**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 05 June 2009**

CASE NO.: 2009-FRS-00004

*In the Matter of:*

STEPHANIE MEECH,
Complainant,

vs.

TXI RIVERSIDE CEMENT,
Respondent.

Appearances: Stephanie Meech
Pro se

Denise Giraudo, Esquire
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

### INTRODUCTION

This matter arises out of a request for a hearing before the Office of Administrative Law Judges ("OALJ") filed by the Complainant after the Regional Administrator for the U.S. Department of Labor's Occupational Health and Safety Administration ("OSHA") ("Regional Administrator") dismissed a complaint she filed under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53.

For the reasons set forth below, it is recommended that the complaint be DISMISSED.

## ANALYSIS AND DISCUSSION

### Procedural Background

The Complainant filed a complaint with OSHA by phone on January 6, 2009, alleging that she was terminated for complaining about cleaning up metal and steel "slag" in railway cars.[1] OSHA processed her complaint under the employee protection provision of the Federal Rail Safety Act and dismissed her complaint on January 29, 2009, as untimely filed. The Complainant then filed a timely request for a hearing before the Office of Administrative Law Judges ("OALJ").

On March 6, 2009, I issued a Notice of Hearing setting this matter for hearing on June 4, 2009, in Long Beach, California. On the same day, I issued a separate order noting that this complaint appeared to be untimely and ordered the Complainant to show cause why the case should not be dismissed without a hearing because of the late filing of the complaint. I ordered the Complainant to respond to the order by March 27, 2009. I gave Respondent until April 10, 2009, to reply to the Complainant's response.

On March 26, 2009, the Complainant spoke to my law clerk by phone and asked for an extension of time to respond to my order. I issued an order on March 26, 2009, granting the oral request for an extension of time and extended the deadline for responding to my order to April 3, 2009. Additionally, I extended the deadline for Respondent's reply to April 17, 2009.

I received no response to my order to show cause from the Complainant before the April 3, 2009, deadline. Respondent filed a document entitled "Response to Complainant's Statement and TXI's Motion to Dismiss Complainant's Late Filed Complaint" on April 15, 2009, stating that it only recently received notice of this case and was never served with the proper pleadings. It argued that the Complainant had failed to state a claim under the Federal Rail Safety Act and that her complaint was, and continued to be, untimely, and urged that the complaint be dismissed.

Respondent identified its filing as a reply to the Complainant's response to my Order to Show Cause leading me to wonder about the lack of a response from the Complainant. My law clerk contacted the Complainant and spoke to her on April 17, 2009, about the fact that I had not received a response to the Order to Show Cause from her. She informed my law clerk that she had served her response to my order on everyone listed in the OALJ service sheet for my order and had failed to provide a copy to me and would send a copy to me. Her response was subsequently received on April 20, 2009.

After reviewing the Complainant's response to the Order to Show Cause and Respondent's reply and Motion to Dismiss, I issued another Order to Show Cause on April 24, 2009, informing the parties that I had doubts that this case falls under the Federal Rail Safety Act and ordered the Complainant to show that TXI is a railroad carrier and that her complaint comes under the FRSA. I ordered her to respond to the Order by May 14, 2009. The Complainant did

[1] This is reflected in an OSHA "Case Activity Worksheet" that was included in the documents sent to the OALJ by OSHA.

not respond to this Order to Show Cause until May 27, 2009. Respondent responded to the Order with another Motion to Dismiss which was filed May 27, 2009.

Findings of Fact

TXI is a company in the building materials industry. (Exhibit 2 of Complaint.) The Complainant was employed by TXI as a maintenance laborer and miner. She was terminated by TXI effective January 31, 2006. (Exhibit 9 of Complaint.) On or about December 1, 2008, the Complainant filed a Retaliation Complaint with the California Labor Commissioner stating that she was terminated after filing a safety complaint. In her attachment to the state complaint form, the Complainant provided details of the sexual harassment she alleged she was subjected to and the unsafe working conditions she worked under. (Exhibit 1 of Complaint.) In her attachment, she described in detail one incident when she became ill from exposure to toxins while working in a railcar that had been used to haul materials to her work site.

On January 6, 2009, she contacted OSHA by phone and alleged that she had been "terminated in part for complaining about cleaning up metal and steel 'slag' in railway cars." OSHA investigated her complaint and concluded that the complaint was untimely because it was not filed within 180 days of her termination. The OSHA Regional Administrator issued a decision on January 29, 2009, dismissing her complaint as untimely filed and informed her of her right to request a hearing before an administrative law judge within 30 days after receiving the decision. On February 28, 2009, the Complainant sent in a timely request for a hearing to the Office of Administrative Law Judges in Washington, D.C. by fax.[2]

Applicable Law

Section 20109(b) of the Federal Rail Safety Act prohibits a railroad carrier engaged in interstate or foreign commerce from discharging or in any way discriminating against an employee because the employee refused to work when confronted by a hazardous condition related to the performance of the employee's duties. 49 U.S.C. § 20109(b). Enforcement of this provision of the Federal Rail Safety Act was transferred from the National Railroad Adjustment Board to the U.S. Department of Labor when § 20109 of the FRSA was amended in 2007 with the signing of the 9/11 Act by President Bush.

The 9/11 Act, which significantly changed the employee protection provisions for railway employees, was the result of a Conference Report H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amended the FRSA by modifying the railroad carrier employee whistleblower provision - both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121**.** The amended FRSA § 20109 shifts the responsibility for investigating and adjudicating retaliation claims to the U.S. Department of Labor. It also provides that any enforcement of the new employee protection provisions shall be governed by the rules and procedures set forth in 49 U.S.C. § 42121(b), where enforcement of the whistleblower protection provisions under the AIR21 are found.

[2] Though instructed by the Regional Administrator to serve a copy of the request on the Respondent, the Complainant failed to do so.

However, the definitions under the FRSA remain unchanged by the 9/11 Act. The FRSA at 49 U.S.C. § 20102(2) defines a "railroad carrier" as a "person" providing railroad transportation. "Railroad," in turn, is defined at 49 U.S.C. § 20102(1) as "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways… ."

Jurisdiction Issue

OSHA processed the Complainant's complaint under the FRSA, presumably because of her allegation that she was terminated by the Respondent in part for complaining about cleaning up metal and steel slag in railway cars. However, the employee protection provisions of the FRSA apply only to those employees who are employed by a railroad carrier. TXI Riverside Cement does not appear to fall that definition.

In response to my Order to Show Cause ordering her to show that TXI is a railroad carrier covered under the FRSA, the Complainant merely stated that she was "told by a member of the OSHA office in San Bernardino, California that TXI Riverside Cement must adhere to the rail and safety act due to the fact that they have rail road access on their property."[3]

The statement by the OSHA employee that TXI had to comply with the FRSA does not mean that the employee protection provisions of the FRSA apply to this case. That may have been a reference to a provision of the FRS that related to railroad cars. There appears to be no dispute that TXI had railroad cars on its facilities and that Complainant was apparently assigned the task of cleaning out those cars. However, that is not sufficient to extend the employee protection provisions of the FRSA to cover the Complainant if TXI is not a railroad carrier.

There is no evidence that TXI is a railroad carrier. The Complainant's own documents that were submitted at various times to the Department of Labor establish that TXI is a cement plant, and not a railroad carrier. The retaliation complaint form that the Complainant filed with the State of California asked what type of business TXI was in, and the Complainant wrote "cement" in the box asking for that information. (Exhibit 1 of Complaint.) The first page of the TXI employee handbook, which the Complainant submitted as Exhibit 2 of her Complaint, describes TXI as being "an industry leader in the building materials business" and a "significant supplier of cement, aggregates and consumer products in North America." With her response to my first order to show cause, the Complainant submitted a news release issued by Attorney General Jerry Brown on July 3, 2008, in which Attorney General Brown announced a lawsuit against TXI for exposing people to the potent carcinogen hexavalent chromium without providing warnings to the community as required by law. This news release described TXI as a "cement plant." The other materials submitted by the Complainant include numerous references to TXI as a plant, along with references to cement and toxic substances associated with the processing of the cement. It is apparent that TXI Riverside Cement is a cement plant and not a railroad carrier.

Thus, the Complainant's complaint does not fall under the Federal Rail Safety Act.

[3] The Complainant failed to serve a copy of her response to my order to show cause on the Respondent. A copy of her response was separately forwarded to Respondent's counsel by fax on June 4, 2009.

Timeliness Issue

Since this complaint does not fall under the jurisdiction of the Federal Rail Safety Act, there is no need to address the timeliness issue.

## CONCLUSION

It is apparent that the Complainant had many concerns about sexual harassment, environmental issues, and workplace safety surrounding the conditions at her job site. While voicing those concerns might be protected under employment discrimination and occupational or environmental safety laws, the Complainant's complaints are not protected by the Federal Rail Safety Act because TXI Riverside Cement is not a railroad carrier covered by the FRSA. The Complainant's allegations of sexual harassment can be addressed by the Equal Employment Opportunity Commission and her numerous complaints about unsafe working conditions can be addressed by OSHA, but not in the context of a whistleblower complaint. There are also state agencies that can address these complaints.

## ORDER

It is recommended that this complaint be DISMISSED.

A

JENNIFER GEE
Administrative Law Judge

**NOTICE OF REVIEW**: Review of this Recommended 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 Recommended Decision and Order and the administrative file in this matter will be forwarded for review by 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.