



Issue Date: 03 December 2013

CASE NO.: 2013-FRS-00069

IN THE MATTER OF

**MICHAEL WRIGHT,
Complainant**

v.

**B.N.S.F. RAILWAY CO.,
Respondent**

RULING ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Procedural History

This case comes under the Federal Rail Safety Act (FRSA),¹ as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

On 10 Mar 11, Complainant filed his initial complaint with the Occupational Health and Safety Administration (OSHA). In it, Complainant alleged that Respondent retaliated against him on 3 Feb 11 for reporting a 29 Apr 07 workplace injury by subsequently failing to reinstate him as a machinist.

OSHA issued its decision 20 Jun 13, dismissing the complaint, finding that Respondent based its decision on its medical department's determination that Complainant would not be able to perform the machinist duties without exacerbating his injury. Complainant filed a timely objection, the case was referred to OALJ and assigned to me, and I held a conference call with the parties on 24 Jul 13 to discuss scheduling.

¹ 49 U.S.C. § 20109.

² Pub. L. No. 110-53 (Aug. 3, 2007).

On 13 Sep 13, my office received from Respondent a Motion for Summary Decision. Respondent noted that Complainant had filed a disability claim under the Federal Employers' Liability Act (FELA)³ for the same injury and then entered into a settlement on 5 Oct 10 that, it argued, released Respondent from all liability for claims under the FRSA and any other law. On 24 Oct 13, Complainant responded that the release did not include the FRSA claim, and in any event no settlement of the FRSA claim is valid without agency approval. On 28 Oct 13, Respondent moved to strike Complainant's response as untimely.⁴

Therefore, the two central questions presented are (1) is there a genuine issue of material fact that would allow for a finding that the release did not include Complainant's FRSA claim and (2) is the release of a potential whistleblower claim not yet filed with OSHA valid without agency approval?

Applicable Law

FRSA Whistleblower Protection

The FRSA makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition,⁵ for reporting a work-related illness or injury,⁶ "for requesting medical or first aid treatment, for refusing to work when confronted by a hazardous safety or security condition,⁷ or for following orders or a treatment plan of a treating physician."⁸

The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).⁹ AIR 21 requires a complainant prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the 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 action.¹⁰ If he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.¹¹

³ 45 U.S.C. §51.

⁴ I decline to do so. Though Complainant's response was filed more than thirty days after Respondent filed its Motion for Summary Decision, Respondent did not set forth any prejudice it suffered by virtue of Complainant's late rejoinder. I deny Respondent's Motion to Strike Complainant's Response and Supplementary Response, and grant its Motion to file a Reply in Support of its Motion.

⁵ 49 U.S.C. §20109(b)(1)(a) (2011).

⁶ *Id.* at §20109(a)(4).

⁷ *Id.* at §20109(b)(1)(B).

⁸ *Id.* §20109(c)(2).

⁹ 49 U.S.C. §42121 (2011).

¹⁰ *See* 49 U.S.C. §42121(b)(2)(B).

¹¹ 29 C.F.R. § 1979.109(a); *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4; *Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5.

Settlement of FRSA Claims

The FRSA regulations state that a party may withdraw its petition for ALJ review. If, however, the objections to the Assistant Secretary's findings or the petition for review are withdrawn because of settlement, the settlement must be submitted for approval, if the settlement is reached while the case is pending before the agency.¹²

Missouri law governs the interpretation of the release, because it appears to have been executed there and it does not specify a choice of law.¹³ "Interpretation of a release depends on the same principles applicable to any other contractual agreement."¹⁴ If there is no ambiguity in the contract, the intent of the parties is discerned from the four corners of that contract.¹⁵ In such a case, the question of whether or not a release covers a claim can be answered as a matter of law.

A release typically covers the matters within contemplation of the parties at the time of its execution.¹⁶ Therefore, "the question of whether a postrelease claim is barred by the release is not solely tied to the date the claim accrued, but rather to whether the plaintiff knowingly gave up the right to sue on a particular claim or claims, or on all claims that were predictable at the particular time."¹⁷

In *Tagliatela v. Metro-North Commuter Railway Co.*, the Connecticut District Court held that a release the complainant signed in settlement of his Federal Employers' Liability Act (FELA) claim did not bar his FRSA claim.¹⁸ The language of the agreement released the employer "from all claims, demands, and causes of action...now existing or which may hereafter arise from or out of injuries and damages...sustained or received by [the complainant] at or near Mamaroneck station, State of New York, on or about the 12th day of April, 2008."¹⁹ The release was executed while his retaliation claim was pending before the OSHA.

The court found that while the complainant had released all claims arising from or out of injuries and damages related to his workplace knee injury, that language could not be interpreted to mean that his FRSA claim arose *from* the injury. Rather, his FRSA claim arose from his protected activity of reporting a workplace injury. The court found Respondent was aware of the FRSA claim at the time of the settlement of the FELA claim, and could have negotiated to explicitly include that claim in the release: "[t]he failure to include any language expressly releasing Tagliatela's pending FRSA claim or even language broadly releasing claims brought

¹² 29 C.F.R. § 1982.111(c) (2010); *Baena v. Atlas Air, Inc.*, ARB No. 03-008, ALJ No. 2002-AIR-4 (ARB Nov. 4, 2002).

¹³ See Respondent's Exhibit 2, page 4, attached to Motion for Summary Decision.

¹⁴ *Eisenberg v. Redd*, 38 S.W.3d 409, 410-11 (Mo. 2001) (internal quotations omitted).

¹⁵ *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. Banc 1973).

¹⁶ See 29 Williston on Contracts § 73:10 (4th Ed., 2013).

¹⁷ *Id.*

¹⁸ 2012 WL 5493618 (D. Conn., Nov. 13, 2012).

¹⁹ *Id.* at *3.

under employment or whistleblowing laws clearly evinces that it was not the parties' intent to release Tagliatela's FRSA claim."²⁰

The *Tagliatela* court distinguished the decision in *Davies v. Florida East Coast Railway, LLC*, because there the release explicitly mentioned whistleblower claims.²¹ In that case, the complainant executed a release after filing both FELA and FRSA claims, and after the OSHA had dismissed his FRSA claim. The ALJ found no evidence that the complainant's release was obtained involuntarily or unknowingly: he was represented by counsel at the time, who made changes to the release, and the complainant signed the release after consulting with his counsel. Moreover, the ALJ found that the release was clear and unambiguous on its face. The expansive language of the release stated it "is intended to release all claims of any kind... arising from, or in any way connected to, the subject... incident[.]"²² It went on to include release of claims under "any other state, federal or municipal law... including... whistleblowing[.]"²³ The ALJ found the FRSA was clearly encompassed by this language.

Summary Decision

Parties are allowed to seek a summary decision without a full hearing.²⁴ They are entitled to a summary decision 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."²⁵ In a motion for summary disposition, the moving party has the burden of establishing the "absence of a genuine issue of material fact."²⁶ While all of the evidence must be viewed in the light most favorable to the nonmoving party, the mere existence of some evidence in support of the non-moving party's position is insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party.²⁷

Discussion

In his 10 Mar 11 FRSA complaint to OSHA, Complainant stated that he sustained an injury on 29 Apr 07 and underwent medical treatment from April 2007 through October 2010. He alleged that during the course of that treatment, he repeatedly requested to return to his job as a machinist, but Respondent denied those requests in retaliation for his reporting of an injury. Complainant noted that he also filed a disability complaint under the FELA against Respondent in 2009.

²⁰ *Id.* at *6.

²¹ 2010-FRS-7 (ALJ June 3, 2010).

²² *Id.* at 9.

²³ *Id.*

²⁴ 29 C.F.R. § 18.40 (2011).

²⁵ *Id.* at §§ 18.40(d), 18.41(a).

²⁶ *Wise v. E.I. DuPont De Nemours and Co.*, 58 F.3d 193, [195](#) (5th Cir. 1995), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

²⁷ *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

There is no dispute that on 5 Oct 10, Complainant executed a release in favor of Respondent in exchange for monetary payment. That release recounts Complainant's claims that, while working for Respondent, he sustained injuries to his neck, upper back, mid back, and low back on or about 29 Apr 2007, resulting in physical impairment.²⁸ It goes on to state that "the undersigned has agreed to accept said sum in full settlement and satisfaction of any and all claims and demands of any kind and character arising as a result of the incident and the undersigned's employment described herein." Complainant further released Respondent

from all claims, demands, or causes of action of any kind...whether known or unknown, which he has or may have or claim to have against [Respondent], including...[those] relating to any employment practices, labor claims, claims under the Americans with Disabilities Act...Title VII of the Civil Rights Act of 1964...the Civil Rights Act of 1866...the Rehabilitation Act of 1973...the Age Discrimination in Employment Act...or any similar state or federal law or any other claims resulting from or arising from the incident and [Complainant's] employment by the [Respondent], or causes of action of any kind, nature, or character, whether known or unknown, which he has or may have or claim to have against the [Respondent], as a result of the employment described herein."²⁹

There is no material fact in dispute as to the content of the release or the terms under which it was signed. Complainant does not dispute that he was represented by counsel at the time he executed the release.

Does the Release Include the FRSA Claim?

Respondent argues that the language of the release is comprehensive, unambiguous, and clearly released it from not only Complainant's FELA claim, but from his subsequent claim under the FRSA. Complainant's answer is that his FRSA claim does not arise out of the injury he suffered, but from his reporting of it; the general language is too broad; the inclusion of a list of other specific statutes by implication excludes the FRSA; and that in any event, at the time of the release, he didn't even know he had a claim under the FRSA.

Complainant argues that his FRSA claim did not accrue until 14 Oct 10, with the release of a functional capacity examination report that he maintains clearly establishes that he was physically qualified to return to his machinists job. That report may well support Complainant's allegation that Respondent could have allowed him to return to his original job and the excuse that it was concerned about his physical ability was simply pretext for its retaliatory motive. However, there is no genuine issue of material fact that Complainant, before signing the release, believed he could return to the machinist job and was frustrated by and unhappy with Respondent's refusal to allow him to do so.³⁰ Accordingly, whether or not Complainant specifically knew of the specific statutory basis for his FRSA claim when he (with advice of counsel) signed the release, he clearly knew of all the relevant facts.

²⁸ Respondent's Exhibit 2, page 1.

²⁹ *Id.* at 2.

³⁰ See, e.g., Complainant's OSHA complaint and his 30 Apr 09 deposition testimony.

Complainant similarly cites the fact that he executed this release several months before filing his FRSA complaint with OSHA.³¹ However, the language of the release clearly includes future claims, known or unknown.³²

As Complainant points out, the release names a series of specific federal laws, but does not include the FRSA among them. Nor does it include general language covering whistleblower complaints.³³ On the other hand, the agreement states that it releases Respondent from claims “relating to any employment practices” and “arising from the incident and...as a result of the employment described herein.” The release clearly does not solely cover claims directly relating to the workplace injury,³⁴ but also contemplates associated labor and employment claims. Given the saving language that includes any similar state or federal law or any other claims resulting from or arising from the incident, I do not believe the principle of *inclusio unius est exclusio alterius* applies in this instance to exclude FRSA claims. In fact, the inclusion of discrimination statutes indicates an intention that the release go beyond disability compensation and medical coverage.

Complainant also accurately notes that his FRSA claim is not related directly to his injury, but rather to the refusal of Respondent to reinstate him in retaliation for reporting that injury. Nonetheless, the language of the release applies to “causes of action of any kind, nature, or character, whether known or unknown, which he has or may have or claim to have against the [Respondent], as a result of the employment described herein.” Obviously, the language implies a nexus to the incident of 29 Apr 07. For example, no one would have understood that language to apply to a dispute over missing retirement payments, or a claim for long term hearing loss. Nonetheless, the FRSA is clearly an employment matter “arising as a result of the incident and [Complainant’s] employment.”

The benefit of the bargain for Complainant was the cash settlement. In return he agreed to release Respondent from any claims associated with that injury. The FRSA is associated with the injury and is covered by the release.

Is Agency Approval Required?

There is no clear law addressing whether agency approval is required before a FRSA claim may be released as part of a settlement. The implementing regulations address only investigative settlements³⁵ and adjudicative settlements.³⁶ In the absence of any statutory or regulatory requirement, I find no basis to determine that a pre-complaint settlement of a possible FRSA claim is invalid.

³¹ *Cf Tagliatela and Davies*

³² This also moots the question of the date of accrual.

³³ *Cf Davies*.

³⁴ *Cf Tagliatela*

³⁵ 29 C.F.R. § 1982.111(d)(1) (“at any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order”).

³⁶ 29 C.F.R. § 1982.111(d)(2) (“at any time after the filing of objections to the Assistant Secretary’s findings and/or order”).

Because the release's unambiguous, broad language contemplates future claims such as an FRSA whistleblower complaint, and because there is no issue of material fact that Complainant signed the release in good faith and under the guidance of an attorney, I find that summary decision is appropriate.

Respondent's Motion for Summary Decision dismissing Complainant's claim is **GRANTED**.

In view of the foregoing, the hearing scheduled on **9 Dec 13** in **Houston, Texas** is hereby **CANCELLED**.

ORDERED, this 3rd day of December, 2013 in Covington, Louisiana.

PATRICK M. ROSENOW
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, 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).