U.S. Department of Labor

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Issue Date: 10 February 2012

Case No.: 2010-FRS-00026

In the Matter of

CHRISTOPHER BALA
Complainant

v.

PORT AUTHORITY
TRANS-HUDSON CORPORATION
Respondent

APPEARANCES: Charles C. Goetsch, Esquire
For Complainant

Megan Lee, Esquire
Stephen Powell, Esquire
For Respondent

BEFORE: Theresa C. Timlin
Administrative Law Judge

DECISION AND ORDER

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.[1] The employee protection provisions of the Act apply to railroad employees who feel they have been subjected to retaliatory discipline or discrimination from their employer for engaging in protected activities related to railway safety.

I. STATEMENT OF THE CASE

Christopher Bala ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") on June 2, 2009, alleging that his employer, the Port Authority Trans-Hudson Corporation ("Respondent" or "PATH"), disciplined him for engaging in protected activity. Specifically, he asserted he was absent from work pursuant to orders from treating doctors and was subsequently suspended from work for violating PATH's attendance policy.

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[1] Pub. L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, § 419, Oct 16, 2008, 122 Stat. 4892.

OSHA investigated the complaint and issued the Secretary's findings on May 5, 2010. OSHA determined that Respondent's actions constituted a violation of the Act. Respondent timely appealed, and the matter was assigned to me. I held a hearing on November 19, 2010 in Cherry Hill, New Jersey. The following decision is based on the Act and its implementing regulations, and the evidence and testimony presented by the parties.

II. ISSUES PRESENTED

The parties stipulated: that the Office of Administrative Law Judges (OALJ) has jurisdiction over this matter; that Complainant is an employee within the meaning of the Act; that Complainant was absent from work on June 23, 2008; that Respondent held an investigative hearing on January 8, 2009; and that Complainant was suspended for six days, three of which were held in abeyance and not served. (Tr. pp. 6-7.)[2] I find that the record supports these stipulations. The following issues are presented for adjudication:

1) Whether Respondent is covered under the Act;
2) Whether Complainant engaged in protected activity;
3) Whether Respondent knew of the protected activity;
4) Whether Complainant suffered an unfavorable personnel action; and
5) Whether the protected activity was a contributing factor to the unfavorable action.

III. CONTENTIONS OF THE PARTIES

It is Complainant's position that Respondent is covered by the Act. Complainant contends that he was disciplined under PATH's attendance policy for calling out sick on June 23, 2008. Complainant contends that his absence was pursuant to the orders of his treating physician. Complainant claims Respondent violated the Act by disciplining him for following the orders of his treating doctor. Complainant seeks lost wages, punitive damages, expungement of his personnel file, attorney's fees, and litigation costs.

Respondent contends Complainant's absence from work was not protected activity and that, pursuant to Respondent's attendance policies, he was properly disciplined for excessive absences. Even if Complainant's absence constituted protected activity, Respondent contends that Complainant failed to prove that his supervisor had knowledge that Complainant was following his physician's treatment plan. Thus, Respondent asserts Complainant cannot meet the elements of his case because there was no protected activity and because Complainant's decision to follow the orders of OMS and his treating physician was not a contributing factor to the disciplinary action.

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[2] The following abbreviations are used herein: "JX" refers to Joint exhibits submitted on behalf of both parties and "Tr." refers to the transcript of the November 19, 2010 hearing.

IV. EVIDENCE

A. Exhibits

Summarized below are the joint exhibits admitted into evidence at the hearing:

JX 1: PATH General Notice

This exhibit is a General Notice explaining PATH's absence policy. Employees are allowed four "frequencies" a year before they receive a warning letter. Five frequencies result in attendance counseling. Six frequencies result in a disciplinary hearing. A frequency is a block of time an employee is out of work. Sick, "personal no-pay," AWOL, and "no-report" absences are counted as frequencies. According to the General Notice "PATH will continue to evaluate an employee's entire attendance record and will institute disciplinary action at its discretion for attendance violations of any length, frequency, or pattern." This policy is "subject to any limits set forth in an applicable collective bargaining agreement."

JX 2: Complainant Absence Chronology

This document lists Complainant's absences from 1991 through 2007. Complainant missed 511 days of work over that time period. From 1991 through 2001, Complainant was absent 234 days. Complainant was out sick for a total of 274 days in 2002, 2003, 2004, and 2007.

JX 3: Complainant's 2007 Employee Attendance Card

This document lists the days in 2007 when Complainant was out of work. Complainant was absent 113 total days - twenty-three vacation days, two personal days, eighty-two sick days, and six from an injury-on-duty.

JX 4: Complainant's 2008 Employee Attendance Card

This document lists the days in 2008 when Complainant was out of work. Complainant was absent 153 total days - nineteen vacation days, two personal days, ninety-six sick days, and thirty-six from an injury-on-duty.

JX 6: October 17, 2006 Occupational Injury Report

This is a form completed by Complainant describing an on-the-job injury. The time of injury is listed as 3:00 a.m. He described the accident as follows: "Bent down to pick up switch rod to reattach it to point. When I picked it up it did not move and I felt a sharp pain. Right side of back (sic)."

JX 7: April 2, 2008 Occupational Injury Report

Complainant sustained an on-the-job injury at 3:30 a.m. which he described as "Getting up on train side door and hurt my back."

JX 8: Disciplinary Charge Letter

Frederick Childs issued a letter dated July 14, 2008 charging Complainant with violating PATH attendance Rules J.1 and J.3. The letter states that Complainant had missed eighty-two work days in 2007[3] and sixteen work days beginning June 23, 2008. The letter orders Complainant's appearance for an investigatory hearing on July 18, 2008.

JX 9: Investigatory Hearing Transcript

This exhibit is a transcript of the disciplinary hearing to investigate charges that Complainant violated PATH's attendance policy. Complainant was represented by Clyde Easterling, General Chairman of the Brotherhood of Railroad Signalmen. Hearing Officer Radomir Bulayev presided over the hearing. Bulayev elicited direct testimony from Frederick Childs, who explained PATH's attendance policy and summarized Complainant's absence history. Childs also explained that Complainant had been counseled on sixteen occasions regarding his absences. On cross-examination, Childs acknowledged receiving medical disposition forms from PATH's Office of Medical Services ("OMS") explaining Complainant's injury.

JX 10: Letter imposing discipline

Radomir Bulayev issued a letter dated January 26, 2009 sustaining the charges against Complainant. Bulayev assessed a six-day suspension, with three days held in abeyance for one year.

JX 12: Respirator Questionnaire

This is an OMS respirator questionnaire dated January 31, 2007 in which Complainant noted that he had no back problems.

JX 13: Respirator Questionnaire

On this respirator questionnaire dated March 12, 2008, Complainant responded affirmatively to the question about back pain.

JX 14: Letter from Joel Goldstein, M.D.

This is a March 25, 2008 report indicating that Complainant had been treated for lower back pain dating back to an injury in October 2006.

[3] The number eighty-two constitutes only the days when Complainant was out of work on sick leave in 2007.

JX 15: Request for Job Fitness Evaluation

This is a memo from Frederick Childs dated July 31, 2008 requesting that OMS examine Complainant to determine his fitness for work.

JX 16: Job Fitness Evaluation

This is an August 4, 2008 letter from Martin Duke, M.D. to Frederick Childs estimating that Complainant could return to work in ten to twelve weeks.

JX 24: E-mails

Brian Hodgekinson and Frederick Childs exchanged a series of e-mails discussing Complainant's absence on June 23, 2008. Hodgekinson spoke to Complainant's wife and was informed that Complainant had an appointment with his treating physician. Hodgekinson ordered Complainant to be evaluated by OMS.

JX 25: Medical Disposition Form

This is an OMS form dated June 23, 2008 indicating that Complainant had been seen and had been determined to be unfit for work.

JX 26: Return to Work Slip

This slip, dated June 22, 2008, is from Complainant's treating physician estimating that Complainant could return to work on July 30, 2008.

JX 27: Complainant Absence Chronology

This is a spreadsheet listing Complainant's absences from 1991 through 2008.

B. Summary of Testimony

Christopher Bala (Complainant)

Complainant testified that he works as a signal repairman in PATH's Power, Signals and Communications Division. (Tr. p. 14.) As a signal repairman, Complainant is responsible for the maintenance, installation, and repair of the signal system along PATH's railroads. (Id. p. 15.) In October 2006, Complainant felt a stinging pain in his back while attempting to lift a switch rod. (Id.) Complainant reported this injury to OMS, which referred Complainant to Dr. Joel Goldstein. Dr. Goldstein administered a series of epidural shots and ordered Complainant out of work for three months while undergoing treatment. (Id. pp. 16-19.)

In March 2008, Complainant experienced a recurrence of his low back pain. (Tr. p. 21.) Complainant reported his condition to OMS and was again referred to Dr. Goldstein. (Id.) On April 2, 2008, Complainant reinjured his lower back while lifting himself onto a train. (Id. p.

31.) Complainant completed an "injury-on-duty" report and reported to OMS the next morning. (Id. p. 32.) OMS again referred Complainant to Dr. Goldstein, who treated the injury with a series of epidural shots. (Id. p. 33.) Dr. Goldstein ordered Complainant out of work until further notice. (Id.) Complainant remained out of work until May 21, 2008. (Id. p. 34.)

On June 22, 2008, Complainant injured his low back while rearranging boxes at his home. (Tr. p. 34.) That evening, Complainant called out of work. (Id. p. 35.) The next morning, Complainant saw his family physician, Dr. Thomas Lozowski. (Id.) Dr. Lozowski ordered Complainant out of work until July 30, 2008. (Id. p. 36.) Complainant informed his supervisor, Brian Hodgekinson, of Dr. Lozowski's orders. (Id.) Hodgekinson directed Complainant to be evaluated by OMS. (Id. p. 37.) Dr. Ronda Whitley, an OMS physician, examined Complainant and concurred that he was unfit for duty. (Id.) Dr. Whitley completed a medical disposition slip indicating that Complainant was unfit for work and Complainant hand-delivered the slip to the office of Frederick Childs, superintendent of the Power, Signals and Communications Division. (Id. p. 39.)

In July 2008, Complainant received a letter from Childs charging Complainant with violating PATH's attendance policy. (Tr. pp. 41-42.) Complainant was ordered to report to a hearing to address the charges. (Id.) Complainant testified that he was "a mess" over the letter because he felt he had not violated PATH's attendance policy, which allows for five "occurrences" per year. (Id. p. 42.) An occurrence, according to Complainant, is a block of time in which an individual is out of work resulting from an injury or illness. (Id. p. 45.) Complainant testified that had only one occurrence that year prior to his injury. (Id. p. 43.) Complainant returned to work in November 2008, after undergoing a back discectomy in September. (Id. p. 46.)

A hearing to investigate the disciplinary charges was held on January 8, 2011. (Tr. p. 48.) Radomir Bulayev, assistant to the superintendent, presided over the hearing and presented evidence on behalf of Path. (Id.) Frederick Childs testified at the hearing, and stated that Complainant's absence on June 23, 2008 triggered the charges. (Id. p. 49.) Complainant was "flabbergasted" by the hearing and testified that it "tore [him] up" emotionally. (Id.) Ultimately, the charges were sustained, and Bulayev imposed a six day suspension, three days to be held in abeyance during a one year probation period. (Id. p. 51.) Complainant served the three day suspension, losing $367.00 per day in lost wages. (Id. p. 55.)

Ronda Whitley, M.D.

Dr. Whitley is the staff physician for PATH, performing annual physicals on PATH employees, evaluating whether employees are fit for duty post-injury, monitoring sick absences, and treating on-the-job injuries. (Tr. p. 146.) Dr. Whitley testified that employees who call out sick must be evaluated by OMS. (Id. p. 149.) On October 17, 2006, Dr. Whitley evaluated Complainant after he suffered an on-the-job injury to his low back. (Id. p. 150.) Dr. Whitley referred Complainant for an orthopedic evaluation on October 20, and Complainant returned to work on January 15, 2007. (Id. p. 151, 170.)

Dr. Whitley evaluated Complainant on April 2, 2008 after he reinjured his low back while lifting himself onto a train. (Tr. p. 152.) Dr. Whitley recommended "no lifting or strenuous activity during the course of treatment." (Id. pp. 152-53.) OMS returned Complainant to duty on May 22, 2008. (Id. p. 153.) Complainant returned to Dr. Whitley on June 23, 2008 after injuring his lower back moving boxes at home. (Id. pp. 154-55.) Because Complainant's injury had occurred off-duty, Dr. Whitley did not recommend a treatment plan. (Id. p. 155.) Complainant subsequently submitted a note from his treating physician ordering him out of work. (Id. pp. 155-56.) Dr. Whitley completed a medical disposition slip finding Complainant unfit for duty. (Id. pp. 161-62.)

Radomir Bulayev

Radomir Bulayev is the assistant superintendent of PATH's Power, Signals, and Communications Division. (Tr. p. 175.) Bulayev also acts as a hearing officer, investigating disciplinary charges, presiding over disciplinary hearings, and determining whether charges should be sustained. (Id. p. 176.) Bulayev testified that Frederick Childs asked him to preside over Complainant's disciplinary hearing. (Id. p. 177.) To prepare for the hearing, Bulayev reviewed the charge letter and gathered information regarding Complainant's absentee record. (Id.) Bulayev did not review Complainant's medical records. (Id. pp 177-78.)

At the disciplinary hearing, Complainant was represented by a union representative. (Tr. p. 178.) Bulayev read the charges and questioned Complainant. (Id. p. 179.) Bulayev also questioned Frederick Childs, who was then cross-examined by Complainant's representative. (Id.) After the hearing, Bulayev sustained the charges against Complainant and imposed a six-day suspension, three days to be held in abeyance during a one year probationary period. (Id. p. 184.) Bulayev testified that his determination was based upon Complainant's "pattern of excessive absences." (Id. p. 185.)

Frederick Childs

Frederick Childs is the superintendent of PATH's Power, Signals, and Communications Division. (Tr. p. 201.) Childs supervises 180 employees, and is responsible for the overall management and oversight of the division. (Id. pp. 201-03.) As superintendent, Childs oversees each employee's attendance, reviews medical disposition slips, and reports the division's absentee record to PATH's director. (Id. pp. 204-05.)

Childs testified that Complainant was terminated in 2005 for insubordination. (Tr. p. 209.) Complainant sought arbitration before the National Railroad Adjustment Board, and the penalty was reduced to a suspension without pay. (Id. pp. 209-10.) Childs also testified that Complainant had been counseled on several occasions regarding his absenteeism. (Id.)

On June 23, 2008, Complainant called out of work and Childs spoke to Complainant's supervisor, Brian Hodgekinson. (Tr. p. 213.) Hodgekinson ordered Complainant to report to OMS for a medical evaluation. (Id.) At 11:45 a.m., Childs received the OMS medical disposition slip declaring Complainant unfit for duty. (Id. p. 228.) Subsequently, Childs reviewed Complainant's absence record and initiated an investigation. (Id.) Based upon

Complainant's attendance and counseling record, Childs issued a disciplinary charge letter. (Id. pp. 214-15.) At the time, Childs did not know the nature of Complainant's injury or his treating physician's orders (Id. pp. 217-19, 228.)

V. FINDINGS OF FACT

Respondent is a rapid transit railroad running from northern New Jersey into New York City. (Tr. p. 202.) Complainant has worked for Respondent in its Power, Signals, and Communication Department since 1990, first as a signal trainee and subsequently as a signal repairman. (Tr. p. 14.) Complainant's job duties involve the installation, maintenance, and repair of signals along Respondent's railroads. (Tr. p. 15.)

On October 17, 2006, Complainant suffered an on-the-job injury to his lower back while attempting to lift railroad equipment. (Tr. p. 15; JX 6.) Complainant reported the injury to OMS, who referred him to Dr. Joel Goldstein for an orthopedic evaluation. (Tr. pp. 20, 168; JX 14.) Dr. Goldstein ordered Complainant out of work pending further evaluation. (Tr. p. 19; JX 2.) Complainant informed Frederick Childs, superintendent of the Power, Signals and Communications Division, of Dr. Goldstein's orders. (Tr. pp. 20-21.) Complainant returned to work on January 10, 2007. (JX 2.)

Complainant reinjured his lower back while lifting himself onto a train on April 2, 2008. (Tr. p. 33; JX 7.) OMS again directed Complainant to Dr. Goldstein for further evaluation and Complainant was ordered out of work until May 21, 2008. (JX 14.) On June 22, 2008, Complainant experienced sharp lower back pain while lifting boxes at home. (Tr. p. 34.) Complainant subsequently called in sick. (Tr. p. 35.) The next morning, Complainant was evaluated by his family physician, Dr. Thomas Lozowski, who ordered him out of work until July 30, 2008. (Tr. pp. 35-36; JX 26.) Complainant informed his supervisor, Brian Hodgekinson of Dr. Lozowski's orders. (Tr. p. 36.) Hodgekinson directed that Complainant be evaluated by Dr. Ronda Whitley at OMS. (Tr. pp. 36-37.) After evaluating Complainant, Dr. Whitley concurred that he was not fit for duty and scheduled an orthopedic evaluation with Dr. Goldstein. (Tr. pp. 38-39; JX 25.) Complainant hand-delivered Dr. Whitley's medical disposition slip to Frederick Childs' office. (Tr. pp. 39, 228; JX 25.)

On July 14, 2008, Childs issued a disciplinary charge letter to Complainant, notifying him that he had been charged with violating PATH's attendance policy.[4] (JX 8.) The charges

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[4] According to the disciplinary charge letter, Complainant was charged with violating PATH Rules J.1 and J.3. (JX 8.) Rule J.1 states:

> Employees must maintain a satisfactory attendance record. Path has the discretion in establishing the length of time and employee may be absent due to injury or illness before disciplinary action is taken.

Rule J.3 states:

were triggered by Complainant's absence from work beginning June 23, 2010. (Id.) Complainant was ordered to attend a hearing to address the charges. (Id.)

Radomir Bulayev, assistant superintendent of the Power, Signals, and Communication Department, presided over Complainant's disciplinary hearing on January 8, 2009. (JX 9.) Complainant was accompanied by his union representative, Clyde Easterling. (Id.) Frederick Childs was the only witness called at the hearing, and he recounted Complainant's prior absences, counseling sessions, and Respondent's attendance policies. (Id.) On January 26, 2009, Bulayev sustained the charges and issued a six day suspension, with three days to be held in abeyance for one year. (JX 10.)

VI. ANALYSIS

The Act provides, in relevant part, that:

> A railroad carrier or person covered under this section may not discipline, or threaten to discipline, 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.

49 U.S.C. § 20109(c)(2). If an employee prevails in a claim under the FRSA, remedies available include "all relief necessary to make the employee whole," such as reinstatement with the same seniority status the employee would have had if the discrimination had not occurred, back pay with interest, and compensatory damages including litigation costs, expert witness fees, reasonable attorney fees, and compensation for any "special damages sustained as a result of the discrimination." 49 U.S.C. § 20109(e). Punitive damages may also be granted in an amount not to exceed $250,000. 49 U.S.C. § 20109(e)(3).

The Act incorporates by reference the procedures and burdens of proof for claims brought under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121 (2011). *See* 49 U.S.C. § 20109(d)(2). AIR 21, and therefore FRSA, requires a complainant to prove by a preponderance of the evidence that: (1) he or she engaged in protected activity or conduct; (2) the employer knew of the protected activity; (3) the complainant suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* Clemmons v. Ameristar Airways Inc., et al., ARB No. 05-048, ALJ No. 2004-AIR- 11, slip opinion at 3 (ARB June 29, 2007). A complainant who meets this burden is entitled to relief unless the employer can establish, by clear and convincing evidence, that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); *see also* Barker v. Ameristar Airways, Inc., ARB

> Unexplained or unauthorized absences, repeated or excessive absenteeism, lateness or making a false report of injury or illness will be cause for disciplinary action.

Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; Hafer v. United Airlines, Inc., ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.

The regulations promulgated to administer cases brought under the FRSA are found at 29 CFR Part 1982. They incorporate the General Rules of Practice and Procedure before the Office of Administrative Law Judges ("OALJ"), which are found at 29 CFR Part 18.8.

A. Coverage

The FRSA applies to any "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." 49 U.S.C. § 20109(a). Respondent is a rail carrier engaged in interstate commerce, carrying passengers between New York and New Jersey. Respondent made no argument and presented no evidence to support a finding that PATH is not a covered railroad carrier. I therefore find Respondent is a covered employer under the FRSA.

B. Protected Activity

As stated above, the FRSA prohibits covered employers from disciplining employees "for following orders or a treatment plan of a treating physician." 49 U.S.C. § 20109(c)(2). Complainant contends that the plain and unambiguous meaning of § 20109(c)(2) prohibits railroads from disciplining employees who are ordered out of work by their treating physicians, and that this protection is not conditioned upon whether the injury giving rise to the employee's absence occurred on-duty or off-duty. (Compl.'s Br. pp. 6-9.) Respondent, on the other hand, contends that § 20109(c), when read in its entirety, only protects activities arising out of on-the-job injuries. (Resp.'s Br. pp. 8-9.)

Respondent argues that precedent supports a finding that a rail carrier can discipline employees for excessive absenteeism even when those absences are legitimate uses of sick leave supported with medical documentation. Respondent cites to several opinions issued by the National Railroad Adjustment Board upholding disciplinary actions resulting from excessive absenteeism. However, these cases are not entitled to persuasive authority because they do not arise under the FRSA and were decided long before Congress enacted § 20109(c)(2).

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002), *citing* Robinson v. Shell Oil Co., 519 U.S. 337, 340, (1997); *see also*, Dodd v. U.S., 545 U.S. 353, 359 (2005); U.S. v. Gonzales, 520 U.S. 1, 4 (1997); U.S. v. Kinzler, 55 F.3d 70, 72 (2d Cir. 1995). Thus, § 20109(c)(2), by forbidding "discipline…for following orders or a treatment plan of a treating physician" would seem to plainly and unambiguously prohibit Respondent from suspending an employee for calling out sick pursuant to orders from a treating physician that the employee is not fit for duty.

Acknowledging this unconditional language, Respondent states that subsection (c)(2) must be read in conjunction with the entirety of § 20109(c). Section 20109(c) is titled "Prompt Medical Attention." Subsection (c)(1) states as follows:

> A railroad carrier 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.

Respondent argues that the phrase "during the course of employment" in subsection (c)(1) must also be read into subsection (c)(2) because the Act's purpose is to encourage railroad employees to report unsafe conditions and to allow workers injured by an unsafe condition "immediate medical attention free from railroad interference." (Tr. 11; Resp. Br. p. 9.) However, Respondent's argument runs contrary to another important canon of statutory construction, which is that when "Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. U.S., 464 U.S. 16, 23 (1983). Therefore, when Congress included the phrase "during the course of employment" with regard to emergency medical care in subsection (c)(1), but omitted the phrase with regard to treatment plans in subsection (c)(2), it acted purposely, and did not intend to limit the protection only to treatment plans involving on-the-job injuries.

Adopting Respondent's reading of § 20109(c)(2) would also subvert congressional intent. In enacting the FRSA, Congress stated that "employees should not be forced to choose between their lives and their livelihoods." H.R. Rep. No. 1025, 96th Cong., 2d Sess. 1980, 3. The purpose of the Act is to "promote safety in *every* area of railroad operations and reduce railroad-related accidents and incidents" (emphasis added). And, in addition to these stark pronouncements, the Supreme Court has stated that "safety legislation is to be liberally construed to effectuate the congressional purpose." Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980). After reviewing the Act's text and purpose, I find it clear that § 20109(c)(2) exists not only to encourage employees suffering on-the-job injuries to report unsafe conditions to their superiors without fear of reprisal, but also to discourage sick or injured workers from returning to duty while their impairment poses a threat to the safety of railroad passengers and fellow employees. I thus find that § 20109(c)(2) applies equally to treatment plans arising out of on-duty and off-duty injuries.

Complainant's uncontroverted testimony revealed that he suffered a lower back injury while moving boxes at his home. (Tr. p. 34.) And, while the parties bicker over whether Complainant's injury occurred off-duty or was an aggravation of a prior on-the-job injury, that distinction is irrelevant, as I have discussed above. Preponderant evidence further indicates that Complainant's treating physician, Dr. Lozowski, ordered him out of work on June 23, 2008 and that Respondent's own physician, Dr. Whitley, declared Complainant unfit for duty. (JX 25, 26.)

Therefore, Complainant engaged in activity protected under the FRSA when he called out sick and failed to report to work.

C. Knowledge of the Protected Activity

Complainants must generally go beyond establishing that the employer, as an entity, was aware of the protected activity, and must instead show that the decision-maker who carried out the allegedly adverse action was aware of the protected activity. *See* Gary v. Chautauqua Airlines, ARB Case No. 04-112, ALJ No. 2003-AIR-00038 (ARB Jan. 31, 2006); Peck v. Safe Air Int'l, Inc., ARB Case No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004).

A series of e-mails between Frederick Childs and Complainant's supervisor indicate that Childs spoke with Complainant on June 23, 2008 and was informed that Complainant had been ordered out of work. (JX 24.) Complainant subsequently visited Dr. Whitley at OMS who completed a medical disposition slip indicating that Complainant was unfit for duty on the date in question. (JX 25.) This slip was received in Childs' office on June 23, 2008 at 11:40 A.M. (Tr. p. 39; JX 25.) Despite Childs' knowledge that Complainant's absence was advised by Dr. Whitley, Childs charged Complainant with violating Respondent's attendance policy and ordered him to appear at an investigatory hearing, which ultimately resulted in Complainant's suspension from work. (JX 8, 10.)

Respondent argues that although Childs was presented with the out-of-work slip, nevertheless, Childs had no knowledge of the specifics of the medical treatment plan or whether Complainant was compliant with his doctor's treatment plan. Respondent again reads the regulation too narrowly. The medical treatment plan at issue was rest and absence from work. The regulation does not require that an employee make his or her employer aware of all the details of the medical treatment or compliance with the plan. Once the employer has been advised that a medical provider has deemed an employee too ill or injured to work, the employer is aware that it would be unsafe to require the employee to report to work.

I thus find that Childs was aware that a treating physician had ordered Complainant out of work on June 23, 2008 and Respondent therefore had knowledge of Complainant's protected activity.

D. Unfavorable Personnel Action

The Act prohibits an employer from taking adverse actions against employees who report injuries, including discharge, demotion, suspension, reprimand, or "any other discriminatory action." § 20109(a). The parties stipulated that Complainant was charged with violating Respondent's attendance policy on July 14, 2008, and, after a formal hearing on January 26, 2009, was suspended from work. (Tr. p. 7; JX 8-10.) Accordingly, I find that Complainant suffered an unfavorable personnel action.

E. Contributing Factor

Finally, the Act requires that the protected activity be a contributing factor to the unfavorable personnel action against Complainant. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision." Rocha v. AHR Utility Corp., ARB No. 07-112, ALJ Nos. 2006-PSI-1 through 4, slip op. p. 10 (ARB June 25, 2009). The legitimacy of an employer's reasons for taking an unfavorable personnel action should be examined when determining whether a complainant has shown by a preponderance of the evidence that protected activity contributed to the unfavorable action. Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-00008, slip op. at 14 (ARB Jan. 31, 2006) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). A complainant is not required to prove discriminatory intent through direct evidence, but may satisfy this burden through circumstantial evidence. Douglas v. Skywest Airlines, Inc., ARB Nos. 08-070, 08-074, ALJ No. 2006 AIR-00014, slip op. p. 11 (ARB Sept. 30, 2009).

The disciplinary charge letter issued by Frederick Childs explicitly states that Complainant's absence on June 23, 2008 factored into Respondent's decision to charge Complainant for violations of PATH's attendance policy. And, although Respondent argues that Complainant was disciplined for violating PATH attendance policies rather than for following the orders of his treating physician, I find that this argument presents a false distinction. Assuming *arguendo* that Complainant's absence did violate the PATH attendance policy, his absence was nonetheless ordered by OMS and his treating physician. Complainant found himself between a rock and a hard place - if he obeyed the OMS physician and his own physician, he would be in violation of Respondent's attendance policy.[5] While I am sympathetic to Respondent's desire to develop policies aimed to curb excessive absences, I cannot uphold such policies if they run afoul of federal law. Accordingly, I find that Complainant's decision to follow the orders of OMS and his treating physician contributed to Respondent's decision to issue charges.

In sum, preponderant evidence demonstrates that Respondent is covered under the FRSA, that Complainant engaged in protected activity, that Complainant's supervisor knew of the protected activity, and that the protected activity factored into Respondent's decision to discipline Complainant. Respondent is therefore liable under§ 20109(c), unless it can demonstrate entitlement to safe harbor.

F. Safe Harbor

Because I have found that preponderant evidence demonstrates Respondent violated § 20109(a), Respondent may only avoid liability if it can present clear and convincing evidence that it would have taken the same adverse action absent the protected activity. Barker, ARB Case No. 05-058 at 8. Although the evidence indicates that Complainant accumulated a significant number of absences throughout his career and was counseled on many occasions,

[5] I also note that PATH was in an equally difficult position. Complainant missed 131 days between June 23, 2007 and June 23, 2008. (JX 3, 4.) Nevertheless, where Complainant was absent from work secondary to a physician's orders (and in this case, PATH's own physician); PATH could not discipline him "for following orders … of a treating physician." 49 U.S.C. § 20109(c)(2).

Respondent put forth no evidence or argument indicating that PATH was preparing to discipline Complainant prior to his absence on June 22, 2008. Complainant therefore has not established through clear and convincing evidence that it would have disciplined Complainant had he not followed the orders of Drs. Whitley and Lozowski.

VI. REMEDIES

When a railroad violates the Act's employee protection provisions, remedies are available to the aggrieved employee. These include, where relevant, reinstatement with restoration of seniority; back pay with interest; compensatory damages including emotional distress, litigation costs, expert witness fees, and reasonable attorney's fees; and possible punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e).

With regard to reinstatement, Complainant has not been terminated or demoted, thus reinstatement is not necessary here. Regarding back pay, the parties stipulated that Complainant was suspended without pay for three days starting February 2, 2009. (Tr. p. 7.) I find that Complainant is owed back pay for those three days plus interest. Complainant testified that his wage was $367.00 per day, which amounts to $1,101.00 for three days. (Id. p. 55.) Respondent did not rebut this testimony, thus I hold that Complainant should be awarded $1,101.00 in back wages plus interest. In addition, Complainant's personnel file should be purged of any reference to the suspension including the three days which were held in abeyance.

Although Complainant alleged he suffered emotional distress after being disciplined, there is insufficient support for this claim. A complainant must show by a preponderance of the evidence that the unfavorable personnel action caused mental suffering or emotional anguish in order to receive compensatory damages for those conditions. Testa v. Consol. Edison Co. of New York, Inc., ARB No. 08-029, ALJ No. 2007-STA-027, slip op. at 11 (ARB Mar. 19, 2010). Here, Complainant testified that he was "flabbergasted" after receiving the disciplinary charge letter and that he was "very worried" after being suspended. (Tr. pp. 49, 52.) However, I do not find Complainant's testimony has established a compensable injury. Although I accept that he was upset about being disciplined, Complainant submitted insufficient evidence demonstrating mental suffering or emotional anguish.

No attorney's fee petition has yet been submitted in connection with this claim. As Complainant prosecuted a successful claim, I find he is entitled to litigation costs and reasonable attorney's fees. No expert witness fees are awarded because there was no such testimony in this claim.

Finally, on the issue of punitive damages, I note the OSHA determination did not contain a punitive damage award. Punitive damages may be assessed in whistleblower cases to "punish wanton or reckless conduct and to deter such conduct in the future." Anderson v. Amtrak, 2009-FRS-00003 (Aug. 26, 2010), at 26 (citing Johnson v. Old Dominion Security, 86-CAA-3/4/5, (Sec'y May 29, 1991)). In determining whether punitive damages are appropriate, factors to assess include the degree of the respondent's reprehensibility or culpability; the relationship between the penalty and the harm to the victim caused by the respondent's actions; and the sanctions imposed in other cases for comparable misconduct. *See* Anderson at 26 (citing Cooper

Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001)). Because Complainant was neither terminated nor demoted, and was suspended for only three days, I agree with the Secretary's determination that no punitive damages are warranted.

ORDER

For the foregoing reasons, I find that Respondent violated the Federal Rail Safety Act when it disciplined Complainant for following the orders of his treating physicians. It is hereby ORDERED:

1) Respondent will expunge Complainant's personnel file of any disciplinary record arising out of his absence on June 23, 2008.

2) Respondent will pay Complainant three days salary ($1,101.00) plus interest from the date such salary was lost until the date of payment at the rate prescribed in 28 U.S.C. §1961.

3) Respondent will pay Complainant's litigation costs and reasonable attorney's fees. Complainant's attorney may submit a petition for fees within thirty (30) days.

SO ORDERED.

A

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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).