U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 20 May 2011

CASE NO.: 2011-FRS-00009

IN THE MATTER OF

BRUCE ALEXANDER,
Complainant

v.

KANSAS CITY SOUTHERN RAILROAD COMPANY,
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION, DISMISSING THE COMPLAINT, AND CANCELLING THE HEARING SET FOR JUNE 1, 2011

This proceeding arises from a claim of whistleblower protection under the Federal Rail Safety Act (FRSA), as amended. 49 U.S.C. § 20109. The Act and implementing regulations prohibit retaliatory or discriminatory actions by railroad carriers against their employees who: (1) provide information to their employers, a Federal agency, or Congress, alleging violation of any Federal law relating to railroad safety or security, or fraud, waste or abuse of public funds intended to be used for railroad safety or security; (2) report a hazardous safety or security condition, refuse to work when confronted by a hazardous safety or security condition, or refuse to authorize use of any safety-related equipment, track, or structure in a hazardous condition; or (3) request medical or first aid treatment. In this case, the Complainant, Bruce Alexander, alleges that the Respondent, Kansas City Southern Railway Company ("the Railway"), violated the Act when it discharged him because he reported an injury.

The Railway has filed a Motion for Summary Decision asserting that Complainant was discharged not because he reported an injury, but rather, because he failed to report an injury in a timely manner, thereby violating the Railway's work rules. Complainant has filed a response opposing the Motion and the Railway has filed a reply. The Motion is now ready for ruling.

In reaching my ruling on the Motion, I have considered the entire record, including the complaint filed with the Occupational Safety and Health Administration (OSHA), the findings of OSHA, the objections to the findings, and the materials submitted in connection with the Motion. As no hearing has been held, I have accepted all of Complainant's factual allegations as true. I conclude that the Motion should be granted, as there are no genuine issues of material fact, and the Railway is entitled to summary judgment as a matter of law.

APPLICABLE LAW

The FRSA provides in pertinent part:

> (a) In general.--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--
> …
> (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;

This prohibition is reiterated in the newly promulgated Interim Final Regulations. An employee who believes he has been discharged in violation of this section may file a complaint with OSHA, which conducts an investigation and issues findings. Any party aggrieved by OSHA's findings may appeal to the Office of Administrative Law Judges. Such actions are governed by the rules and procedures set forth in Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century including the burdens of proof. In order to prevail on his claim, Complainant must demonstrate that (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. If Complainant proves that the Railway violated the FRSA, he is entitled to relief unless the Railway demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.

STANDARD FOR SUMMARY JUDGMENT

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide that an Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by 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." 29 CFR § 18.40(d). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the absence of evidence to support the
nonmoving party's case. The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party.

FINDINGS OF FACT

The basic facts are not in dispute. Complainant worked for the Railway or its predecessors since approximately 1974. The Railway has a rule (Rule 1.2.5 Reporting) which requires a prompt written report when an employee is injured on the job. (EX I). Failure to file such a report is cause for dismissal. Complainant testified that he was familiar with Rule 1.2.5. (EX C, p. 23-24).

Rule 1.2.5 provides:

> All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.
>
> A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.
>
> If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager.

As early as July 1, 2009, Complainant was seen by his doctor for shoulder pain. On July 1, 2009, Complainant told Dr. Turakhia that he was thinking about filing for occupational disability. (EX M). In September 2009, Complainant went on leave for a shoulder injury and was diagnosed with a torn right shoulder rotator cuff. On September 21, 2009, Complainant notified the Railway via fax of his impending shoulder surgery. On September 24, 2009, Complainant applied for occupational disability pay with the Railway Retirement Board without reporting such to the Railway. On October 1, 2009, Complainant had surgery on his rotator cuff. On January 8, 2010, Complainant's doctor verbally indicated that his shoulder injury may have been caused by his work duties. (CB, pp. 3, 4).

On January 13, 2010, Complainant notified the Railway that he wanted to file a report for cumulative injuries. Complainant filed out a Form 68-D injury report on January 14, 2010, on which he wrote that he suffered from cumulative injuries but indicated the date, time and location of the injury-causing event was "Unknown." (EX C, pp. 33-36).

On January 18, 2010, Complainant was notified of an investigation regarding his possible violation of Rule 1.2.5 for failure to timely report an injury. (EX D). The investigation was held on January 28, 2010, with Complainant being present and represented by the union and having an opportunity to present evidence and call witnesses. (EX E). Complainant refused to provide requested information during the investigation. (EX E, pp. 12-15).

David Carroll is the General Manager of the Southeast Division of the Railway. After the investigation of January 28, 2010, Carroll reviewed the transcript of the investigation to

determine if there had been a violation of Rule 1.2.5 and, if so, whether discipline should be assessed. Prior to reviewing the transcript, Carroll had no prior knowledge of the incident and did not know Complainant. Based on a review of the transcript and exhibits, Carroll concluded Complainant had undergone shoulder surgery on October 1, 2009, from which he concluded that Complainant had been injured sometime prior to October 1, 2009. Complainant did not notify the Railway of his intent to file an injury report until January 13, 2010, and he filed an injury report on January 14, 2010. Carroll concluded the injury report was not filed until nearly 3 ½ months after the surgery. Carroll further concluded that Complainant failed to timely report the injury and repeatedly refused to answer questions at the investigation. Carroll concluded that Complainant had committed a grossly negligent, willful and flagrant violation of Rule 1.2.5. On February 2, 2010, Carroll notified Complainant that he was being dismissed from the services of the Railway for the violation of Rule 1.2.5. Carroll's unrebutted sworn statement indicates that Carroll dismissed Complainant solely for his grossly negligent, willful, and flagrant violation of Rule 1.2.5. Complainant was not dismissed for reporting his injury. The Railway encourages injury reporting and individuals routinely submit injury reports without receiving any discipline. (EXs F, K).

Complainant appealed his dismissal to the Public Law Board (PLB). On October 18, 2010, the PLB issued its decision making factual findings and uphold Complainant's dismissal. The following is quoted from the PLB's Decision:

> Claimant had a responsibility to provide factual information on the Form 68-D as to when and where an injury had occurred and what specific work related activities had given cause for the claimed injuries as listed on the form. Claimant also had a responsibility to provide significant probative testimony regarding his alleged injury or injuries at the company investigative hearing which had been called for the purpose of ascertaining the facts and to determine his responsibility, if any, in connection with the late reporting of an alleged injury.
>
> The Claimant, having filed the Form 68-D, was obliged to have cooperated with the Carrier investigation into the late reporting of his claimed injury and the Carrier effort to seek a clarification as to the manner in which Claimant had filled out the Form 68-D questionnaire. The Claimant did not have the right to thwart such investigation in a constant refusal to answer questions relevant to a determination of the charge of record in offering response statements such as: "I respectfully submit that that question is out of the realm of the charge that has been levied against me for filing a late injury report." The information that was being sought by the Carrier hearing officer was for legitimate safety and business reasons.
>
> The seriousness of an employee failure to promptly report an on-the-job personal injury has been articulated in numerous arbitration awards. It has generally been held that the prompt reporting of a work related injury is necessary to assure timely and proper medical treatment for the injured employee; to permit a carrier the opportunity to investigate the reported cause of the injury so as to prevent injury to other employees; and, to permit a carrier to be aware of any potential liability that it may have for a claimed injury under the Federal Employer's Liability Act.

> The Organization does make an interesting point in arguing the timeliness of reporting injuries that are sustained over an extended career, however the specifics of this case do not warrant a judgment based on that argument. The Claimant has offered no medical evidence that he has in fact suffered such injuries.
>
> The record shows that the only injury that has been documented by the Claimant is the shoulder injury which was surgically repaired on October 1, 2009. This injury was not reported to the Carrier as required until more that three months after surgery was performed, or even a longer period of time given the fact that injury had to have occurred prior to October 1, 2009, the date of surgery. The severity of the injury is evidenced by the fact that the Claimant's own doctor has judged Claimant still unable to perform his job.
>
> Whether this injury was sustained on duty or off duty; in one event or as the result of "cumulative" action does not matter. By rule, it was incumbent upon the Claimant to report this injury once diagnosed and treated under GCOR Rule 1.2.5. Having failed to do this, on the basis of this violation alone, the Board finds no reason to hold that discipline of dismissal from service as assessed by the Carrier was harsh or unreasonable. The claim will, therefore, be denied.

Public Law Board No. 6639, Case No. 136 (EX A)

DISCUSSION

The Railway has a rule requiring a prompt written report when an employee is injured on the job. The seriousness of an employee's failure to promptly report an on-the-job personal injury is evident from the PLB decision. Failure to file such a report is cause for dismissal. When the Railway learned that Complainant was claiming that he had work-related injuries, it initiated an investigation into whether he had violated its rules. It conducted a hearing and Carroll states he made his decision to dismiss Complainant based on the transcript and the evidence submitted at the investigative hearing. The transcript and the evidence submitted at the hearing match the factual assertions contained in Carroll's affidavit. The Supplemental Doctor's Statement indicates the shoulder surgery was on October 1, 2009. Mr. Wright testified at the hearing that the Railway was first aware of Complainant's injury on January 13, 2010, and that Complainant filed his injury report on January 14, 2010. (EX 4, p. 9). These were the facts presented to Carroll and upon which he based his decision to dismiss Complainant.[1]

In his Response, Complainant states that on January 8, 2010, his doctor verbally indicated that his shoulder injury may have been caused by his work duties. Had Carroll been aware of this information maybe his decision would have been different. But this information was never

[1] Based on Complainant's brief, I find there is evidence that on September 21, 2009, Complainant notified the Railway via fax of his impending shoulder surgery. But there is no evidence nor even an assertion that Carroll was aware of the fax.

presented to Mr. Carroll. Complainant had refused to answer questions about when he knew that his injuries had occurred from his work responsibilities. (EX 4, p. 14).

Complainant argues that the Railway's proffered reason for his dismissal (late reporting) was a pretext for unlawful retaliation. As proof, Complainant cites the Railway's failure to submit an injury report to the FRA. However, the materials submitted by Complainant include a letter from the FRA indicating that "KCS acted in accordance with regulatory guidance and properly completed a Form FRA F6180.107 – Alternative Record for Illnesses Claimed to be Work Related." (CX 24-2).

Complainant has produced no evidence to rebut Carroll's sworn statement that Complainant was dismissed for late reporting of an injury. Carroll's sworn statement is supported by the findings of the PLB. As found by the PLB, the record before Carroll showed that the only injury that has been documented by Complainant was the shoulder injury which was surgically repaired on October 1, 2009. The record before Carroll showed this injury was not reported to the Railway as required until more than three months after the surgery was performed, or even a longer period of time given the fact that injury had to have occurred prior to October 1, 2009, the date of surgery. The seriousness of Complainant's failure to promptly report his on-the-job personal injury is also reflected in the PLB's decision.

Complainant has presented no evidence to rebut the Railway's expressed legitimate reason for his dismissal – the late reporting of an injury. I conclude that Complainant has not raised any genuine issue of material fact to support his claim that his discharge violated the FRSA. Under these circumstances, the Railway is entitled to summary judgment.

ORDER

IT IS THEREFORE ORDERED that the Respondent's Motion for Summary Decision filed on May 2, 2011, is **GRANTED**. The claim is **DISMISSED**. The hearing set for June 1, 2011, in Shreveport, Louisiana, is **CANCELLED**.

So ORDERED.

A

LARRY W. PRICE
ADMINISTRATIVE LAW JUDGES

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).