U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 February 2013

CASE NO: 2012-FRS-17

IN THE MATTER OF

MICHAEL JACKSON

Complainant

v.

UNION PACIFIC RAILROAD COMPANY

Respondent

APPEARANCES:

BLAKE G. ARATA, JR., ESQ.

For the Complainant

FRED S. WILSON, ESQ.
LELAND F. WILLIS, ESQ.

For the Respondent

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This matter arises under the employee protection provisions of the Federal Railroad Safety Act ("the Act") 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. The employee protection provisions of the Act are designed to safeguard railroad employees who engage in certain protected activities related to railroad safety from retaliatory discipline or discrimination by their employer.

A formal hearing in this matter was conducted on October 23 and November 14, 2012, in Covington, Louisiana. Each party was represented by counsel, presented documentary evidence, examined and cross-examined the witnesses, and made oral and written arguments. The following exhibits were received into evidence[1]: Administrative Law Judge's Exhibits 1-6; Complainant's Exhibits 1-7; and Respondent's Exhibits 1-21. Following the hearing, both parties filed briefs.

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They are also based on my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been reviewed and considered.

UNDISPUTED FACTS

As evidenced by the discussion on pages 7-10 of the October 23, 2012 transcript the parties agreed to the following:

1. Respondent is a railroad carrier within the meaning of FRSA 49 U.S.C. §20109. Respondent is engaged in the business of line-haul freight operations throughout the United States, and is therefore engaged in interstate commerce within the meaning of FRSA 49 U.S.C. §20109.

2. Complainant was employed by Respondent as a Switchman/Brakeman and was assigned to the transportation department. As such, Complainant is an employee covered under FRSA 49 U.S.C §20109.

3. On or about August 29, 2011, Complainant was employed as a Switchman/Brakeman working in Respondent's Avondale yard in Avondale, Louisiana. Approximately two hours into his service he reported smelling a foul, smoky odor outside, which he reported to his Manager of Yard Operations (MYO), Jimmy Couget. The conditions were the result of marsh fires near New Orleans, Louisiana.

4. Complainant was ultimately compensated full back pay for any job assignments he missed between the events of August 29, 2011, and his return to work.

5. On December 1, 2011, Complainant filed a complaint with the Department of Labor, alleging the events of August 29, 2011, constituted an inappropriate act by Respondent, in violation of 49 U.S.C. §20109.

[1] References to the transcript and exhibits are as follows: Trial Transcript: Tr. ___; Administrative Law Judge's Exhibit: ALJX-___; Complainant's Exhibit: CX-___; and Respondent's Exhibit: EX-___.

6. On January 13, 2012, the Secretary of the Department of Labor issued findings that Complainant had failed to make a *prima facie* showing in accordance with the FRSA. Consequently the complaint was dismissed.

7. On January 25, 2012, Complainant timely requested *de novo* review before an Administrative Law Judge (ALJ).

DISPUTED FACTS

1. Did Respondent engage in protected activity?

2. Did Respondent retaliate against Complainant for conduct protected by FRSA 49 U.S.C. §20109?

3. Did Complainant suffer any adverse action as a result of retaliatory action by Respondent?

4. What are the appropriate damages, if any?

SUMMARY OF RELEVANT EVIDENCE

Michael Jackson

Complainant has worked for Respondent since November 2006 as both a Switchman and Conductor. On August 29, 2011, he was foreman of a three man crew working in the Avondale yard. The first two hours of the midnight shift he was working were uneventful. Around 2:00 a.m. when the Complainant was in the office checking the computer, someone told him he needed to look outside. He did and discovered smoke which he reported to Jimmy Couget, the Manager of the Yard Operations. Mr. Couget checked the yard and called the local fire department. He also called Ronald Tindall, the Director of Terminal Operations, who was at home some six miles away.

Mr. Couget handed the phone to Complainant. Mr. Tindall apparently acknowledged that Complainant did the proper thing in reporting the smoke, but he said Complainant appeared to have personal concerns about the smoke and sent Complainant home without pay until he obtained medical clearance to return.

Complainant did in fact return to work on September 2, 2011, unaccompanied by any medical clearance, and with the efforts of the union received the guaranteed pay he missed while Mr. Tindall took him out of service. Upon returning to work, Complainant testified he was concerned what treatment he would get from Mr. Tindall and Mr. Couget so he took a job on the road for sixty days as a freight conductor and then went on the "supplemental board" until March 2012 when Mr. Tindall was transferred to another yard. The supplemental board's infrequent assignments caused Complainant, he said, to lose approximately $1,800.00 over the four month period.

Ronald Tindall

Mr. Tindall has worked for Respondent since June 22, 1998. At the time of this instance he was Director of Terminal Operations. In the phone conversation which transpired between he and Complainant on August 29, 2011, Mr. Tindall said Complainant denied being injured, but expressed concern that if he stayed outside in the smoky environment he could become sick. Thus, according to Mr. Tindall he sent Complainant home for his own good, not in retaliation for what he reported. (A fact Complainant denies). No other employees went home.

Raymond Blanco

Mr. Blanco was a Switchman for Respondent and he overheard Complainant express his concerns to Jimmy Couget about the smoke. He did not hear Complainant ask to go home.

Roger Lambert

Mr. Lambert was Superintendent of Transportation and defended Mr. Tindall's decision, but later approved pay to Complainant for the hours he missed.

Gregory Cox

Mr. Cox is the Manager of Payroll for Respondent. He is aware Complainant was put on leave August 29, 2011, and reported back to work September 2, 2011. Upon returning, Complainant was eventually paid for the 8 hours a day he lost at the rate he was last earning, but no overtime was paid since that was not guaranteed.

Jimmy Couget

Mr. Couget testified he was Manager of Yard Operations for the last two years. On August 29, 2011, while working as night supervisor, Mr. Couget said he was told Complainant smelled smoke in the yard. Subsequently, Complainant was "removed" or "laid off" by Mr. Tindall that night, and Claimant did not return to work until September 2, 2011. The day he did return he worked 3 hours and 22 minutes of overtime, as overtime was often worked on this job. While the smell of smoke required investigation, it was Mr. Couget's testimony that was not a safety concern initially, but he acknowledged Complainant viewed it as such. In any event, Mr. Couget contacted his supervisor, Ron Tindall, at home advising that Complainant said he could not work outside because of the bad air quality. He also called the local fire department and was told the smoke was from a marsh fire and posed no threat.

Mr. Couget said he got Mr. Tindall on the phone and handed the phone to Complainant, and when he got back on the phone Tindall told him to mark Complainant off pending a medical clearance. Thus, Complainant was sent home because he stated he could not work in the smoky environment, and there were no other positions available outside the yard to accommodate Complainant's concerns. In other words, Mr. Couget said Complainant was given the choice of "work or go home", and after the conversation with Mr. Tindall was completed Mr. Tindall advised Mr. Couget Complainant was going home.

After Complainant went home, Mr. Couget asked the remaining crew if they had problems working and no one else refused. Specifically, he testified he did not threaten the workers with going home.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law that follow are in part those proposed by the parties in their post-hearing briefs. Where I agreed with the summations, I adopted the statements rather than rephrasing the sentences. The facts and conclusions were determined by me from the evidence, the pleadings, and the parties' exhibits.

1. Respondent is a railroad carrier within the meaning of FRSA 49 U.S.C. §20109. Respondent is engaged in the business of line-haul freight operations throughout the United States, and is therefore engaged in interstate commerce within the meaning of FRSA 49 U.S.C. §20109.

2. Complainant was employed by Respondent as a Switchman/Brakeman and was assigned to the transportation department. As such, Complainant is an employee covered under FRSA 49 U.S.C. §20109.

3. On or about August 29, 2011, Complainant was employed as a Switchman/Brakeman working in Respondent's Avondale Yard in Avondale, Louisiana. Approximately two hours into his service, Complainant reported smelling a foul, smoky odor outside, to his Manager of Yard Operations (MYO), Jimmy Couget. The conditions were the result of marsh fires near New Orleans, Louisiana.

4. Mr. Couget contacted his supervisor, Ronald Tindall, Director of Train Operations (DTO) by telephone. Mr. Tindall advised Mr. Couget to determine if there were any health advisories for the Avondale area and Mr. Couget contacted the Westwego Fire Department, which advised that no advisories were issued.

5. Complainant told Mr. Tindall that he did not believe he could work in the conditions and advised the smoke was irritating his eyes and throat. Complainant did not report a personal injury, but was advised to go home and return to work after he had obtained a medical release to do so.

6. Complainant returned to duty on or about September 2, 2011 with no reduction in seniority and no medical clearance. Complainant concedes that thereafter he was free to bid on any job his seniority would secure and that no supervisor limited the jobs he could pursue. As stipulated, Complainant was ultimately compensated full back pay for any job assignments he missed between the events of August 29, 2011, and his return to work on September 2, 2011.

7. On December 1, 2011, Complainant filed a complaint with the Department of Labor alleging the events of August 29, 2011 constituted an inappropriate act by Respondent.

8. On January 13, 2012, the Secretary of the Department of Labor issued findings that Complainant had failed to make a *prima facie* showing in accordance with the FRSA. Consequently, the Complaint was dismissed.

9. On January 25, 2012, Complainant timely requested *de novo* review before an Administrative Law Judge (ALJ).

10. Based on the evidence presented at the formal hearing in this matter, Complainant engaged in protected activity under FRSA by voicing a perceived safety and/or health concern regarding the smoke and both Mr. Couget and Mr. Tindall were aware of Complainant's protected activity.

11. That as a result of Complainant's protected activity Complainant was sent home by Mr. Tindall which was an adverse personnel action amounting to a constructive discharge.

12. That Respondent has offered no evidence to show that it would have constructively discharged Complainant had he not reported concern over the smoke.

13. Complainant has been fully compensated for the 4 days he was discharged as so stipulated at the outset of trial and in Complainant's post-trial brief.

14. The evidence does not support a finding that Complainant lost $1,800.00 in wages because he bid less lucrative jobs.

15. Respondent acted with indifference and disregard for Complainant's federally protected rights. Punitive damages will be assessed against Respondent as a result.

16. Complainant has provided only minimal evidence that he suffered compensable emotional distress as a result of his employment being suspended.

17. Complainant is entitled to have his record expunged of any reference to the subject event and the filing of his FRSA claim.

18. Complainant is entitled to reasonable attorney's fees and costs.

DISCUSSION

I. Applicable Provision

Complainant alleges that Respondent violated § 20109(b)(1)(A)-(B), which provides:

> **(b)** Hazardous Safety or Security Conditions
>
> (1) A railroad carrier engaged in interstate commerce or an officer or employee of such a railroad carrier, shall not discharge,

demote, suspend, reprimand or in any way discriminate against an employee for –

(A) reporting, in good faith, a hazardous safety or security condition;

(B) refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties, if the conditions described in paragraph (2) exist;

…

(2) A refusal is protected under paragraph (1)(B) and (C) if –

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that –

(i) the hazardous condition presents an imminent danger of death or serious injury; …

II. Elements of the FRSA Violation & Burdens of Proof

Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, ("AIR 21"). *See* 49 U.S.C. § 20109(d)(2)(A)(i). Accordingly, to prevail, a FRSA complainant must demonstrate that: (1) his employer is subject to the Act, and he is a covered employee under the Act; (2) he engaged in a protected activity, as statutorily defined; (3) his employer knew that he engaged in the protected activity; (4) he suffered an unfavorable personnel action; and (5) the protected activity was a contributing factor in the unfavorable personnel action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); *Clemmons v. Ameristar Airways Inc., et al.*, ARB No. 05-048, ALJ No. 2004-AIR- 11, slip op. at 3 (ARB June 29, 2007).

The term "demonstrate" as used in AIR 21, and thus the FRSA, means to "prove by a preponderance of the evidence." *See Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 9 (ARB Jan. 30, 2004). Thus, Complainant bears the burden of proving his case by a preponderance of the evidence. If Complainant establishes that Respondent violated the FRSA, Respondent may avoid liability only if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected behavior. *See* 49 U.S.C. §§ 20109(d)(2)(A)(i); 42121 (b)(2)(B)(iii)(iv).

A. Protected Activity and Knowledge of Protected Activity

By its terms, the FRSA defines protected activities as including acts done to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a hazardous safety, health, or security condition. The evidence readily establishes that Complainant engaged in protected activity under § 20109(b)(1)(A)-(B) by voicing in good faith a perceived safety and/or health concern regarding the smoke. Respondent clearly had knowledge of Complainant's protected activity.

B. Unfavorable Personnel Action

The FRSA explicitly prohibits employers from terminating or suspending employees who in good faith engaged in protected activity. In this instance, Mr. Tindall violated the Act by responding to Complainant's smoke concerns by constructively discharging the Complainant rather than addressing the concerns he raised. In other words, Mr. Tindall engaged in adverse action by deciding Complainant had "quit" his job thereby sending Complainant home without pay until he returned with medical clearance. In fact, Complainant had done no such thing and had simply engaged in protected activity over hazardous concerns. Claimant did not ask to go home without pay. Mr. Tindall's decision to interpret Complainant's concerns otherwise effectively discharged Complainant and amounted to an adverse action. In sum, Mr. Tindall's exaggerated response to Claimant's concerns was an unfavorable personnel action. The request for medical clearance was obviously a ruse as Claimant was allowed to return to work despite the fact that such clearance was neither sought nor obtained. Furthermore, it took Union intervention for Claimant to be reimbursed for wages lost.

C. Contributing Factor

i. *Complainant's protected activity contributed to Respondent's decision to suspend his employment.*

Complainant's burden is to prove by a preponderance of the evidence that his reporting of the smoke was a contributing factor in Respondent's decision to constructively suspend or discharge his employment. 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 concerning the adverse personnel action**. *See Marano v. Dept. of Justice, 2 F.3d 1137 (Fed. Cir. 1993); Allen v. Admin. Rev. Bd., 514 F.3d 468, 476 n. 3 (5th Cir. 2008)***.**

In this instance, I find Respondent's decision to send Complainant home violated the direct language of the FRSA, which provides that a railroad carrier may not discharge or suspend an employee when the employee's actions are "due, in whole or in part, to the employee's lawful, good faith act done." 49 U.S.C. § 20109(a). In light of the statute and the framework for proving a contributing factor under AIR 21 and the facts discussed above, I conclude that Complainant's reporting of smoke was a factor in the suspension of his employment.

ii. *Respondent has failed to show it would have discharged Complainant had he not reported the smoke.*

Once Complainant has shown that his protected activity was a factor to the adverse employment action, Respondent is liable unless it can prove by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); *Patino v. Birken Manufacturing Co.*, ARB No. 06-125, 2005-AIR-23 (ARB July 7, 2008). Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." Black's Law Dictionary 577 (7th ed. 1999). As a general proposition, proof that an employer's "explanation is unworthy of credence" is persuasive evidence of discrimination because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000). In this instance Respondent sent Complainant home for no reason other than Complainant's concerns over the smoke.

III. Damages

When a rail carrier violates the Act's employee protection provision, the Act provides relief to make the Complainant whole, including reinstatement with restoration of seniority and back pay with interest. It also provides for compensatory damages, including emotional distress, litigation costs, expert witness fees, and reasonable attorney's fees. Finally, Congress has provided for possible punitive damages not to exceed $250,000. 49 U.S.C. § 20109(e).

A. Back Pay

Despite Complainant's argument post-hearing that he is entitled to overtime pay for the four days he missed, I do not find it so in view of his pre-trial stipulation and post-hearing brief wherein he agreed he was ultimately compensated his full back pay for the time he lost, a fact also tesitified to by Mr. Cox.

As far as the alleged $1,800.00 Complainant maintains he lost in later months because of his personal election to go to other job assignments, there was no evidence presented that upon return to work Complainant was subjected to any retaliation or mistreatment by management because of the smoke incident. Complainant's choice to go to the "supplemental board" for several months was voluntary on his part.

B. Compensatory Damages for Emotional Injury

The Supreme Court has long required that compensatory damages for emotional distress "be supported by competent evidence concerning the injury." *Cary v. Piphus*, 435 U.S. 247, 264 n. 20, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Failure to establish an "actual injury" with sufficient evidence will result in the award of only nominal damages. *Id.* At 266-267. While a complainant need not submit corroborating testimony, the complainant's testimony alone may only be sufficient to prove mental damages if the testimony is "particularized and extensive." *Brady v. Fort Bend County*, 145 F.3d 691, 718 (5th Cir 1998); see also *Forsyth v. City of Dallas*, 91 F.3d 769 (5th Cir. 1996), and *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998). Furthermore, an award is "warranted only when a sufficient causal connection exists

between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp*., 90 F.3d 927, 938 (5th Cir. 1996).

Regardless of his testimony, I do not find that Complainant has presented evidence of an emotional injury with sufficient specificity to establish entitlement to more than nominal compensatory damages for such. Complainant did not give testimony about when stress began or the specific ways it manifested to cause him injury; he did not seek treatment for alleged emotional distress. No other witnesses testified to corroborate Complainant's testimony. While there is no doubt that being sent home in the face of his peers for expressing health and safety concerns was stressful, Complainant has only provided evidence to support a nominal award of $500.00 in compensatory damages.

C. Punitive Damages

Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: 1) the degree of the defendant's reprehensibility or culpability, 2) the relationship between the penalty and the harm to the victim caused by the respondent's actions, and 3) the sanctions imposed in other cases for comparable misconduct. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001). Punitive damages are appropriate in whistleblower cases to punish wanton or reckless conduct and to deter such conduct in the future. *Anderson v. Amtrak*, 2009-FRS-00003, slip op. at 26 (Aug. 26, 2010), *citing Johnson v. Old Dominion Security*, 86-CAA-3/4/5 (May 29, 1991).

I find Respondent, through the actions of Mr. Tindall in this case, has demonstrated indifference to the legal rights of Complainant under the Act. As a result, I find punitive damages are appropriate to correct and deter this conduct. I assess punitive damages in the amount of $1,000.00.

D. Attorney's Fees and Costs

Lastly, Complainant is entitled to reasonable costs, expenses and attorney fees incurred in connection with the prosecution of his complaint. 49 U.S.C. § 20109(e)(2)(C). Counsel for Complainant has not submitted a fee petition detailing the work performed, the time spent on such work or his hourly rate for performing such work. Therefore, Counsel for Complainant is granted twenty (20) days from the date of this Decision and Order within which to file and serve a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the application within which to file any opposition thereto.

IV. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Respondent shall expunge from the employment records of Complainant any adverse or derogatory reference to his protected activities of August 31, 2011 and his constructive discharge.

2. Respondent will pay Complainant $500.00 in compensatory damages.

3. Respondent will pay Complainant $1,000.00 in punitive damages.

4. Counsel for Complainant shall have twenty (20) days from the date of the Decision and Order within which to file a fully supported application for fees, costs and expenses. Thereafter, Respondent shall have twenty (20) days from receipt of the fee application within which to file any opposition thereto.

So ORDERED this 15th day of February, 2013, at Covington, Louisiana.

Digitally signed by C. Richard Avery
DN: CN=C. Richard Avery,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

C. RICHARD AVERY
Administrative Law Judge

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).