

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 September 2009

CASE NO.: 2009-FRS-6

In the Matter of:

ANTHONY JOHNSON
Complainant

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)
Respondent

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Anthony Johnson (complainant) filed a complaint under the Federal Rail Safety Act, as amended, 49 U. S. C. § 20109 on December 5, 2008. After an investigation, the complaint was dismissed by the Area Director of the Occupational Health and Safety Administration (OSHA) on February 25, 2009. Complainant filed Objections and Request for Hearing on March 24, 2009 and the case was referred to the Office of Administrative Law Judges. A hearing in the case is currently scheduled before the undersigned on September 23, 2009 in Indianapolis, Indiana.

On August 24, 2009, Respondent filed a Motion for Summary Judgment and Complainant filed a Reply on September 8, 2009. Pursuant to 29 CFR § 18.40(d) an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained in discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorably to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 247 (1986).

Statement of Facts

Complainant worked in Respondent's Locomotive Department when he suffered a work-related injury to his left eye on June 9, 2008. Deposition of Roger Riggen at 10. Riggen was an assistant superintendent and was in charge of the Locomotive Department. Id at 6. When informed of Complainant's injury Riggen took Complainant to a medical clinic for a doctor to evaluate his eye injury. Id at 13. At the clinic, Riggen telephoned James Goodlet, Respondent's Manager of Safety and Environmental Control, whose job duties included investigating work injuries and determining any work restrictions. Id at 14, Deposition of James Goodlet at 4, 19-

20. Goodlet talked to the doctor who informed him that Complainant had a piece of slag that had burned his eyelid and that he had given Complainant a prescription salve. Goodlet deposition at 21. Goodlet told the doctor that if it was necessary to give Complainant a prescription medication he should, but he asked the doctor if there was any way he could give Complainant an over-the-counter medication. Id. The doctor responded “No problem. I can give him Ibuprofen.” Id. Goodlet testified that he asked the doctor to give Complainant an over-the-counter medication rather than a prescription medication because giving Complainant a prescription medication would have required Respondent to report the injury to the Federal Railroad Administration (FRA). Goodlet deposition at 22, 30.¹

Conclusions of Law

Johnson’s complaint references only § 20109(a)(4) but in his response to Respondent’s interrogatories, Complainant alleges that Respondent also violated § 20109 (a)(1), (a)(2), and (a)(6). The decision of the OSHA Area Director does not refer to any sections of § 20109 but it is clear from the content of the report that the complaint was denied pursuant to § 20109(c). I will evaluate all of these sections to determine if summary judgment is warranted in this case.

Section 20109 provides:

- (a) 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-
 - (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of Federal law, rule, or regulation relating to railroad safety or security, . . . if the information or assistance is provided to or an investigation stemming from the provided information is conducted by-
 - (A) a Federal, State or local regulatory or law enforcement agency . . . ;
 - (B) any member of Congress, any committee of Congress, or the Government Accountability Office; or

¹ By fax dated September 10, 2009, Respondent filed a Motion to Correct the Record on its Motion for Summary Judgment including its response to Complainant’s request for production of documents providing documentation which purportedly shows that Respondent ultimately reported Complainant’s injury to the FRA. The documentation submitted by Respondent does not clearly indicate that Complainant’s injury was reported to the FRA and therefore Respondent’s Motion to Correct the Record is denied. However, whether or not Respondent reported Complainant’s injury to the FRA is irrelevant to the question of whether Respondent’s Motion for Summary Judgment should be granted.

- (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct;
- (2) to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;
- (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;
- (6) to furnish information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident, or incident resulting in injury or death to an individual or damage to property occurring in connection with railroad transportation.

Section 20109(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,....

Regarding (a)(1), there is no evidence that Complainant provided information or assisted in any investigation regarding any conduct which he reasonably believed to be a violation of any Federal law, rule, or regulation relating to railroad safety or security conducted by a Federal, State, or local regulatory agency, a member of Congress, or a person with supervisory authority over him. Complainant merely reported his injury to one of Respondent's employees but in doing so he did not allege a violation of any law or regulation related to railroad safety or security. Complainant's filing of this complaint on December 5, 2008 took place six months after his eye injury and could not have influenced any action taken by Respondent at the time of his injury. Moreover, the record does not contain any evidence that Complainant was discharged, demoted, suspended, reprimanded, or in any other way discriminated against by Respondent. Complainant also did not refuse to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security. See (a)(2).

Complainant did notify the railroad carrier of his work-related injury, but as noted previously, there is no evidence that he suffered any adverse employment action as a result. Goodlet's suggestion to the doctor that he recommend an over-the counter medication rather than a prescription medication to treat Complainant's eye injury does not constitute an adverse employment action as it did not affect the terms or conditions of Complainant's employment. See *Agee v. ABF Freight Systems, Inc.*, ARB No. 04-155, ALJ No. 2004-STA-34, slip opinion at

4 (ARB Nov. 30, 2005), *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No 2005-AIR-31 (ARB Mar. 14, 2008), cases decided under the whistleblower provisions of two other transportation statutes. Moreover, Complainant has not referred to any evidence in the record that the use of over-the-counter medication for the treatment of his eye injury was ineffectual such as to constitute discrimination. See (a)(4).²

The analysis under (a)(6) is similar to the analysis under (a)(1). Complainant's filing of the instant complaint with OSHA six months after his injury could not possibly have motivated Respondent to discriminate against him six months earlier. Furthermore there is no evidence in the record that Complainant was subjected to an adverse employment action or any other kind of discriminatory action. Construing the facts most favorably to Complainant, there is no legal basis for Complainant to prevail and summary judgment is appropriate with regard to (a)(1), (a)(2), (a)(4), and (a)(6).

Section 20109(c) comes closest to providing Complainant with a legal basis for prevailing on his complaint assuming that Goodlet's suggestion to the doctor to use an over-the-counter medication so Respondent did not have to report the injury to the FRA constitutes interference with Complainant's treatment. However, as found by the OSHA Area Director, the statute was amended on October 16, 2009 to add § 20109(c) and that provision has no retroactive application to Complainant's injury of June 9, 2008. Thus, Complainant does not have a basis for recovery under § 20109(c).

For good cause shown,

IT IS ORDERED THAT:

1. Respondent's Motion for Summary Judgment is GRANTED,
2. The hearing scheduled in this case on September 23, 2009 in Indianapolis, Indiana is CANCELLED.

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DANIEL L. LELAND
Administrative Law Judge

NOTICE OF REVIEW: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by

² Respondent's motivation to have the doctor change the medication from a prescription medication to an over-the-counter medication, to which the doctor readily agreed, to avoid reporting the injury to the FRA does not in any way render Respondent's action discriminatory.

the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210. *See generally* 5 U.S.C. § 557(b). However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.