UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 09 June 2017

CASE NO.: 2016-FRS-00061

In the Matter of:

JEREMIAH J. GIULIANO
Complainant,

v.

CSX TRANSPORTATION, INC.,
Respondent,

and

ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
Party in Interest.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DENYING THE ASSISTANT SECRETARY'S MOTION FOR SUMMARY DECISION

This proceeding arises from a complaint of discrimination filed under the Federal Rail Safety Act ("FRSA" or "the Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the "9/11 Act"), Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). On March 18, 2014, Jeremiah Giuliano ("Complainant" or "Giuliano") filed a complaint against CSX Transportation Inc. ("CSX" or "Respondent") claiming he suffered numerous adverse actions for reporting alleged safety hazards and violations to the Occupational Safety and Health Administration ("OSHA"). On June 20, 2014, Giuliano filed an amended complaint with OSHA alleging additional adverse actions as a result of his letter to OSHA detailing the violations.

I. BACKGROUND & PROCEDURAL HISTORY

On May 2, 2016, OSHA's Regional Administrator, acting as agent for the Secretary of Labor ("Secretary"), issued a letter and preliminary order ("Order") finding Complainant's protected activity contributed to the adverse actions against him.[1] At the time of Giuliano's OSHA complaint, he was employed by Respondent as an electrician in the Selkirk, New York Locomotive Shop maintaining and repairing locomotives. Order at 2. On September 6, 2013, Complainant gave the CSX plant superintendent a letter outlining various alleged violations of safety rules and regulations.[2] *Id.* That same day, Respondent's assistant plant superintendent told Complainant a meeting would be organized the following day in order to discuss the issues detailed in the letter. *Id.* The Secretary found Complainant engaged in FRSA protected activity on September 7, 2013 when he told the plant superintendent about CSX's failure to provide a clean and safe working environment for its employees and the union's withdrawal from the Safety Committee. *Id.* Thus, the Secretary concluded Respondent knew of Complainant's protected activities. *Id.*

On September 11, 2013, Respondent observed Complainant walking onto a locomotive without a cross walk board. *Id.* This was a rule violation, albeit a minor offense, which does not often result in a write-up unless it is repeated.[3] Order at 2. The Secretary determined Complainant suffered an adverse action on December 13, 2013 when Respondent suspended Complainant for five days, with an additional five days held in abeyance, for violating safety rules. *Id.* at 3. OSHA found Complainant's protected activity contributed to his suspension from CSX. *Id.* at 6. Accordingly, OSHA's preliminary order mandated the following:

> Respondent CSX Transportation, Inc. shall pay Complainant punitive damages in the amount of $5,000.
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> Respondent CSX Transportation, Inc. shall pay Complainant's attorney's fees in the amount of $27,735.

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[1] As for Giuliano's amended OSHA complaint filed on June 20, 2014, the Secretary found the protected activity was not a factor in the circumstances involving Respondent's denial of Complainant's official union business time. Order at 4-6.

[2] Complainant was a Chairman of the International Brotherhood of Electrical Workers Local 770. Order at 2. Complainant's letter also indicated the union would be withdrawing their support and involvement from Selkirk's Safety Committee due to Respondent's failure to provide a safe and cleaning working environment. *Id.*

[3] The Secretary noted CSX's observance of Giuliano's rule violation was part of an operational test or "O test," which is planned in advance and only constitutes a minor offense. Order at 2.

Respondent CSX Transportation, Inc. shall have all managers at CSX's Selkirk Locomotive Shop/Diesel Shop receive training provided by OSHA relative to the FRSA and the rights afforded employees.

Respondent CSX Transportation, Inc. shall provide all new hires with information on FRSA and the rights afforded to them.

Respondent CSX Transportation, Inc. shall expunge Complainant's employment records of any reference to the exercise of his rights under the FRSA and any record of the December 18, 2013 suspension.

Respondent CSX Transportation, Inc. shall not discriminate against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to FRSA.

Respondent CSX Transportation, Inc. shall post immediately in a conspicuous place in or about Respondent's facility , including in all places where notices for employees are customarily posted, including Respondent's internal Web site for employees or e-mails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of the posting, the attached notice to employees, to be signed by a responsible official of Respondent's and the date of the actual posting to be shown thereon.

Id.

On June 3, 2016, Respondent filed *CSX Transportation. Inc.'s Objections and Request for a Hearing* (Resp. Objections), opposing certain parts of the Secretary's May 2, 2016 preliminary order. Respondent objected to the following three provisions in the OSHA Order:

1. Respondent CSX Transportation, Inc. shall have all managers at CSX's Selkirk Locomotive Shop/Diesel Shop receive training provided by OSHA relative to the FRSA and the rights afforded employees.

2. Respondent CSX Transportation, Inc. shall provide all new hires with information on FRSA and the rights afforded to them.

3. Respondent CSX Transportation, Inc. shall post immediately in a conspicuous place in or about Respondent's facility, including in all places where notices for employees are customarily posted, including Respondent's internal Web site for employees or e-mails, if Respondent customarily uses one or more of these electronic methods for communicating with employees, and maintain for a period of at least 60 consecutive days from the date of the posting, the attached

notice to employees, to be signed by a responsible official of Respondent's and the date of the actual posting to be shown thereon.

Resp. Objections at 1-2. The notice attached to the OSHA Order stated, among other things, "CSX TRANSPORTATION, INC. has been ordered to make whole an employee who was found to have been retaliated against for exercising his rights under the Federal Rail Safety Act (FRSA)." Respondent argued that the Secretary does not have authority to order these types of relief under the FRSA. *Id.* at 1.

My June 30, 2016 *Scheduling Order* noted that during a June 23, 2017 teleconference, Respondent indicated it had no intention to litigate the underlying facts of the case, but it opposed the Secretary's order of equitable relief. Complainant and Respondent agreed a hearing was not necessary, but briefing the issue would be appropriate. Since the Respondent challenged the Secretary's authority to order the disputed equitable relief, the *Scheduling Order* specifically invited the Solicitor of Labor ("Solicitor") to participate in briefing on behalf of the Secretary.

On August 23, 2016, Respondent and the Solicitor filed a *Joint Motion to Modify the Briefing Schedule* requesting the Court allow the parties to file their respective motions for summary decision as well as to respond to each other's motions. Under the joint motion, Complainant would be permitted to file his response to Respondent's motion for summary decision. On August 30, 2016, I issued a *Modification of Scheduling Order* granting the parties' joint motion.

On September 16, 2016, the Solicitor filed a *Memorandum of Law in Support of the Assistant Secretary of Occupational Safety and Health's Motion for Summary Decision* (Sec. Motion) and on September 23, 2016, Respondent filed *CSX's Transportation, Inc.'s Memorandum of Law in Support Motion for Summary Decision* (Resp. Motion). Then, on October 17, 2016, the Solicitor filed the *Assistant Secretary of Occupational Safety and Health's Memorandum of Law Opposing Respondent's Motion for Summary Decision* (Sec. Opp.), and Respondent filed *CSX's Opposition to the Secretary's Motion for Summary Decision* (Resp. Opp.). On October 17, 2016, the Complainant filed *Complainant Giuliano's Memorandum in Support of OSHA's Motion for Summary Decision and in Opposition to CSX's Motion for Summary Decision* (Compl. Memo.).

II. STANDARD OF REVIEW- SUMMARY DECISION

"A party may move for summary decision, identifying each claim or defense—or the part of each claim or defense—on which summary decision is sought." 29 C.F.R. Part 18.72(a). The Administrative Law Judge may "grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." *Id.* A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In determining whether there is a genuine issue for trial, the court must view all the evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If the non-moving party produces enough evidence to create a genuine issue of material fact, it defeats the motion for summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. CONCLUSIONS OF LAW

The sole issue remaining is whether the Secretary of Labor has authority to mandate "affirmative action to abate the violation" and require Respondent to: a) post notice at its facility of OSHA's findings, b) train its managers, and c) provide new hires with information about the rights of a whistleblower employee under the FRSA. The dispute between the parties focuses on whether the FRSA allows for this type of relief.

The FRSA outlines the remedies available to employees:

> **(e) Remedies.—**
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> **(1) In general.**—An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.
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> **(2) Damages.**—Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include—
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> > **(A)** reinstatement with the same seniority status that the employee would have had, but for the discrimination;
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> > **(B)** any backpay, with interest; and

> **(C)** compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
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> **(3) Possible relief.**—Relief in any action under subsection (d) may include punitive damages in an amount not to exceed $250,000.

49 U.S.C. 20109(e). The Secretary argues the FRSA vests the Department of Labor ("DOL") with broad authority to order "all relief to make the employee whole" and that the plain language of § 20109(e) does not limit any form of relief. Sec. Motion at 5-6. As noted by the Secretary, the remedies specified in § 20109(e)(2) are illustrative, rather than exhaustive.[4] Sec. Motion at 6-7; Sec. Opp. at 6-8. Conversely, Respondent avers the FRSA's equitable remedies are limited, especially in comparison to other statutes explicitly providing for broad types of equitable relief. Resp. Motion at 7-8. Therefore, Respondent argues that the remedies under the FRSA are confined to only those outlined in § 20109(e)(2)(A)-(C), punitive damages, and are narrowly limited to "make-whole" relief specific to the wronged employee. *Id.* at 3-4, 6-8.

The FRSA's remedial purpose is to "make a successful complainant whole" and "compensate the wronged whistleblower for losses caused by the employer's unlawful conduct and restore him to the terms, conditions, and privileges of his former position that existed prior to the employer's adverse action." *Rudolph v. Nat'l R.R. Passenger Corp.*, Nos. 14-053, 14056, slip op. at 12 (ARB Apr. 5, 2016). In Respondent's view, the Secretary's order to post notice, train managers and provide new hires with information about the FRSA rights does not make a complainant whole under any circumstance as it is "purely prospective" relief.[5] Resp. Motion at 4. While I agree with Respondent that agencies and courts may only order relief authorized by statutes, I find Respondent's interpretation of FRSA's "make-whole" provision too restrictive. *See* Resp. Motion at 4, 7-10; Resp. Opp. at 10-12.

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[4] *See, e.g., Barati v. Metro-N. R.R. Commuter R.R. Co.*, 939 F. Supp. 2d 143, 152 (D. Conn. 2013) (finding the FRSA remedies not limited to relief listed by use of the word "including" under § 20109(e)(2)).

[5] Respondent cites to case law where courts have denied awarding relief not specifically identified under the FRSA. Resp. Motion at 8-9. None of those cases discuss whether an order of relief including posting notice and training employees is permitted under the FRSA as a "make-whole" remedy. *See id.* As noted by Respondent, dicta from the U.S. Court of Appeals for the Ninth Circuit suggests posting a notice pursuant to the Sarbanes-Oxley Act, (which similarly provides for "make-whole" relief), is not supported by any clear authority. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 n.9 (9th Cir. 2006). However, the Ninth Circuit did not discuss or decide this particular issue.

Respondent argues that the FRSA does not authorize orders of abatement as it is merely a type of "prospective equitable relief" aimed at altering the future practices of employers, whereas "make-whole" relief is solely intended to compensate a particular wronged employee.[6] *See* Resp. Motion at 4, 7-10. Although abatement is a form of prospective relief, I disagree with Respondent's assertion that abatement cannot also function as a "make-whole" remedy. There may be certain circumstances where abatement can assist in making an employee whole by restoring the aggrieved complainant's reputation and by remedying the resulting fear of future retaliation caused by the retaliatory adverse action. Thus, those particular forms of relief are not simply prospective in nature, but may also help return the wronged complainant back to the work environment they enjoyed prior to the adverse action.

The Secretary persuasively argues the FRSA authorizes "affirmative action to abate a violation" as it can be a crucial and necessary part of making an employee whole. Sec. Motion at 12-13, 14-15. In support, the Secretary points to specific instances such as reprimands, threats of discipline and harassment where abatement may be particularly significant or an employee's only recourse.[7] *Id.* at 7-8; Sec. Opp. at 4-5. The FRSA protects employees against adverse actions that may or may not result in economic harm, and states that "[a] railroad carrier engaged in interstate or foreign commerce . . . may not *discharge, demote, suspend, reprimand, or in any other way discriminate against an employee* . . . ." 49 U.S.C. § 20109(a) (emphasis added). I agree with the Secretary that there may be circumstances where abatement of an employer's adverse action may be a meaningful form of relief to combat the "chilling effect" of the retaliation on the individual complainant. *See* Sec. Motion at 7; Sec. Opp. at 5.

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[6] On this point, however, Complainant noted the FRSA's remedial provisions are "forward-looking" as the statute specifically provides for punitive damages to help deter employers' future illegal conduct. Compl. Memo. at 3.

[7] The Secretary noted the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, provides for "make-whole" relief and lists types of adverse actions taken by an employer that may not cause economic harm to an employee. Sec. Motion at 7-8; Sec. Opp. at 4-5. The Secretary provided case law illustrating this point. *See, e.g., Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) (explaining Sarbanes-Oxley Act "proscribes certain employer conduct, namely 'threat[s] and harass[ment]'. . . that in the usual case will only cause noneconomic harm . . . [I]t would be anomalous to construe the statute to fail to afford a corresponding remedy for such."); *Jones v. Southpeak Interactive Corp.*, 777 F.3d 658, 672 (4th Cir. 2015) (finding that "[t]here will be times when the primary harm will be noneconomic."). The Fifth Circuit noted, "it would be an odd result, to say the least, to construe a statute that prohibits certain "threat[s]" and "harass[ment]" against employees and purports to afford "all relief necessary to make the employee[s] whole" to not offer a remedy for the most usual and predictable result of threats and harassment, emotional distress. *Halliburton*, 771 F.3d at 266 (citations omitted).

In 2015, OSHA issued its final rule pursuant to the FRSA specifically instructing its Assistant Secretary to order, if appropriate, "affirmative action to abate the violation."[8] *See* 29 C.F.R. § 1982.105(a)(1). The text of the regulation provides:

> If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will include, where appropriate: Affirmative action to abate the violation; reinstatement with the same seniority status that the employee would have had, but for the retaliation; any back pay with interest; and payment of compensatory damages, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees . . . . The preliminary order may also require the respondent to pay punitive damages up to $250,000.

Id. (emphasis added). The Secretary states this recent rule allows OSHA to mandate an employer to post notice and train managers in order to make a wronged employee whole.[9] Sec. Motion at 12-13.

Respondent correctly points out that the FRSA is narrower than other whistleblower statutes because it only grants DOL with authority to order reinstatement, backpay, compensatory and punitive damages, and "make-whole" relief tailored to the aggrieved complainant. Resp. Motion at 6-7. The Secretary acknowledges that ordering abatement under the FRSA, such as directing an employer to train its managers, may only apply in limited circumstances where it would make the individual employee whole. *See* Sec. Motion at 12-15. In the preamble to the final rule, OSHA addressed the issue of whether "make-whole" relief under the FRSA included remedial relief such as posting notice and training employees. *See Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act*, 80 Fed. Reg. 69126 (Nov. 9, 2015) (codified at 29 C.F.R. pt. 1982). The agency stated:

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[8] This same language is mirrored in the regulations under the remedies an administrative law judge and the Administrative Review Board may order in FRSA cases. *See* 29 C.F.R. 1982.109(d)(1); 20 C.F.R. 1982.110(d).

[9] In support of its argument the Secretary highlights whistleblower statutes similar to the FRSA, such as the Surface Transportation Assistance Act ("STAA"), 49 U.S.C. § 31105 and the Wendell H. Ford Aviation Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, which, like OSHA's new rule, provides for an "abatement of the violation" as a possible form of relief. Sec. Motion at 10-11, 12-13. The Secretary points to case law interpreting the STAA or AIR 21 to argue for allowing the equitable relief disputed in this case. *Id.* at 10-11.

> OSHA believes that injunctive relief to abate a violation of a specific employee's rights can be an important element of making the employee whole. Such relief could include, for example, an order requiring a railroad carrier to expunge certain records from an employee's personnel file or an order requiring that a particular company policy not be applied to an employee where application of the policy would penalize the employee for having engaged in protected activity. The posting of a notice to employees regarding the resolution of a whistleblower complaint can be important to remedying the reputational harm an employee has suffered as a result of retaliation. In some instances, an order to provide training to managers or notice to employees regarding the rights protected by the statute at issue can assist in making the employee whole by ensuring that the circumstances that led to retaliation do not persist, thus remedying the employee's fear of future retaliation for having engaged in the protected activity that gave rise to employee's whistleblower complaint. Therefore, while OSHA is cognizant of the textual differences between NTSSA and FRSA, it has made no change in response to this comment to the text of 1982.105, which permits an order of abatement where appropriate.

Id. (emphasis added). It appears OSHA's interpretation aligns with the FRSA's "make-whole" provision as the agency specified that abatement, such as posting notice and training employees, applies *only* when tailored to the individual employee.[10] *See* Sec. Motion at 12-13, 14-15.

The FRSA's legislative history does not reference intent by Congress to prohibit abatement.[11] Congress enacted the FRSA in 1970 to promote safety in railroad operations and reduce railroad-related accidents and incidents. 49 U.S.C. § 20101. In 1980, Congress amended the Act to protect whistleblower employees from retaliation by railroad carriers. *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, 94 Stat. 1811 (1980). In 2007, Congress again amended the Act by granting the Secretary of Labor enforcement authority to investigate FRSA whistleblower complaints. *See Implementing Recommendations of the 9/11*

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[10] Recently, an administrative law judge ordered abatement under the FRSA. *See Perez v. BNSF Ry. Co.*, 2014-FRS-00043, slip op. at 40 (ALJ Dec. 14, 2016) (finding that respondent retaliated against complainant in violation of the FRSA for his protected activities, requiring BNSF to post a copy of the ALJ decision and order at its facilities establishing that the complainant was retaliated against by BNSF, and ordering the respondent to "disseminate a communication throughout BNSF's . . . mechanical department that Perez [the complainant] is innocent of all charges in connection with the . . . disciplinary charge letter."). Respondent CSX cites to ALJ and ARB FRSA decisions where the courts did not order the employers to post notice or train managers/employees. *See* Resp. Opp. at 8. I note those cases cited by Respondent were decided prior to OSHA's final rulemaking. *See* 29 C.F.R. 1982.109(d)(1); 20 C.F.R. 1982.110(d).

[11] *See generally Norfolk S. Ry. Co. v. Solis*, No. 12-0306, 2013 U.S. Dist. LEXIS 535, 2013 WL 39226, at *3-4 (D.D.C. Jan. 3, 2013) (emphasizing changes to FRSA under 2007 amendments); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-012 (ARB Oct. 26, 2012) (outlining legislative history of FRSA); *Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012) (discussing FRSA's legislative history and purpose of 2007 amendments).

Commission Act of 2007, Pub. L. No. 110-53, § 121 Stat. 266, 444 (2007) (codified at 49 U.S.C. § 20109). The 2007 Conference Committee's report noted the purpose of these amendments:

> Section 1430 of the Senate bill updates the existing railroad employee protections statute to protect railroad employees from adverse employment impacts due to whistleblower activities relate to rail security. The provision precludes railroad carriers from discharging, or otherwise discriminating against, a railroad employee because the employee, or the employee's representative: provided, caused to be provided, or is about to provide, to the employer or the Federal government information relating to a reasonably perceived threat to security; provided, caused to be provided, or is about to provide testimony before a Federal or State proceeding; or refused to violate or assist in violation of any law or regulation related to rail security . . . .
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> The Conference substitute adopts a modified version of the Senate language. It modifies the railroad carrier employee whistleblower provisions and expands the protected acts of employees, including refusals to authorize the use of safety-related equipment, track or structures that are in a hazardous condition. Additionally, the Conference substitute enhances administrative and civil remedies for employees, similar to those in subsection 42121(b) of title 49, United States Code. The language also provides for de novo review of a complaint in Federal District Court if the Department of Labor does not timely issue an order related to the complaint.
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> The Conference substitute also raises the cap on punitive damages that could be awarded under this provision from $20,000 to $250,000. The Conference notes that railroad carrier employees must be protected when reporting a safety or security threat or refusing to work when confronted by a hazardous safety or security condition to enhance the oversight measures that improve transparency and accountability of the railroad carriers. The Conference, through this provision, intends to protect covered employees in the course of their ordinary duties. The intent of this provision is to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers.

H.R. Rep. No. 110-259 at 348 (2007) (Conf. Rep.) (emphasis added). The legislative history illustrates the intent of Congress to encourage employee reporting of railroad violations without fear of possible retaliation or discrimination from railroad carrier employers. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d. 152 (3d Cir. 2013) (emphasizing 2007 FRSA amendments indicate Congressional "intent to be protective of plaintiff-employees").

Respondent is correct that a statute's legislative history cannot surpass the plain language of its text. Resp. Opp. at 9. However, Congress's omission of "abatement" under the FRSA does not conclusively demonstrate its intent to preclude this type of relief. I also note the

FRSA's statutory language broadly mandates *all* remedies to make the employee whole. § 20109(e). In light of the "make-whole" language in the FRSA and its underlying intent to encourage employee reporting, it seems unlikely that Congress sought to limit abatement targeted to remedy the wronged complainant's subsequent fear of retaliation or meant to assuage any damage to the employee's reputation caused by the adverse action.[12]

Based on the foregoing, Respondent's position that posting notice and training employees never operates to benefit an aggrieved complainant is unconvincing. *See* Resp. Opp. at 10. Accordingly, I find an order of "affirmative action to abate a violation," may be appropriate under the FRSA when it functions to make the employee whole.

IV. THE MOTIONS FOR SUMMARY DECISION

Both the Assistant Secretary and Respondent have moved for summary decision. After reviewing their arguments, materials and exhibits, I find there is no genuine dispute as to any material fact and I find Respondent is entitled to judgment as a matter of law. Accordingly, I find OSHA was not authorized, under the particular facts of this case, to order Respondent to remedy its violation by posting the Notice to Employees, training all managers at CSX's Selkirk Locomotive Shop/Diesel Shop and providing all new hires with information about the rights afforded to them under the FRSA.

Although posting a notice may play a part in making an employee whole in instances where that individual's reputation was harmed, I decline to find that this particular OSHA Notice to Employees, attached to the preliminary order, achieves this purpose. *See* Sec. Motion, Ex. 1. The Notice to Employees does not mention Complainant by name; it only states that CSX was ordered to "make whole *an employee* who was found to have been retaliated against for exercising his rights under the Federal Rail Safety Act (FRSA)." *Id.* The Notice to Employees further indicates that Respondent agrees to certain conditions, such as training managers and new

[12] Although I agree with Respondent that FRSA's remedial language is narrower than other whistleblower statutes as it directs "make-whole" relief specific to the individual employee, I do not find that to be determinative. Respondent avers that FRSA precludes abatement as it explicitly excludes this language unlike other whistleblower statutes, including STAA and AIR 21. Resp. Motion at 6-9. Respondent highlights AIR 21's statutory language which specifically provides for "affirmative action to abate the violation." *See* Resp. Opp. at 9. I decline to adhere to Respondent's position that FRSA's remedial authority wholly excludes abatement just because Congress explicitly allows for abatement pursuant to other statutes. *See* Resp. Motion at 7.

hires, but it fails to specifically refer to the retaliation against Complainant. *Id.* Based on the particular language of the Notice to Employees, posting said notice would not serve to "make-whole" Giuliano by restoring his reputation.

In the preamble to the final rule, OSHA noted that an order of abatement in certain instances may ensure "that the circumstances that led to retaliation do not persist, thus remedying the employee's fear of future retaliation for having engaged in the protected activity that gave rise to employee's whistleblower complaint." *See* 80 Fed. Reg. 69126 (Nov. 9, 2015). Attached to the *Assistant Secretary's Opposition to Respondent's Motion for Summary Decision* is Complainant's signed declaration, mirroring that language, asserting that training managers at the Selkirk Shop and providing information about employee's rights under the FRSA would help to make him whole by assuring that future retaliation against him will not continue. Sec. Opp., Ex. 1.

However, it is undisputed that Complainant currently lives in Florida, works for the union as its General Chairman for IBEW System Council No. 9, is no longer employed as an electrician in the Selkirk, New York Shop and may never return to that employment. Compl. Memo. at 5; Resp. Motion at 10, Ex. 3; Resp. Opp. at 12; Sec. Opp., Ex. 1. Despite Giuliano's assertions, I find the relief ordered by OSHA will not help to alleviate his "fear of future retaliation for having engaged in the protected activity that gave rise to . . . [his] complaint." *See* 80 Fed. Reg. 69126. Giuliano is not now subject to the managerial authority responsible for the retaliation against him, or bound by terms and conditions of employment at CSX's Selkirk Shop. He has not worked at Respondent's Selkirk Shop in several years. Giuliano's return to his former position as an electrician at CSX's Selkirk Shop under the same supervisory authority responsible for his retaliation is mere speculation. Therefore, OSHA's order to train managers and provide new hires with information about their rights under the FRSA at the Selkirk Shop will not serve to remedy the Complainant's *present or existing* fear of retaliation at CSX.

Accordingly, it is hereby **ORDERED** that Respondent's Motion for Summary Decision is **GRANTED** and the Assistant Secretary's Motion for Summary Decision is **DENIED**.

SO ORDERED.

Digitally signed by TIMOTHY MCGRATH
DN: CN=TIMOTHY MCGRATH, OU=ADMINISTRATIVE LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

TIMOTHY J. McGRATH

Administrative Law Judge

Boston, Massachusetts