U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street - Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 20 August 2013

CASE NO. 2012-FRS-00090

In the Matter of:

DOUGLAS E. METZGER,
Complainant

v.

BNSF RAILROAD COMPANY,
Respondent

Appearances: Douglas E. Metzger, *Pro Se*
Claimant

Jennifer Willingham, Esq.
Andrea Hyatt, Esq.
BNSF Railway Company
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER

This case arose when the Complainant, Douglas E. Metzger ("Complainant"), filed a complaint under the employee protection provisions of the Federal Rail Safety Act ("FRS"), 49 U.S.C.A. § 20109 against his former employer, BNSF Railroad Company ("BNSF" or "Respondent"). On September 10, 2012, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, (Secretary) issued Secretary's Findings containing specific factual findings and legal conclusions which resulted in the dismissal of the complaint in this case (the "Secretary's Findings"). Thereafter, Complainant objected to the Secretary's Findings and requested a hearing before this Office.

A formal hearing with the Office of Administrative Law Judges ("OALJ") was held in Sioux Falls, South Dakota on December 18 and 19, 2012. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. After being advised of his right to legal representation, Complainant waived same and elected to proceed with the hearing without counsel. Hearing Transcript ("TR") at 4-9. The following exhibits were admitted to record: Administrative Law Judge ("AX") exhibits 1-3, Complainant's exhibits ("CX") 1-58; and Respondent BNSF Railway Company exhibits ("RX") 1-24. *Id*. at 10-11, 35, 37, 39, 122, 126, 355, 357, 358-359. Complainant testified on his own behalf. Alexander Franco, Jr., Terry L. Morgan, and Thomas Albanese testified on behalf of BNSF. Respondent

submitted its Proposed Findings of Fact and Conclusions of Law on April 8, 2013. Claimant submitted his Reply Brief on May 9, 2013. Based upon the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

FINDINGS OF FACT

Respondent engaged in operating railroads for transport of passengers and/or cargo over a long distance within a rail network and is thus a covered employer under the FRS. TR at 25; RX 2 at 52. Complainant was hired by Respondent as a Sectionman in its Twin Cities Division on May 12, 1993, and continued to work as a Sectionman until his termination of employment on February 13, 2012. TR at 44, 241; RX 8. As such, Complainant is a covered employee under the FRS. TR at 25-26; RX 2 at 52.

On September 20, 2011, Complainant was involved in an accident when the spiker vehicle he was riding in collided with a civilian pickup truck. TR at 46-47; RX 3; CX 1. Complainant testified he was thrown against the spike bin and struck the right side of head and body against the bin, injuring his right shoulder, back and head. TR at 47. Complainant did not report any injury at that time. TR at 46. On September 21, 2011 and on September 22, 2011, Complainant again worked his regular shift without reporting his injury but on September 23, 2011, Complainant requested a Form F-27 for the purpose of reporting his accident and injury and completed the form and gave it to his supervisor, Alexander Franco, about 9:15AM on September 23, 2011. TR at 48, 108-110, 179-181; CX 1 at 1; CX 4 at 16; RX 3. Franco transported Complainant to the Emergency Room at Cloquet Memorial Hospital in Cloquet, Minnesota on September 23, 2011 where he was diagnosed with cervical strain, right shoulder strain and lumbar strain. TR at 48-50, 181-182; CX 1 at 2. The ER physician noted that Complainant could return to work with restrictions on the following Monday, September 26, 2011, and indicated Complainant should follow up with his primary physician in 7 to 10 days. TR at 51-52, 186-187; CX 1 at 2; RX 4.

On September 24, 2011, Complainant spoke with Franco regarding returning to work. TR at 52, 114-115; CX 2 at 4. Franco told Complainant that he had not been removed from service since the ER physician had indicated that Complainant could return to work with restrictions on September 26, 2011. CX 2 at 4. Complainant objected to the diagnosis provided by Cloquet Memorial Hospital ER and told Franco he wished to seek a second opinion. *Id*. at 4-5. Franco advised Complainant to advise him the name of the second opinion doctor so that Respondent could forward the doctor the relevant medical information. *Id*. Franco testified that he told Complainant he would need a doctor's note explaining his need for a medical absence before he could take medical leave versus vacation days. TR at 188-189. On October 5, 2011, Complainant was examined by Nurse Practitioner Jean Toman at Saint Alexis Center for Family Medicine in Mandan, North Dakota who provided Complainant with a note excusing Complainant from work until he could be examined by an orthopedist on October 13, 2011. TR at 53; CX 5 at 27. Complainant provided this document to union vice chairman John Geleneau, Respondent Division Engineer Craig Rasmussen and Respondent's mobile staff nurse via facsimile. CX 5 at 23; CX 6 at 29; CX 7 at 32. In his fax forwarding the off work note to Rasmussen on October 5, 2011, Complainant expressed his frustration with the paperwork required by Respondent in connection with documenting his medical treatment and need to be off work, stating:

> I ain't the least bit happy with the way things been go'n down!! Far too many hoops too jump thru …. Far too many unnecessary repetitions Far too many personal questions asked.

CX 6 at 30. Complainant concluded his fax to Rasmussen with "I'd like to keep this civil …. If there is gonna be hardball too play, it'll happen October 13th." *Id.*

Franco forwarded the forms pursuant to the CBA between Respondent and the union, documenting Complainant's Medical Leave of Absence due to an on Duty Injury to Complainant's address on record with Respondent in Ashland, Nebraska. TR at 191-192; CX 8 at 36; RX 18. On October 13, 2011, Complainant saw Dr. Duncan Ackerman at the Bone and Joint Center in Bismarck, North Dakota, who gave Complainant a Statement of Sickness stating that he had a right rotator cuff strain and would be out of work for "minimum 6 weeks possibly longer." CX 9 at 42; TR at 55-56. Complainant faxed medical records from Dr. Ackerman to Rasmussen and the mobile staff nurse for Respondent on October 13, 2011, and requested that all further correspondence be sent to his Wagner, South Dakota address. CX 10; CX 11; RX 5; RX 6. On October 18, 2011, Complainant received the forms for Respondent's Medical Leave of Absence at his address in Wagner, South Dakota. CX 12 at 60. Complainant faxed a letter to Franco addressed "To' All; Whom It May Concern!" on October 18, 2011 complaining of the manner in which his injury claim was being handled by Respondent including the delay in receiving the Medical Leave of Absence forms due to forwarding them to his Nebraska address.[1] TR at 60-61; CX 12; RX 7. In that faxed letter, Complainant wrote:

> A wise man would re-issue a correct "on duty leave of absence" Past 11-29-11…
>
> BNSF, I'm gonna shoot you straight up; To whom it may concern, I'm not a happy camper!!!

CX 12 at 60-61. Complainant wrote further:

> So, not only am I "not" happy; I'm hurt, and angry! I'm get'n real close to an impasse…Brickwall, in deal'n with you people. The horrendous, faggoty jew horseshit by R.R.B. [Railroad Retirement Board], Aetna, Union, Drs. [Doctors], BNSF … needs to be address'd by the courts. Near as I can tell, you got no protocol for when your workers get hurt!! Jew horseshit! I don't need no fuck'n faggoty formal threats from you people…who the fuck you think you are?

Id. at 61-62. In closing, Complainant's faxed letter stated:

[1] The October 18, 2011 fax was initially received by Franco's administrative assistant who "was so disturbed by its contents" that she immediately reported it to Human Resources even before Franco had the chance to review it. TR at 195, 211-212, 243, 246-247.

> So you wanna play hardball … with a hard dick!?? You obviously don't know who I am. Google me-up on one of those on-line snoop services ‹I'll pay for it› Send me the bill $. One angry white man…[2]

Id. at 62. Complainant also asked in the letter "What would Mr. Warren Buffet do?" and indicated that Buffet knew Complainant by name. *Id*.

Franco testified that he was concerned for his own safety as well as the safety of other employees based on the fax so he reported it to his immediate supervisor. TR at 196-199. He also was concerned due to the profanity, racial slurs and sexual orientation slurs in the fax. *Id*. at 214. Respondent sent a railroad security agent with the local police to Complainant's home on October 20, 2011, to interrogate Complainant about the fax of October 18, 2011, and his intentions with regard thereto. *Id*. at 60-61, 133. Complainant testified he told the agent that when he wrote "Shoot you straight up," he intended only that he was being straightforward and speaking from the heart and did not mean to threaten anyone. *Id*. at 68-71. He also indicated that his reference to Warren Buffet was only because Buffet is an owner of the company and Complainant's father apparently knew Buffet. *Id*. at 69-70; CX 15 at 76. Respondent notified Complainant by letter dated October 21, 2011 that he was being removed from service pending an investigative hearing scheduled for October 27, 2011 to determine if Complainant had violated Respondent's Workplace Violence Policy and Harassment Policy when he faxed the October 18, 2011 to Franco.[3] *Id*. at 60-61, 247-248; RX 9.

Complainant wrote a letter to Robert Craig, a foreman for Respondent, on December 13, 2011, declining Craig's offer to represent Complainant at the investigative hearing in which Complainant wrote:

> Again, I'm grateful for your offer. But, No Go!! You'll mess up my strategy. Yes, 2 heads are better than 1 …
>
> Now, I'm gonna go up there, enemy territory MLPS … Their own front living room ‹I must be a bad man› Phony Phuckers!!! And, I'm gonna have some fun. Heres worst case scenario … Ol' Gunjack might really snap and kill all the motherfuck'n contestants present ‹witnesses› ….That would include you and my woman. Don't much care if I do-in the woman and others … but you, I wouldn't want that to happen to.

CX 24 at 105; RX 10 at 81; TR at 154-159.

[2] Complainant testified that his reference to Googling his name was meant to reveal to Respondent that he was serious as a Google search would pick up his arrest and conviction, as a much younger man, for indecency, which was overturned by his appealing up to the Nebraska Supreme Court but a clean record otherwise. TR at 137-141.

[3] Terry Morgan, the HR Director who recommended the letter be issued testified that his only knowledge of Complainant reporting an injury was the information contained in the fax itself. TR at 249.

The investigative hearing was held on January 16, 2012 in Sioux City, Iowa at which Complainant appeared and defended his actions on the basis that he intended no specific threat against any person and that his language was common in the "blue collar" world in which he worked. TR at 76-79, 159-160; RX 11; CX 30 at 153, 228, 231-232. Franco and Rasmussen appeared as witnesses by telephone over the objection of Complainant and his representative at the hearing, John Geleneau, citing concerns over their personal and family's safety due to the threatening language in Complainant's letter to Craig.[4] TR at 199-202; CX 30 at 156-161. The investigation hearing record was reviewed by the Twin Cities management who sought advice from Morgan, the HR Director. TR at 252. Morgan testified that Complainant's subsequent termination was consistent with two similar disciplinary actions against two Twin cities division employees who harassed and threatened workers and supervisors and both were also terminated. *Id*. at 252-254. Tom Albanese, the Twin Cities General Manager, testified that after reviewing the investigation and Complainant's files, he agreed with the recommendation of Morgan that Complainant should be terminated from employment for violating the Work Place Violence and Harassment Policies as well as Maintenance of Way Operating Rule 1.6. TR at 293-297. Albanese testified that Complainant's reporting of an injury played no role in his dismissal and that he would have terminated Complainant's employment based on his violence and harassment violations even if Complainant had not reported an injury. *Id*. at 298-299. Complainant was terminated following the investigative hearing by letter dated February 13, 2012 for violating Respondent's Workplace Violence and Harassment Policy and specifically for "delivering an inappropriate facsimile to ADMP Alex Franco containing threats, racist remarks and language inappropriate to the workplace on October 18, 2011." RX 12.

Complainant continued receiving treatment from Dr. Ackerman for his shoulder and apparently was on medical leave of absence through his termination date. *See* CX 19-23.

Section 1.6 of Respondent's Maintenance of Way Operating Rules, December 2, 2009, dictates that employees must not be quarrelsome or discourteous, among other things and concludes that "Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated." RX 14.

Respondent's Workplace Harassment Policy was issued by its Human Resources Vice President on January 1, 1982 and revised on November 1, 2009. RX 15 at 91. The policy prohibits "any form of harassment" by or toward employees including "sexually or racially degrading words" as well as "ethnic or racial slurs." *Id*. at 91-92. Employees witnessing possible violations of the policy are required to notify a supervisor or Human Resources or the employee hotline. *Id*. "Violation of this policy will result in discipline, up to and including termination." *Id*.

Respondent's Violence in the Workplace policy was issued by its Human Resources Vice President on August 1, 1995 and revised on April 1, 2009. RX 16 at 94. The policy states that "Individuals who engage in violent or threatening behavior may be withheld from service pending formal investigation, and may be subject to dismissal or other disciplinary action, arrest, and/or criminal prosecution." *Id*. The policy defines a threat of violence as "any behavior that by

[4] District Manager Albanese testified he recommended the witnesses not attend due to the threatening language in both the October 18, 2011 fax to Franco and the December 13, 2011 letter to Craig. TR at 294.

its very nature could be interpreted by a reasonable person as demonstrating intent to cause physical harm to another individual." *Id*. Employees are required to notify local management and HR of any such behavior. *Id*. The policy lists a number of "Potential Violence Indicators" including "Verbal, nonverbal or written threats or intimidation, explicit or subtle," as well as "Displays of unwarranted anger" and "Feelings of persecution, expressed distrust, especially with management." *Id*. at 95.

Notices of both policies were posted at work sites advising employees that the policies were available for review at Respondent's website. RX 17. Pamphlet forms of both policies were distributed as well. RX 20. On September 11, 2009, the General Manager of Respondent's Twin Cities Division issued a memo to all employees reaffirming Respondent's commitment to EEOC policies and noted that Respondent would not tolerate behavior causing an offensive or hostile work environment including profanity, sexual or ethnic jokes or comments, demeaning or disrespectful treatment or verbal harassment of co-workers. RX 19. That memo also noted that "If it is identified that someone is creating an offensive work environment for our employees, serious actions up to termination will be taken to address this behavior." *Id*. Respondent's Policy for Employee Performance Accountability dated March 1, 2011, provides a non-exhaustive list of "Stand Alone Dismissible Violations" which may result in immediate dismissal which includes violence in the workplace and aggravated EEO policy infractions. RX 22 at 118. Complainant testified that he was aware of all of these rules and policies and had received notice and training upon them. TR at 127-129; *see also* testimony of Human Resources Director to same effect at 244-249, 258-259, 276; testimony of Tom Albanese at 284-288.

At the hearing, Complainant testified that he sent the October 18, 2011 fax to Franco out of frustration with the handling of his claim and particularly the delays in receiving a medical leave of absence to seek treatment rather than having to use his vacation days and the threat of termination or loss of seniority if he didn't comply timely with his documentation. TR at 62-65, 130-131. Complainant noted this was his first on the job injury with Respondent and he felt there wasn't sufficient information given to him about how to proceed even though the leave rules are contained in the Collective Bargaining Agreement between his union and Respondent. *Id*. at 66-67, 117-120; RX 24. He also indicated his dissatisfaction began with the accident itself which he felt could have been averted if Respondent had followed its safety rules. TR at 66.

Complainant agreed at the hearing that his language in the October 18, 2011 fax to Franco was profane and even inflammatory but he did not agree it was inappropriate due to the manner in which he felt he was treated following his September 20, 2011 accident. *Id*. at 82-83. Complainant testified that he felt his actions did not warrant his termination although he was unaware of any similar conduct by another employee.[5] *Id*. at 84-85. He further agreed that there was a different protocol or etiquette in dealing with office personnel than as may be permissible and tolerated at his actual work site. *Id*. at 90-91. Complainant maintained that considering his 18 years of service, he should have been disciplined in a lesser manner than termination. *Id*. at 91-95, 162-163.

[5] HR Director Morgan termed the October 18, 2011 fax "one of the most egregious letters that I've ever seen, in my 18 years of working for the BNSF Railway. TR at 262.

CONCLUSIONS OF LAW

The FRS prohibits railroad carriers engaged in interstate commerce from discharging or otherwise discriminating against any employee because he engaged in protected activity. 49 U.S.C. § 20109(a) and 29 C.F.R. § 1982.102(b)(1) protect an employee who: (1) provides information to Federal, State, or local regulatory or law enforcement agencies, a member of Congress, GAO member, or a supervisory authority regarding any conduct which he reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security; (2) refuses to violate or assist in the violation of any Federal law, rule or regulation relating to railroad safety or security; (3) files an FRS complaint or participates in a FRS proceeding; (4) notifies the railroad carrier or Secretary of Transportation of a work-related personal injury or illness; (5) cooperates with a safety or security investigation; (6) furnishes information to Federal, State, or local authorities relating to any railroad transportation accident resulting in injury or death, or damage to property; (7) accurately reports hours on duty pursuant to chapter 211 and, reports, in good faith, a hazardous safety or security condition. Second, 49 U.S.C. § 20109(b) and 29 C.F.R. § 1982.102(b)(2) provide protection for an employee who reasonably refuses to work when confronted with hazardous safety or security conditions related to the performance of his duties or refuses to authorize use of equipment, track or structures in hazardous safety or security conditions. Under this provision, railroad security personnel are also protected when reporting a hazardous safety or security condition. Third, 49 U.S.C. § 20109(c)(2) and 29 C.F.R. § 1982.102(b)(3) protect an employee who requests medical or first aid treatment or follows orders or a treatment plan of a treating physician. However, a railroad carrier's refusal to permit an employee to return to work following medical treatment is not considered a violation of this provision if the refusal is based on FRA's or a railroad carrier's medical standards for fitness for duty.

The whistleblower protection provisions of the FRS were enhanced in 2007, in part because of a perceived history of intimidation and retaliation against railroad workers injured on the job. Conference Report H.R. Rep. 110-259, at 348 (July 25, 2007). The FRS whistleblower provision incorporates the administrative procedures found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. *See* § 20109(d)(2)(A)(i); H.R. Rep. 110-259, at 358. Therefore, complaints under the FRS are analyzed under the legal burdens of proof outlined in the AIR 21. The whistleblower provision incorporates by reference the burden shifting framework under AIR 21. 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d) (2) (A).

The burden-shifting framework set forth in AIR 21 requires a complainant to prove by a preponderance of the evidence that: "(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[6] *DeFrancesco v. Union Railroad Co.*,

[6] The "[p]reponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-8 PDF at 13 (ARB Jan. 31, 2006) (internal quotation marks omitted) (*quoting Black's Law Dictionary* at 1201 (7th ed. 1999)).

ARB No. 10-114, ALJ No. 2009-FRS-009, PDF at 5 (ARB Feb. 29, 2012) (*citing* 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012)). A "contributing factor" is one that "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco*, ARB No. 10-114, PDF at 6 (*quoting Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also* OSHA, Interim Final Rule, *Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act*, 75 Fed. Reg. 53522, 53524 (Aug. 31, 2010) (*citing Marana v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." 49 U.S.C. §§ 42121(b)(2)(B)(iv), 20109(d)(2)(A)(i); *see also* 29 C.F.R. § 1982.104. If the employer does so, no relief may be awarded to the complainant. § 42121(b)(2)(B)(iv). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB 09-092, PDF at 5 (*quoting Brune*, ARB No. 04-037, slip op. at 14).

There is no dispute that Complainant engaged in protected activity when he reported an injury on September 23, 2011 and sought medical treatment therefor. TR at 26. Likewise, there is no dispute as to the facts that Complainant was notified that he was withheld from service on October 21, 2011 and later terminated from employment on February 13, 2012 and that both were adverse actions against him. *Id*. at 26-27. Therefore, the only issues are whether his protected activity was a contributing factor in Respondent's decision to withdraw him from service and terminate him; and if so, whether Respondent has shown by clear and convincing evidence that it would have done so regardless of the Complainant's protected activity.[7]

Contributing Factor

In establishing the contributing factor, a complainant need not "prove that his protected activity was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action" but only that his protected activity "tends to affect in any way the outcome of the [employer's] decision." *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, PDF at 13 (ARB Sept. 30, 2011) (internal quotations and citations omitted). A complainant can connect his protected activity to the adverse action directly or indirectly through

[7] Respondent argues in its brief that Complainant has not proven that its decision makers were aware of his protected activity. Preliminarily, an implicit component of the element, "contributing factor," is knowledge of the protected activity. Generally, demonstrating that an employer, as an entity, was aware of the protected activity is insufficient. Instead, the complainant must establish that the decision makers who subjected him to the alleged adverse action were aware of the protected activity. However, Respondent failed to make this issue known in the discussion of the issues at the hearing. *See* TR at 25-33. In any event, it is clear that the October 18, 2011 fax in question specifically refers to and relates to a claim of personal injury on the part of Complainant. Even if this were the only reference thereto seen by Messrs. Morgan and Albanese, that would be sufficient. However, Albanese testified that he fully reviewed the transcript of the investigative hearing as well as Complainant's file, both of which must amply reflect Complainant's report of a personal injury at work. *Id*. at 295-297. Accordingly, I find that Respondent's decision makers were sufficiently apprised of his protected activity in this case.

circumstantial evidence. *Williams*, ARB 09-092, PDF at 6; *DeFrancesco*, ARB No. 10-114, PDF at 6-7.

Direct evidence "conclusively links the protected activity and the adverse action and does not rely upon inference." *Williams*, ARB 09-092, PDF at 6 (*citing Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004-AIR-028, PDF at 4-5 (ARB Jan. 30, 2008)); *DeFrancesco*, ARB No. 10-114, PDF at 6 (holding employer's suspension of employee who reported job related injury "violated the direct language of the FRSA"). A complainant may also rely upon circumstantial evidence, which may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity. *DeFrancesco*, ARB No. 10-114, PDF at 7; *see also Bechtel*, ARB No. 09-052, PDF at 13, n.69; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, PDF at 13 (ARB June 24, 2011). Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question." *Bobreski*, ARB No. 09-057, PDF at 13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel*, ARB No. 09-057, PDF at 13 (*quoting Sylvester v. SOS Children's Vills. Ill., Inc*., 453 F.3d 900, 903 (7th Cir. 2006)).

As noted, a complainant is not required to provide direct evidence of discriminatory intent; he may satisfy his burden through circumstantial evidence. *Evans v. Miami Valley Hospital*, ARB Nos. 07-118, -121, ALJ No. 2006-AIR-22 (ARB June 30, 2009), *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 12 (ARB Nov. 30, 2006). In circumstantially based cases, the fact finder must carefully evaluate all evidence of the employer's agent's "mindset" regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). The fact finder should consider "a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5. Circumstantial evidence of causation may be established if the employer's stated reason for the action is determined to be pretext.[8] In other words, it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action.[9] Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action.[10] Such pretext may be shown through an employer's shifting or contradictory explanations for the adverse personnel action.[11] Other examples of circumstantial evidence which may demonstrate pretext or that a

[8] *Speegle v. Stone & Webster Construction, Inc.* ARB No. 06-041, 2005-ERA-006, slip op. at 9 (Sept. 24, 2009);*see also Zinn v. University of Missouri*, 1993-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc*., 1987-ERA-027 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co*., 1986-ERA-032 (Sec'y Jun. 28, 1991); and, *Darty v. Zack Co*., 1980-ERA-002 (Sec'y Apr. 25, 1983).

[9] *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (Jan. 31, 2006).

[10] *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (May 21, 2009).

[11] *Negron v. Viejas Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (Dec. 30, 2004), and *Hobby v. Georgia Power Co.* 1990-ERA-030, slip op. at 9 (Sec'y Aug. 4, 1995).

protected activity was a contributing factor include: temporary proximity between the protected activity and adverse personnel action;[12] the magnitude of controversy leading up to the adverse personnel action generated by the protected activity;[13] a supervisor's disregard for safety procedures;[14] the disproportionate harshness of the unfavorable personnel action considering the employee's work record;[15] and disparate treatment between complainant and similarly situated employees who did not engage in protected activity.[16]

Temporal proximity can support an inference of retaliation, although the inference is not necessarily dispositive. *Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 03-AIR-22 slip op. at 9 (ARB Nov. 30, 2005). For example, when an independent intervening event could have caused the adverse action, it would be illogical to rely on the temporal proximity of the protected act and the adverse action. *See Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 8 (ARB July 31, 2001). Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden to show that his protected activity was a contributing factor. *Barber v. Planet Airways, Inc.*, ARB No. 04-056, ALJ No. 2002-AIR-19 (ARB Apr. 28, 2006).

The Board has recently held that a complainant is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to a respondent's adverse action. Rather, one must prove that his report was a contributing factor to the adverse action. Focusing on the motivation of [the respondent] would impose on a complainant an incorrect burden of proof. *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9 (ARB Feb. 29, 2012). *See also*, *Smith v. Duke Energy Carolinas LLC*, DOL ARB No. 11-003, (6/20/12) [released 7/2/12](The ARB has fully adopted the interpretation of "contributing factor" as set out in *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993).[17]

In this matter, the undersigned has considered all of the evidence presented by both sides. Respondent contends that it removed Complainant from duty and then terminated him for his

---

[12] *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1573 (11th Cir. 1997).

[13] *Seater v. So. Cal. Edison Co.*, ARB No. 96-013, ALJ No. 1995-ERA-013, slip op. at 4 (Sept. 27, 1996).

[14] *Nichols v. Bechtel Const. Co.* 1987-ERA-044, slip op. at 11 (Sec'y Oct. 26, 1992), *aff'd sub nom. Bechtel, supra,* 50 F.3d 926 (11th Cir. 1995).

[15] *Overall v. TVA*, ARB Nos. 98-111 and 128, ALJ No. 1997-ERA-053, slip op. at 16-17 (Apr. 30, 2001), *aff'd TVA v. DOL*, 2003 WL 932433 (6th Cir. 2003).

[16] *Speegle*, ARB. No. 06-041, slip op. at 13 (according to the Administrative Review Board to satisfy the "similarly situated" requirement, a complainant must establish that the complainant and other employees are similarly situated in all relevant aspects).

[17] In *Marano*, the Federal Circuit interpreted "contributing factor" in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. 1221(e) (1), to mean "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano*, 2 F.3d at 1140. The term was intended to "overrule existing case law, which require[d] a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action."

October 18, 2011 fax to Franco on the basis of violation of its work place violence and harassment policies. Complainant contends that his report of injury from his September 20, 2011 accident was at least a contributing cause of his removal from service and subsequent termination. Respondent has presented convincing evidence that it took the adverse actions against Complainant based exclusively on his October 18, 2011 fax. The administrative assistant to Franco who received the fax immediately took it to HR as she perceived the language as threatening and harassing. TR at 195, 211-212, 243, 246-247. Franco likewise immediately reported to his supervisor the fax which he perceived as a direct threat against himself as well as other employees. *Id*. at 196-199. The railroad security officer was dispatched to Complainant's home to investigate whether he felt Complainant was an imminent threat to anyone. *Id*. at 60-61, 133. Immediately thereafter, Complainant was notified of the investigative hearing into the fax and removed from service pending a decision. *Id*. at 60-61, 247-248; RX 9. At the hearing Complainant appeared and defended his language in the fax as simply "blue collar" and intended to reflect his anger at the medical leave process but not really meant as a threat of physical harm. TR at 76-79, 159-160; RX 11; CX 30 at 153, 228, 231-232. Upon review of the hearing transcript, District Manager Albanese terminated Complainant with the blessing of HR Director Morgan who noted that other employees of the Division had likewise been terminated for incidents involving harassment and threatening behavior. TR at 252-254, 293-297.

In contrast, Complainant argues that his language was simply reflective of his "blue collar" world and that his use of language was justifiable given what he felt was Respondent's reluctance in assisting him with his medical leave and treatment. *Id*. at 62-66,76-79, 82-83, 117-120, 159-160; RX 11; CX 30 at 153, 228, 231-232. Indeed, even Complainant effectively admitted that his conduct was deserving of discipline; he simply hoped that his discipline would be less than termination as he was less than two years away from having the 20 years needed for his pension. TR at 91-95, 162-163.

I find that Complainant has not proven that his withdrawal from service and subsequent termination were caused or contributed to in any way by his report of personal injury. None of the circumstantial situations pointing to pretext exist in this case. There is no evidence of shifting or contradictory explanations as Respondent has consistently pointed to Complainant's October 18, 2011 and the language contained therein as the basis for the adverse personnel actions against him. There is no temporary proximity between the protected activity on September 23, 2011 and adverse personnel action as the proximity resides between the October 18, 2011 fax and the immediate withdrawal from service pending hearing on October 21, 2011. CX 1; CX 12; RX 9. Likewise there is no magnitude of controversy leading up to the adverse personnel action generated by the protected activity; rather the controversy was infinitely magnified by the October 18, 2011 fax. While Complainant alleges a supervisor’s disregard for safety procedures in connection with his accident, there is no evidence that this played any role in his termination, even if true. According to the testimony of Morgan and Albanese, the harshness of the unfavorable personnel action was not disproportionate considering the employee’s work record as such violations are noted to warrant termination even for a first offense. TR at 293-297; RX 14; RX 15 at 92; RX 16 at 94; RX 22 at 118. Finally, there is no evidence of disparate treatment between Complainant and similarly situated employees who did not engage in protected activity. TR at 252-254, 293-297. Indeed, the only possible causal connection between Complainant's protected activity of reporting an injury and his adverse personnel actions is the fact that

Complainant would never likely have had the opportunity to address such communications as his offending fax to Franco had he not been injured and required medical treatment. I find this to be a coincidence, not a contributing cause.

Even were I to find that Complainant's report of injury was a contributing cause, I would still feel compelled to rule against him. If a complainant establishes all of the elements, the burden then shifts to the employer to rebut the elements of the claim by demonstrating through clear and convincing evidence that it would have taken the same personnel action regardless of the protected activity. 49 U.S.C. § 42121(b) (2) (B) (ii); 29 C.F.R. § 1979.104(c). If the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity, then relief may not be granted the employee. 29 C.F.R. § 1982.104(e) (4); *see also Barker v. Ameristar Airways, Inc.*, ARB 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. In this case, Albanese testified he would have terminated Complainant for sending the October 18, 2011 to Franco even if Complainant had never reported an injury. TR at 298-299. I must agree with Albanese and Morgan that the language contained in the October 18, 2011, was "egregious" and clearly in violation of the violence and harassment policies. TR at 262, 293-297. Thus, for the reasons cited hereinabove, I find that Respondent has proven that it would have taken the same unfavorable personnel actions against Complainant even in the absence of his protected activity and accordingly, relief must be denied. 29 C.F.R. § 1982.104(e) (4); *see also Barker v. Ameristar Airways, Inc.*, *supra*; *Hafer v. United Airlines, Inc.*, *supra.*

Having found that Respondent did not violate the employee protection provision of the Federal Railway Safety Act, Complainant's complaint against Respondent is hereby **DISMISSED** with prejudice.

Digitally signed by Russell Pulver
DN: CN=Russell Pulver, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

Russell Pulver
Administrative Law Judge

San Francisco, California

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, Division of Fair Labor Standards. *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).