporting, and a decisionmaker utterly ignorant of the FRSA whistleblower provisions); Cain v. BNSF Railway Company, ALJ No. 2012-FRS-00019 at 17-19 (Oct. 9, 2012) ($250,000 in punitive damages awarded where employer had engaged in an intentional, willful conspiracy to deny the complainant his right to pursue his medical claim by making his work environment unbearable).

More mid-level awards have been granted where a supervisor decided, independently of the company and partially "as a friend," to warn a subordinate that the subordinate would be charged if he continued to pursue a position tied to protected activities ($5,000, Rudolph v. Amtrak, ALJ No. 2009-FRS-00015 at 94-95 (March 14, 2011)); where the employer failed to investigate known ambiguities and discrepancies in an injury report before filing charges, but the adverse employment action caused the complainant to lose only two days of pay or vacation time ($1,000, Vernace v. Port Authority Trans-Hudson Corporation, ALJ No. 2010-FRS-00018 at 29

(Sept. 23, 2011), aff'd ARB No. 12-003 (Dec. 21, 2012)); and where a supervisor overreacted to the complainant's report of a hazardous condition, sending the complainant home without pay for four days on the pretext that the complainant had asked for this discharge because of the hazardous condition ($1,000, Jackson v. Union Pacific Railroad Company, ALJ No. 2012-FRS-00017 at 10 (Feb. 15, 2013)).

Finally, there are several cases where the complainant was awarded no punitive damages at all in spite of being entitled to compensatory relief. See, e.g., Bala v. Port Authority Trans-Hudson Corporation, ALJ No. 2010-FRS-00026 at 14-15 (February 10, 2012) (awarding no punitive damages where Complainant was neither terminated nor demoted and was suspended for only three days for accumulating excessive absences under the employer's attendance policy by missing work – as ordered by two different doctors – in connection with a work-related injury which he had reported); Kruse v. Norfolk Southern Railway Co., ALJ No. 2011-FRS-00022 at 33-34 (June 22, 2012) (no punitive damages awarded where discipline was reduced from 30-day suspension without pay to mere suspension, where employer suspended complainant on pretext of speeding charges the day after he returned from medical leave for an injury he had reported, and where employer targeted complainant and "watched" him closely upon his return because of the injury); and Bailey v. Consolidation Rail Corporation, ALJ No. 2012-FRS-00012 at 35 (December 31, 2012) (no punitive damages where complainant had made numerous safety reports and one report of an injury before being removed from service and dismissed, and the actions of two co-workers with knowledge of his reports brought about his dismissal, but there was no real conspiracy or outright antagonism against him for the reports).

This case, with its brief suspension, no termination, and absence of any culpable state of mind on the part of Respondent's agents, is most analogous to the cases in which no punitive damages were awarded; here, as in Bala, Respondent did nothing more blameworthy than consistently apply a legitimate company policy to a situation in which the complainant's violation of that policy happened to be bound up with protected activity under the FRSA. Bala, ALJ No. 2010-FRS-00026 at 14-15, supra. Indeed, Respondent's motivations were even less offensive to whistleblowers' rights than those of the employers in Kruse and Bailey, where punitive damages were also not awarded. Kruse, ALJ No. 2011-FRS-00022 at 33-34, supra; Bailey, ALJ No. 2012-FRS-00012 at 35, supra.

Thus, while Complaint's damages were enough to prove his claim, the harm was not so severe as to entitle him to punitive damages in this case. The deterrent aims of punitive damage awards will be amply achieved by the requirement that Respondent render back pay with interest, attorney's fees, and other costs and expenses associated with the prosecution of this case. No further punishment need be inflicted for a FRSA violation so lacking in reprehensibility.

Attorney's Fees and Costs

Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is

granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

ORDER

For the foregoing reasons, I find that Complainant has established that Respondent retaliated against him in violation of the Federal Railway Safety Act for reporting his injury. It is hereby ORDERED:

1. Respondent shall expunge Complainant's personnel file of any disciplinary record or negative references related to the charges and discipline arising from the December 6, 2008 incident.

2. If any seniority has been lost as a result of the December 6, 2008 incident, Respondent shall restore Complainant to the same seniority status that he would have had but for the discrimination.

3. Respondent shall pay Complainant back wages with interest for the period from January 24 through February 7, 2009. Prejudgment interest is to be paid for the period following Complainant's suspension on January 24, 2009 until the date of this Decision and Order. Post-judgment interest is to be paid thereafter, until the date payment of back pay is made.

4. Respondent shall pay Complainant's reasonable attorney's fees and costs. Counsel for Complainant is granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

SO ORDERED.

Digitally signed by Thomas Burke
DN: CN=Thomas Burke,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

THOMAS M. BURKE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to

the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

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).