



In the Matter of:

DANIEL LEIVA,

ARB CASE NO. 2018-0051

COMPLAINANT,

ALJ CASE NO. 2017-FRS-00036

v.

DATE: **MAY 17 2019**

UNION PACIFIC RAILROAD
COMPANY,

RESPONDENT.

Appearances:

For the Complainant:

Jerry Easley, Esq.; *The Law Office of Jerry Easley*; Bellaire, Texas

For the Respondent:

Jacqueline M. Holmes, Esq., and Nikki L. McArthur, Esq.; *Jones Day*; Washington, D.C.; and Ryan D. Wilkins, Esq.; *Union Pacific Railroad Company*; Omaha, Nebraska

For the Solicitor of Labor as Amicus Curiae:

Kate S. O'Scannlain, Esq., Jennifer S. Brand, Esq., William C. Lesser, Esq., Megan E. Guenther, Esq., and Elizabeth A. Johnston, Esq.; *United States Department of Labor*; Washington, District of Columbia

Before: William T. Barto, *Chief Administrative Appeals Judge*, James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the Federal Rail Safety Act of 1982 (FRSA).¹ Complainant Daniel Leiva filed a complaint alleging that the Respondent,

¹ 49 U.S.C. § 20109 (2008), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 110-53, and as implemented at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

Union Pacific Railway Company, retaliated against him in violation of the FRSA's whistleblower protection provisions because he engaged in protected activity. Respondent appeals from a Decision and Order (D. & O.) of a Department of Labor Administrative Law Judge (ALJ) issued on May 25, 2018, concluding that Respondent unlawfully discriminated against Complainant and ordering relief. Because the events and matters arising in this case relate to a settlement agreement previously reached between the parties and a Public Law Board decision, we vacate the ALJ's D. & O. due to Complainant's failing to state a cause of action under the FRSA's whistleblower protection provisions and dismiss this complaint.

BACKGROUND

Complainant filed a previous complaint pursuant to the FRSA's whistleblower protection provisions with the Occupational Safety and Health Administration (OSHA) on September 19, 2012.² In that case (Case #1), Complainant alleged that while he was working as a train engineer, he engaged in protected activity when he reported that he did not feel safe continuing to work with a conductor who had physically intimidated and threatened him. In response to his report, Respondent pulled him out of service, charged him with workplace violence, informed him that he would be subject to a formal investigation and hearing, suspended him pending the investigation with no pay, and required him to sign a hearing waiver agreeing to termination of his employment followed by immediate reinstatement as a probationary employee in order to continue to be employed with Respondent. Complainant filed a FRSA complaint and an ALJ held a hearing. The ALJ concluded that Respondent violated the FRSA when it took adverse actions against Leiva because he engaged in protected activity and that Respondent did not show that it would have taken the same actions absent Complainant's protected activity. The ARB affirmed the ALJ's decision but remanded the case to the ALJ for consideration of whether punitive damages were warranted, as Complainant had requested them from the ALJ but the ALJ had not addressed the punitive damages issue.

On remand the parties settled the case. The Settlement Agreement states that "Complainant agrees that acceptance of this Agreement constitutes settlement

² We summarize the facts of the Complainant's original complaint as set forth in the ARB's decision in that case. *See Leiva v. Union Pacific R.R. Co., Inc.*, ARB Nos. 2014-0016 and 2014-0017, ALJ No. 2013-FRS-00019 (ARB May 29, 2015) (Case #1).

in full of any and all claims against Union Pacific Railroad Company arising out of Complainant's complaint filed with OSHA on April 8, 2015" subject to approval by the ALJ. Joint Exhibit (JX) 3 at 2. It provided that Respondent would do the following: 1) expunge references to the discipline it assessed against Leiva on July 27, 2012, from its Human Resources Records (HR System Report); 2) take out any references to the exercise of his rights under the FRSA from its HR System Report; 3) ensure that the facts and circumstances relating to the discipline or exercise of his rights "are not used against Complainant in any future disciplinary, employment, or promotional opportunities with Respondent"; and 4) give no negative references regarding any of these matters to a potential future employer. *Id.* Further, the agreement provided that subject to the ALJ's approval of the settlement, it would constitute the final order under the FRSA and was enforceable in an appropriate United States District Court. *Id.* The parties signed the Settlement Agreement on July 1, 2015. *Id.* at 4. The ALJ approved the Settlement Agreement on July 14, 2015, and dismissed the complaint.

On February 15, 2017, Complainant filed the instant complaint alleging that Respondent engaged in adverse action against him by the following actions: when it 1) fired him on October 27, 2014, 2) advised the Public Law Board on August 29, 2016, that he "engaged in workplace violence" in 2012, and 3) thereby enabled the Public Law Board to rely on Respondent's allegations that Complainant engaged in workplace violence in 2012 to deny his claim before the Public Law Board on December 7, 2016, and uphold his termination. D. & O. at 3. OSHA dismissed the instant FRSA complaint because determined it was not timely filed. Complainant appealed and requested an ALJ hearing, which was held on November 20, 2017.

The ALJ found that the instant complaint was timely filed and considered the merits of the case. The ALJ found that it was uncontested that Complainant had engaged in protected activity as set forth in the original ALJ's D. & O. in Case #1. D. & O. at 51. The ALJ further found that Respondent committed a continuing violation of the FRSA by maintaining records that Complainant had engaged in "workplace violence" in 2012 and Complainant's disciplinary history regarding it in Complainant's personnel file. *Id.* at 49, 52. The ALJ found that submission of this information to the Public Law Board "was the same unlawful act from 2012" that continued to 2017, when the information was finally expunged from Complainant's file. *Id.* With regard to causation, the ALJ found that "regardless of Respondent's ignorance" [about Complainant's protected activity when it took the action against him in the instant case], the original decision-makers in Case #1 knew about Complainant's protected activity when they placed the information in his personnel

file where it remained as a continuing violation; thus, the ALJ concluded that contributing factor causation was established. *Id.* at 55-56. The ALJ concluded that Respondent failed to establish that it would have taken the same action absent Complainant's protected activity because "there was no reason under any circumstance for the 2012 incident to be a part of Respondent's submission" to the Public Law Board because it was supposed to have been expunged. *Id.* at 57. Thus, the ALJ ordered relief.

Respondent filed a petition for review with the Board on June 8, 2018, which the Board accepted. Both of the parties filed briefs. The Solicitor of Labor has filed an amicus brief regarding Respondent's challenge that the ALJ was not properly appointed in accordance with the Appointments Clause of the Constitution.³

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to review ALJ decisions in cases arising under the FRSA and issue final agency decisions in these matters.⁴ The Board reviews an ALJ's conclusions of law de novo.⁵

DISCUSSION

As an overarching matter, we hold that the ALJ erred in treating this case as entailing a new, separate FRSA complaint rather than as a continuation of Case #1. The ALJ found that the Complainant established the elements of entitlement for a FRSA complaint, including protected activity, adverse action, and causation, all based on the facts and events arising from Complainant's original complaint. Indeed, the ALJ expressly found that "the alleged unfavorable personnel action is

³ See U.S. Const. Art 2, § 2, cl. 2. Because we are vacating and dismissing this complaint on other grounds, we need not address Respondent's Appointments Clause challenge.

⁴ Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); see 29 C.F.R. § 1982.110(a).

⁵ *Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 7 (ARB Mar. 11, 2019) (*citations omitted*). Specifically, the Administrative Procedure Act provides at 5 U.S.C. § 557(b) (1976) that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision"

the same action noted in [the original] ALJ[‘s] . . . Decision and Order issued December 2, 2013 (i.e., the inclusion of the 2012 workplace violence incident in Complainant’s file).” D. & O. at 52. If all of the elements of the instant claim are the same as in Case #1, then there is not a new case to adjudicate. We need not go so far as to state that *res judicata* applies, but we hold that other avenues of redress are available and appropriate.

First, the facts in this matter represent the breach of a settlement agreement enforceable, by its terms, in United States District Court.⁶ The Settlement Agreement also states that it settles in full any and all claims arising out of the complaint in Case #1.⁷ Therefore, when Respondent breached the terms of the settlement agreement by maintaining information in his personnel file relating to Complainant’s disciplinary history and protected activity regarding the confrontation with his coworker, a claim in contract for breach of the terms of the settlement agreement arose.

Second, Complainant had avenues for redress before the Public Law Board.⁸ Indeed, the ALJ acknowledged that if Complainant objected to the Public Law Board’s reliance on the “workplace violence” notation, “the appropriate remedy was to return to arbitration.”⁹ Additionally, there is a prescribed statutory procedure to appeal the Public Law Board decision to federal district court.¹⁰

⁶ JX 3 at 2 (Settlement Agreement) (“this settlement is . . . enforceable in an appropriate United States District Court.”).

⁷ JX 3 at 2.

⁸ Use of a public law board is one method of arbitration provided for in the Railway Labor Act, 45 U.S.C. 151 et seq. (1996). *See also* D. & O. at 17. It is also significant to note that the ALJ was even aware that “the findings of the arbitral panel (i.e., the public law board, adjustment board) are ‘conclusive of the parties’ and the award is ‘final and binding’ on the parties in the dispute governed by the Railway Labor Act.” D. & O. at 49 n.13.

⁹ *Id.*

¹⁰ 45 U.S.C. § 153(q) (“If any employee . . . is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division’s order.”).

While the ALJ reasonably considered Respondent's failure to expunge the retaliatory information included in Complainant's personnel file,¹¹ in violation of the terms of the settlement agreement, to be reprehensible and egregious conduct, the remedy is not the filing of a new FRSA complaint based on the same set of facts. Neither the ALJ nor this Board possess continuing jurisdiction to enforce settlement agreements that have become the final decision of the Secretary. Under such circumstances, Complainant must pursue any remedies in a proper forum in accordance with the terms of the settlement agreement to which he is a party.¹²

CONCLUSION

Because this complaint does not state a new cause of action, we **VACATE** the ALJ's D. & O. Accordingly, this complaint is **DISMISSED**.

SO ORDERED.

¹¹ We note that it may be futile to order an employer to "expunge" information which other laws may require the employer to maintain. Because businesses may not be able to legally destroy corporate records, ALJs should be cautious and specific when ordering an employer to "expunge" information from an employee's personnel record. Where an ALJ finds it necessary to order an employer to disregard certain information which had been placed in an employee's personnel record, it would be more realistic, for example, for the ALJ to require that the information be placed in a sealed and/or restricted folder or that the employer be specifically prohibited from relying on the information in future personnel actions or referencing it to prospective employers.

¹² Even if we were somehow able to entertain Complainant's complaint, dismissal of the complaint would still be appropriate. The ALJ found that the Respondent's decision-makers who submitted the "workplace violence" information to the Public Law Board had no knowledge about Complainant's protected activity. Specifically, the ALJ summarized the Respondent's decision-makers' (Gearan's, Chappell's and Powell's) testimony indicating that each had stated that they had no knowledge about Complainant's protected activity. D. & O. at 55. The ALJ found each of these witnesses to be "sincere, unbiased, and credible" and their demeanors to be persuasive. D. & O. at 51. But the ALJ found causation despite this and "regardless of Respondent's ignorance," because there was causation in Case #1 when the protected activity and discipline information was placed in Complainant's personnel file. This was error because if the decision-makers did not know about Complainant's protected activity and discipline, it could not have contributed to their decision to use the information. This finding would necessitate dismissal because, with a "no knowledge" finding, there can be no legally sufficient causation.