



In the Matter of:

KENNETH G. DeFRANCESCO,

ARB CASE NO. 10-114

COMPLAINANT,

ALJ CASE NO. 2009-FRS-009

v.

DATE: February 29, 2012

UNION RAILROAD COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

D. Aaron Rihn, Esq., Robert Peurce & Associates, PC, Pittsburgh, Pennsylvania

For the Respondent:

Michael P. Duff, Esq., Pittsburgh, Pennsylvania

Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy Chief Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Kenneth G. DeFrancesco complained that his employer,

¹ 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L.

Union Railroad Company, violated the FRSA when it suspended him for 15 days after he reported a slip-and-fall accident on December 6, 2008. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed his complaint. DeFrancesco appealed to the Administrative Review Board (ARB). We reverse the ALJ's dismissal and remand for further proceedings.

BACKGROUND

The ALJ's findings of fact are largely undisputed.² DeFrancesco worked for Union³ as a trainman for more than 30 years, including 12 years on various furloughs. His work involved putting rail cars together by coupling air hoses and brakes. On the snowy evening of December 6, 2008, while directing a rail car into the steel mill, he slipped and fell on his back. DeFrancesco immediately reported the incident to his supervisor, as Union's work rules required, and went to a doctor who diagnosed a strained lower back.

Several incident reports of the injury were submitted. DeFrancesco described his fall as slipping "on sheet of ice hidden beneath snow" and noted that his "company-issued [shoe] grips did not grip."⁴ Two witnesses, William V. Johnstone and Kenneth R. Sullivan, reported that DeFrancesco had dismounted from the engine and had been walking alongside the rail car to release the handbrake when he fell. Both heard his voice on the intercom radio saying "so much for these grips."

Union transportation supervisor Jason E. Browne noted in his report that DeFrancesco was wearing the required safety equipment of gloves, hard hat, metatarsal boots, safety glasses, and winter overshoes. Browne commented that the possible and actual causes of the incident were "walking/working surfaces" with snow covering packed ballast on flat ground but no obvious debris." He added that the ground did not appear to be icy and no investigation was needed to determine the actual cause.⁵

No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A.

² Decision and Order (D. & O.) at 2-5.

³ Union is one of the railroad properties that make up Transtar, Incorporated, a direct subsidiary of United States Steel Corporation. Hearing transcript (TR) at 100.

⁴ Respondent's Exhibit (RX) 1.

⁵ Complainant's Exhibit (CX) 4.

Nonetheless, superintendant Robert J. Kepic and train rules examiner Ronald A. Sieger watched a video of the December 6 incident,⁶ reviewed the reports, and then decided to review DeFrancesco's discipline and injury history to determine whether he exhibited a pattern of unsafe behavior that required corrective action. They concluded that DeFrancesco violated Safety Rules 5.20 and 5.20.1 because he failed to take short, deliberate steps when walking in the snow, which demonstrated carelessness. They also concluded that DeFrancesco violated General Rule B of Union's rules book in light of his discipline and injury history.⁷ By notice dated December 22, 2008, Union informed DeFrancesco that it would investigate the violations at a hearing set for January 6, 2010. The notice described the charges as violating "Safety Rule 5.20 Weather

⁶ Joint Exhibit (JX) 1; TR at 45-46, 108-11.

⁷ These rules are:

5.20 Weather Hazards: Employee must take precautions to avoid slipping on snow, ice, wet spots or other hazards caused by inclement weather. Employees must wear company issued non-slip footwear during inclement weather conditions.

5.20.1: When hazardous underfoot conditions exist: Keep hands free when walking, and keep them out of pockets for balance. Take short, deliberate steps with toes pointed outward. When stepping over objects, such as rails, be sure your front foot is flat before moving your rear foot. Inspect equipment for icy conditions before mounting or dismounting.

1.2 (Rule B): To enter or remain in the service, employees must be of good moral character and must control themselves at all times, whether on or off Company property, in such manner as not to bring discredit upon the Company. Employees who are careless of the safety of others or themselves, insubordinate, disloyal, dishonest, immoral, quarrelsome or otherwise vicious, or who willfully neglect their duty or violate rules, endanger life or property, or who make false statements or conceal facts concerning matters under investigation, or who conduct themselves in a manner which may subject the railroad to criticism and loss of good will, will not be retained in the service.

Complainant's Exhibit (CX) 2-3.

Hazards” and “General Rule 1.2 (Rule B).” The notice contained a form by which the employee could accept responsibility for the charges and avoid a formal investigation.⁸

Sieger and Kepic informed DeFrancesco that if he accepted the charges against him, he would receive a 15-day suspension without pay. DeFrancesco’s union representative told him that if he proceeded with the investigative hearing, he would be discharged. On January 12, 2009, DeFrancesco waived the hearing. On January 15, 2009, Sieger suspended DeFrancesco for 15 days without pay through February 7, 2009.⁹

DeFrancesco filed a complaint with DOL’s Occupational Safety and Health Administration on February 11, 2009, alleging that Union suspended him in retaliation for reporting a work-related injury. After an investigation, OSHA determined that Union had violated the FRSA and ordered relief.¹⁰ Union timely filed its objections and requested a hearing, which was held in Pittsburgh, Pennsylvania on February 4, 2010. The ALJ concluded that DeFrancesco failed to establish that his protected activity was a contributing factor in the adverse action Union took against him and dismissed his complaint. DeFrancesco appealed to the Administrative Review Board.¹¹

DISCUSSION

The FRSA prohibits a rail carrier from retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness. Section 20109(a) of Title 49 of the United States Code states:

A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee’s

⁸ CX 1.

⁹ RX 5.

¹⁰ May 9, 2009 OSHA letter finding a violation.

¹¹ See Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, § 5(c)(15) (Jan. 15, 2010).

lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.

49 U.S.C.A. § 20109(a)(4). The FRSA's whistleblower provision incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹² Thus, DeFrancesco's complaint will be governed by AIR 21's legal burdens of proof, which contain whistleblower protections for employees in the aviation industry. To prevail, a FRSA complainant must establish 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.¹³ If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.¹⁴

The ALJ found that DeFrancesco engaged in protected activity by reporting his injury, that Union's disciplinary decision-makers were aware of his activity, and that the 15-day suspension was an adverse action. The ALJ's findings with respect to protected activity, knowledge, and adverse action are not contested on appeal.¹⁵

¹² 49 U.S.C.A. § 42121(b), *see* 49 U.S.C.A. § 20109(d)(2)(A).

¹³ 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); *see Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight).

¹⁴ 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010), citing *Brune*, ARB No. 04-037, slip op. at 13.

¹⁵ *See Florek v. Eastern Air Cent., Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 14 (ARB May 21, 2009).

DeFrancesco need not prove retaliatory animus to establish that his protected activity contributed to the adverse action

In considering whether DeFrancesco's report of his injury was a contributing factor to the 15-day suspension, the ALJ stated that the "key inquiry" was whether DeFrancesco could establish that Kopic and Sieger were motivated by "retaliatory animus."¹⁶ The ALJ concluded that DeFrancesco failed to show that his protected activity was a contributing factor because he did not prove that his employer was motivated by retaliatory animus.¹⁷ This is legal error. DeFrancesco is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to Union's adverse action.¹⁸ Rather, DeFrancesco must prove that the reporting of his injury was a *contributing factor* to the suspension. By focusing on the motivation of Kopic and Sieger, the ALJ imposed on DeFrancesco an incorrect burden of proof, thus requiring remand.¹⁹

The ARB has said often enough that a "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."²⁰ The contributing factor element of a complaint may be established by

¹⁶ D. & O. at 12 ("The key inquiry is whether Complainant can establish that Kopic and Sieger, Respondent's decision makers, were motivated by retaliatory animus.").

¹⁷ D. & O. at 12 ("Here, there is insufficient evidence to establish that the decision to commence disciplinary charges against Complainant was motivated by Complainant's reporting of his injury.").

¹⁸ *Marano v. Dept. of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (explaining that proof of retaliatory intent is not necessary to a determination of whether protected activity was a contributing factor to an adverse action); see *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 20-22 (ARB June 29, 2006).

¹⁹ That is not to say that proving an employer's explanation unworthy of credence is not persuasive evidence of retaliation or that examining the legitimacy of an employer's reasons for taking the adverse action is improper in determining whether the complainant has proved by a preponderance of the evidence that his protected activity contributed to the adverse action. Such considerations, however, address the weight of the circumstantial evidence, not the intent or motivation of the employer. See *Brune*, ARB No. 04-037, slip op. at 14.

²⁰ *Williams v. Domino's Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011).

direct evidence or indirectly by circumstantial evidence.²¹ Circumstantial evidence 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 the complainant after he or she engages in protected activity.²²

If DeFrancesco had not reported his injury as he was required to do, Kepic would never have reviewed the video of DeFrancesco's fall or his employment records. Kepic admitted this at the hearing, testifying that such a review was routine after an employee reported an injury and that the purpose of the review was to determine "the root cause."²³ Kepic stated that after seeing the video he reviewed DeFrancesco's injury and disciplinary records to determine whether there was a pattern of safety rule violations and what corrective action, if any, needed to be taken.²⁴

While DeFrancesco's records may indicate a history and pattern of safety violations, the fact remains that his report of the injury on December 6 triggered Kepic's review of his personnel records, which led to the 15-day suspension.²⁵ If DeFrancesco had not reported his fall and Kepic had not seen the video, Kepic would have had no reason to conduct a review of DeFrancesco's injury and disciplinary records, decide that he exhibited a pattern of unsafe conduct, and impose disciplinary action.

Union's decision to suspend DeFrancesco for 15 days thus violated the direct language of the FRSA, which provides that a railroad carrier may not "suspend" an employee when the employee's actions are "due, in whole or in part, to the employee's lawful, good faith act done."²⁶ The statute provides that a "good faith act" includes

²¹ See, e.g., *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 & n.69 (ARB Sept. 30, 2011), citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 27 (ARB May 25, 2011).

²² See, e.g., *Id.*; *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011).

²³ TR at 104-05.

²⁴ RX 2-3; TR at 112-16, 123-26.

²⁵ DeFrancesco's "voluntary" acceptance of the suspension is irrelevant to the issue of whether the suspension was a contributing factor. See RX 4.

²⁶ 49 U.S.C.A. § 20901(a).

“notify[ing]” his employer of “a work-related personal injury.”²⁷ Applying the framework of proving a contributing factor under AIR 21, we can only conclude as a matter of law that DeFrancesco’s reporting of his injury was a contributing factor to his suspension.

On remand, the ALJ must determine whether Union proved by clear and convincing evidence that it would have suspended DeFrancesco absent his protected activity

Because he concluded that DeFrancesco failed to prove that his protected activity contributed to his suspension, the ALJ did not need to consider whether Union proved by clear and convincing evidence that it would have suspended DeFrancesco absent his protected activity. Union argues on appeal, however, that even if DeFrancesco could establish that his protected activity of reporting the injury contributed to the adverse action, Union would have suspended him in the absence of such activity.²⁸

The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.²⁹ Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.³⁰ Clear and convincing evidence that an employer would have disciplined the employee in the absence of the protected activity overcomes the fact that an employee’s protected activity played a role in the employer’s adverse action and relieves the employer of liability.³¹

On remand, the ALJ must consider the evidence of record and determine whether it is sufficient to meet Union’s burden of proof that it would have disciplined DeFrancesco even if he had not reported his slip-and-fall. We make no determination on the merits of this case nor do we intend to suggest that the application of the proper clear-and-convincing standard will change the outcome.

²⁷ 49 U.S.C.A. § 20901(a)(4).

²⁸ Union Brief at 6.

²⁹ See *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011).

³⁰ *Williams*, ARB 09-092, slip op. at 5.

³¹ *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-011, slip op. at 11 (ARB Jan. 5, 2011).

CONCLUSION

The ALJ erred in determining that DeFrancesco failed to prove that his protected activity was a contributing factor in his suspension. We **REVERSE** the ALJ's dismissal of the complaint, and conclude based on the undisputed record evidence that DeFrancesco engaged in protected activity under the FRSA which contributed to his suspension. The ALJ made no findings on whether Union avoided liability under the FRSA by proving by clear and convincing evidence that it would have disciplined DeFrancesco absent his protected activity. Accordingly, we **REMAND** this case for further proceedings on that issue, consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge