



Issue Date: 31 March 2010

CASE NO. 2009-FRS-00008

In the Matter of:

XAVIER ROSADILLO,
Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Federal Rail Safety Act (“FRSA,” “the Act”), 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. Complainant filed a complaint under the Act with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) on January 9, 2009. The complaint asserted that Complainant was wrongfully terminated for substance abuse. On March 11, 2009, the OSHA Regional Administrator dismissed the complaint as untimely (OSHA Findings).

By letter dated March 10, 2009 Complainant appealed the OSHA Findings, and requested a *de novo* hearing before an administrative law judge (Comp. Hrng. Req.).¹ In the request, Complainant asserts that he believed he was recovering from drug addiction and “was misled and denied equal employment.” Comp. Hrng. Req.² This case was assigned to me on April 24, 2009. On May 11, 2009, I issued an order directing Complainant to show cause why I should not dismiss the complaint for lack of jurisdiction. The order explained that the Office of Administrative Law Judges (OALJ) has jurisdiction over FRSA cases only if the alleged violation of the Act’s employee protection provision took place before August 3, 2007. It also noted that nothing in the record shows that the retaliation alleged by Complainant occurred after August 3, 2007.

¹ Complainant’s request is dated March 10, 2009, one day earlier than the date on the OSHA Findings. This discrepancy was not explained by either party. Nevertheless, in the interest of advancing the broad remedial purposes of the Act, Complainant’s March 10, 2009 letter is broadly construed as an appeal of the Regional Administrator’s determination.

² Where citations do not contain a page number the source cited is encompassed in a single page.

By letters dated May 5 and 22, 2009, Complainant responded to the Order to Show Cause (Comp. May 5 Letter, Comp. May 22 Letter). The May 5 letter argues that Employer did not provide Complainant the same opportunity to be reinstated that it afforded a co-worker. It was accompanied by a number of documents including correspondence between Complainant's union and the director of Respondent's Employee Assistance Program (EAP), as well as the decision of a Public Law Board upholding Complainant's dismissal (PLB 6778 Decision, Jan 19, 2009). The May 22 letter states that a number of events related to the Public Law Board's decision occurred after August 3, 2007. These include Respondent's June 8, 2008 submission to the Board of its position that Complainant's dismissal should be upheld, as well as the Board decision itself.

Respondent filed an answer on January 8, 2010 (Resp. Answer). Respondent argues that the adverse employment action predates August 3, 2007, that the complaint was untimely, that Complainant did not engage in protected activity, and that the complaint is barred by the Act's election of remedy provision. Resp. Answer, pp. 1-2. On February 5, 2010, Complainant submitted additional correspondence between Complainant's union and Respondent regarding Complainant's claim to the Public Law Board seeking reinstatement (Comp. Reply).

SUMMARY OF DECISION

Complainant's complaint is dismissed. Complainant has failed to demonstrate that an alleged violation of the Act's whistleblower protection occurred after August 3, 2007, when the OALJ acquired jurisdiction to adjudicate FRSA whistleblower cases. Therefore, this court lacks subject matter jurisdiction over Complainant's complaint.

BACKGROUND

Complainant Xavier Rosadillo was employed by Respondent as a fireman-in-training. Comp. Hrng. Req., Resp. Sept. 5, 2006 Letter, p. 1. According to the Public Law Board³ which reviewed Complainant's termination, Complainant was subject to a drug test on July 31, 2005, which revealed that Complainant had used cocaine. PLB 6778 Decision, Jan. 19, 2009, p. 1. On August 5, 2005 Complainant admitted using illegal drugs, accepted dismissal, and was then admitted into Respondent's EAP with the goal of "conditional leniency reinstatement." *Id.* As part of his EAP participation, Complainant signed a "Personal Program" in which he agreed to abstain from using illegal or unauthorized drugs. Comp. Reply., Resp. Sept. 5, 2006 Letter, p. 1. However, on October 27, 2005, Complainant admitted having again used cocaine. PLB 6778 Dec. at 2. On December 14, 2005, Respondent terminated Complainant's participation in the EAP because of his failure to comply with the treatment plan. *Id.* at 1. Following an investigation by Respondent, Complainant was returned to "dismissed status" by letter dated February 14, 2006. *Id.*; Comp. Hrng. Req., Resp. Feb. 14, 2006 Letter.

³ A Public Law Board is an arbitration board created by an agreement between a railway and a union to resolve a range of disputes, including those involving the disciplining of employees. See 45 U.S.C. § 153 Second; *Utd. Transp. Union v. Nat'l R.R. Passengers Corp.*, 588 F.3d 805, 807 n.1. (2d. Cir. 2009). Such boards consist of a railway representative, a union representative, and a neutral. 45 U.S.C. § 153 Second; see also *Brotherhood of Locomotive Engineers and Trainmen General Comm. Of Adjustment CSX Transp. Northern lines v. CSX Transp., Inc.*, 522 F.3d 1190, 1193 n.1 (11th Cir. 2008).

Complainant's union appealed the termination on June 15, 2006, arguing that the discipline assessed was too severe. Comp. Reply, United Transportation Union (UTU) Letter, pp. 1-2. The appeal culminated in a hearing before the Public Law Board, which denied Complainant's claim for reinstatement on January 19, 2009. PLB 6778 Dec., p. 3.

ANALYSIS

The employee protection provisions of the Federal Rail Safety Act generally protects railroad employees who suffer discharge, discipline, or discrimination (collectively "adverse employment actions") because they have complained to a supervisor or government instrumentality about a violation of a rail safety rule or because they participated in the investigation into such a violation. 49 U.S.C. § 20109(a). The Act also protects employees who suffer adverse employment actions because they have refused to work in hazardous conditions or because they have requested medical treatment for an employment related injury. 49 U.S.C. § 20109(b), (c).

If a Complainant alleges a violation of the Act's whistleblower protection that occurred prior to August 3, 2007, the Office of Administrative Law Judges (OALJ) lacks subject matter jurisdiction over the claim. See *Purcell v. Union Pacific R.R.*, 2008-FRS-00002, slip op. at 3 (ALJ June 24, 2008); *Hamilton v. CSZ Transportation*, 2008-FRS-00001 slip op. at 3-5 (ALJ February 26, 2008). On August 3, 2007, the amendments to FRSA which gave OALJ jurisdiction over FRSA whistleblower claims became effective. Pub. L. 110-53, Sec. 1521 (Aug. 3, 2007). The amended FRSA's whistleblower provisions do not apply to alleged violations prior to August 3, 2007 because the amended Act neither expressly nor impliedly provides for retroactive application and because applying the statute retroactively would improperly impose new legal duties on past conduct. See *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); see also *Hamilton*, slip op. at 3-4 (ALJ February 26, 2008); *Washington v. CSX Transportation Inc.*, ALJ No. 2009-FRS-00001, slip op. at 2 (ALJ January 13, 2009). A complainant alleging a violation of FRSA that occurred prior to August 3, 2007, was required to file his or her complaint with the National Railroad Adjustment Board or its delegate. 49 U.S.C. § 20109(c) (2000); 45 U.S.C. § 153 (2000).

Complainant's complaint does not allege a violation of the Act's whistleblower protection which occurred on or after August 3, 2007. The complaint asserts that Complainant was wrongfully terminated for substance abuse. Complainant accepted dismissal from his job on October 5, 2005 after testing positive for cocaine. PLB 6778 Dec., p. 1. After his admission to the EAP, he was returned to "dismissed status" on February 14, 2006, following additional cocaine use. *Id.* at 2; Comp. Hrng. Req., Resp. Feb. 14, 2006 Letter. Both events occurred well before August 3, 2007.

Although events related to Complainant's appeal of his dismissal occurred after August 3, 2007, these events do not constitute adverse employment actions. It is well established that the filing of a grievance does not toll the limitations period for filing a complaint under whistleblower statutes. *Greenwald v. City of North Miami Beach, Florida*, 587 F.2d 779 (5th Cir. 1979); *Cf. Int'l Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-40 (1976). It follows logically that an adverse employment action does not

continue during a grievance process. *Hamilton v. CSX Transportation*, slip op. at 3-4. The adverse employment action here was the discrete act of terminating Complainant's employment. *Cf., Hamilton*, slip op. at 3.

As this tribunal lacks jurisdiction over Complainant's complaint, I do not reach the other arguments raised in Respondent's Answer.

CONCLUSION

Complainant has produced no evidence that his complaint alleges an adverse employment action that took place on or after August 3, 2007 when OALJ acquired jurisdiction to adjudicate FRSA whistleblower claims. Therefore, I lack subject matter jurisdiction over the claim and it is hereby **DISMISSED**.

A

ANNE BEYTIN TORKINGTON
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.