U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 06 August 2013

Case Number: 2013-FRS-00033

In the Matter of:

WEBSTER WILLIAMS, JR.,
Complainant

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. (Aug. 3, 2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008), and the FRSA regulations issued under at 29 C.F.R. Part 1982.

I. BACKGROUND

Complainant Webster Williams, Jr. ("Complainant" or "Williams") worked as a railroad locomotive engineer for Respondent Grand Trunk Western Railroad Company ("Respondent" or "Grand Trunk") in Flat Rock Yard, Wayne County, Michigan. Complainant's Reply Brief ("CRB") 1; Complainant's Complaint ("CC") 1. In November and December of 2011, Williams was directed several times by his treating physician to take sick leave from work as a result of a "medical condition." Respondent's Motion to Dismiss ("RMD") 2; CC 1. Respondent alleges that Williams suffered from migraines at this time. RMD 2.

On December 29, 2011, Grand Trunk provided Williams with a Notice of Investigation for failing to work on a regular basis between November 28, 2011 and December 29, 2011. CC 2. Williams responded with documentation showing that his absences were at the direction of his treating physician, who was also Grand Trunk's Chief Medical Officer. CC 2.

Grand Trunk conducted a disciplinary investigation into Williams' absences on January 13, 2012. *Ibid.* At that hearing, Williams again provided documentation showing that his absences were pursuant to his physician's treatment plan and that his condition interfered with his job duties. *Ibid.* Williams also provided documentation showing that he needed to take intermittent time off work because of his condition. *Ibid.* Despite Williams' arguments and the

documentation he provided in support of his position, Grand Trunk fired Williams for failing to work on a regular basis between November 28, 2011 and December 29, 2011. *Ibid.*

Williams thereafter filed a whistleblower complaint with the Occupation Safety and Health Administration ("OSHA"), alleging that Grand Trunk retaliated against him in violation of the FRSA. On February 6, 2013, OSHA dismissed Williams' claim, finding that his illness was not work-related and therefore did not fall within the protections of the FRSA. RMD 2.

On February 25, 2013, Williams filed an appeal of OSHA's findings with the Office of Administrative Law Judges ("OALJ"). This case was duly docketed, and I issued a Notice of Docketing directing the parties to exchange and file certain prehearing information on March 1, 2013. On June 20, 2013, Respondent Grand Trunk filed a motion to dismiss Williams' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Complainant thereafter filed a response to the motion to dismiss on July 19, 2013. On July 29, 2013, Respondent filed a motion for leave to file a reply brief to respond to the facts and legal arguments in Complainant's reply brief.

After reviewing the complaint, the moving and replying papers, and the factual and legal arguments made therein, I find the Motion to Dismiss should be denied for the reasons stated below.

II. STANDARD OF REVIEW

The OALJ Rules of Practice and Procedure, 29 C.F.R. Part 18, do not address dismissals for failure to state a claim upon which relief can be granted. Section 18.1(a), however, allows a judge to rule upon such motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure. 29 C.F.R. § 18.1(a) (stating "The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.").

Rule 12(b)(6) of the Federal Rules of Civil Procedure states that upon a properly presented motion, a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Although a plaintiff's burden to avoid dismissal under a Rule 12(b)(6) motion in federal court is the "plausibility" standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Administrative Review Board ("ARB") has explicitly held that this heightened pleading requirement does not apply to whistleblower complaints before the DOL. *Evans v. E.P.A.*, ARB No. 08-059, ALJ No. 2008-CAA-3, at 9 (ARB July 31, 2012). Rather, a whistleblower complaint filed with the OALJ will survive a motion to dismiss if the complainant gives "fair notice" to the respondent. *Ibid.*

"Fair notice" requires that the complainant provide "(1) some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought."[1] *Ibid.* Administrative whistleblower complaints are

[1] I note that Respondent only contests at this point whether Complainant engaged in protected activity. Therefore, elements two through four will not be addressed below.

"rarely suited for Rule 12 dismissals" because they "involve inherently factual issues such as 'reasonable belief' and the issues of 'motive.'" *Sylvester v. Parexel Int'l LLC*, ARB No.07-123, ALJ No. 2007-SOX-39, -42, at 13 (ARB May 25, 2011); *see also Dos Santos v. Delta Airlines, Inc.*, ALJ No. 2012-AIR-20, at 6. "ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort." *Ibid*; *see also Evans*, ARB No. 08-059, at 9 (applying *Sylvester*'s pleading standard to all administrative whistleblower claims).

Finally, in ruling on a motion to dismiss, the ALJ must "focus *solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised – not whether evidence exists to support such allegations." *Id.* at 10. An ALJ must assume all factual allegations in the complainant's complaint are true, and must draw all reasonable inferences of fact in favor of the complainant where the factual allegations differ between the parties. *Ibid.*

III. DISCUSSION

The sole issue for me to address is whether Complainant has alleged sufficient facts to provide "fair notice" to Respondent that he engaged in protected activity under the FRSA. As explained below, I find that Complainant has alleged sufficient facts to provide fair notice that he engaged in protected activity for two reasons: (1) Complainant alleged that his treatment plan arose from a work-related injury; and (2) the FRSA protects railroad employees from harassment for following treatment plans of a treating physician for illnesses or injuries regardless of whether they were incurred during the course of employment.

A. Work-Related Injury

Respondent's motion to dismiss argues that Williams was terminated by Grand Trunk for excessive absences and "abusing the leave recommended in a treatment plan related to a *non-work related injury*" (emphasis added). RMD 1. Complainant however responds that "No where [*sic*] in his Complaint does Williams contend that his medical condition is not related to work. Such determinations will be made solely by medical professionals. [Grand Trunk] may certainly dispute that his condition is work related in this case. However, at this state, it is not entitled to dismissal based on a dispute of fact."

The FRSA, 49 U.S.C. § 20109, prohibits railroads from discriminating against their employees for reporting safety and security issues to the company, a regulatory body, or a law enforcement agency. *See* 49 U.S.C. §§ 20109(a), (b). Importantly for this case, the FRSA also provides protections for employees who are injured or suffering from an illness. It states:

> **(c) Prompt Medical Attention.—**
>
> > **(1) Prohibition.—** A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the

nearest hospital where the employee can receive safe and appropriate medical care.

(2) Discipline.— A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

49 U.S.C. § 20109(c).

Williams' complaint states simply that he worked for Respondent, "was absent from work for various days in November and December 2011 as a result of a medical condition which interfered with his ability to safely perform his job duties," was following the treatment plan of Grand Trunk's chief medical officer, and was terminated for excessive absenteeism. Complainant's Complaint ("CC") 1-2. However, although his complaint does not explicitly state that his injury was "work-related," when read in conjunction with his reply brief, Complainant has alleged sufficient facts to survive a motion to dismiss.

According to Williams' response to the motion to dismiss, whether his injury was work-related "will be made solely by medical professionals." In addition, as Williams correctly notes in his opposition to Respondent's motion, he never alleged in his complaint that his condition is not work-related. It thus appears that this will be an issue of fact to be decided after a hearing on the merits. Whether he is ultimately able to prevail on this issue is simply irrelevant at this juncture. His allegations now are sufficient to provide Respondent with "fair notice" of his claim. As such, I find that Complainant has alleged sufficient facts to survive Respondent's motion to dismiss.

B. Unrelated Injury

Complainant also alleges, in the alternative, that even if his injury was not "work-related," he was still fired impermissibly "for following orders or a treatment plan of a treating physician." CRB 5. Complainant argues that § 20109(c)(2) of the FRSA protects railroad employees from discrimination for following a doctor's medical treatment plan irrespective of whether the plan is for an injury or illness which is work-related. *Id.* at 8. According to Complainant: (1) the language of § 20109(c)(2) is clear that all injuries are protected, not just those that are related to work; (2) the purpose of the FRSA is to promote and ensure the safety of railroad operations; and (3) the legislative history supports his interpretation. *See id.* at 8-17.

Respondent, however, contends that § 20109(c)(2) does not provide protection for injuries which are unrelated to work. Respondent states that §§ 20109(c)(1) and (c)(2) "are not mutually exclusive, and subparagraph 2 cannot be read without referring to the prohibition in subparagraph 1 requiring the injury occur during the course of employment." RMD 3. In support of its arguments, Respondent cites various portions of the statute's legislative history which it alleges show that §§ 20109(c)(1) and (c)(2) were meant to cover only railroad employees who are "injured on the job." *See id.* at 4-11.

The first step in determining a statute's meaning is to look at whether the language of the statute is clear. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). If a statute is plain and unambiguous, then the inquiry ceases and a court must give effect to the statute's literal interpretation. *Ibid*; *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). The text of Section 20109(c)(2) clearly does not limit protection to employees injured only on the job.

Section 20109(c)(2) states that "[a] railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician . . . ." 49 U.S.C. § 20109(c)(2). The provision does not introduce or conclude with a limiting factor, such as that the injury must be "on-the-job" or have occurred "during the course of employment." Rather, it unambiguously protects employees from being disciplined for following "orders or treatment plans of a treating physician," regardless of how the injury arose.

Respondents' contention that Section 20109(c)(2) must read in conjunction with the prohibition in § 20109(c)(1) against denying or interfering with treatment for an injury which occurred "during the course of employment" is also unpersuasive. Courts have consistently recognized that when "Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Congress clearly knew how to limit protection to employees injured on the job, and did so in § 20109(c)(1). That Congress did not provide similar limiting language in § 20109(c)(2) shows that it meant to provide protection for injuries that arise beyond the course of employment – *expressio unius est exclusio alterius. See Bala v. Port Auth. Trans-Hudson Corp.*, ALJ No. 2010-FRS-26, at 11 (ALJ Feb. 10, 2012) (holding that § 20109(c)(2) protected employee who was following physician's treatment plan for injury unrelated to work because "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of a statutory provision) (internal citations omitted). If Congress meant to limit the protection afforded by § 20109(c)(2) to employees injured during the course of employment, then "it could have done so clearly and explicitly." *Barnhart*, 534 U.S. at 454.

I am also not persuaded by Respondent's arguments that the legislative history surrounding the FRSA shows that Congress intended to protect only on-the-job injuries. As noted above, when the language of the statute is clear, that is the end of the inquiry. Legislative history "cannot amend the clear and unambiguous language of a statute." *Barnhart*, 534 U.S. at 457. Rather, a court must give effect to a statute's clear meaning and not turn to the legislative history. *See Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1709 (2012) (internal citations omitted). Moreover, even if there are "contrary indications" in the legislative history that

support Respondent's interpretation, I must apply the clear and unambiguous meaning of the text. *Ratzlaf v. U.S.*, 510 U.S. 135, 147 (1994). As I find that § 20109(c) clearly and unambiguously provides protection to railroad employees if they are following the orders or treatment plan of a treating physician, irrespective of when and how the injury or illness was sustained, Respondent's legislative history cannot stand.

Finally, I note that interpreting § 20109(c)(2) to protect employees who are following a doctor's treatment plan for *all* illnesses and injuries, regardless of whether they are work-related, clearly advances the safety purposes underlying the FRSA. The FRSA is intended "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. *See also Bala*, ALJ No. 2010-FRS-26, at 11 (finding safety purpose of FRSA advanced by interpreting § 20109(c)(2) to protect employees following treatment plans for off-the-job injuries). When it is the medical judgment of a treating physician that a patient is not physically capable of performing his or her work-related duties because of an injury or illness, that individual should not have to choose between, on the one hand, following the physician's advice to abstain from working or, on the other hand, jeopardizing the health and safety of the employee's fellow workers and the traveling public by working because the employee may be fired. At the time he was fired, Williams was employed by Grand Trunk as a locomotive engineer and was under the care of Dr. John Bernick, Respondent's own Chief Medical Officer. Based on his medical knowledge of Complainant's physical and mental condition, Dr. Bernick concluded that Williams was unable to safely perform his duties as a locomotive engineer because of the migraine headaches and anxiety for which he was being treated. While Respondent had every right to seek other medical opinions regarding the severity of Williams' condition, and Dr. Gernick's conclusion that it impaired his ability to work, Respondent cannot simply fire Williams for relying on his treating physician's opinion that he was too ill to work. Doing so would thwart the very purpose of the FRSA to promote safety and reduce accidents and incidents.

IV. CONCLUSION

As stated above, I find that Complainant has alleged sufficient facts to show that he was "injured during the course of employment." To the extent that Complainant may ultimately fail to show at trial that he was "injured during the course of employment," I further find that the statutory language of § 20109(c)(2) protects employees who are following a physician's treatment plan for illnesses or injuries, regardless of whether they are work-related, inasmuch as such an interpretation flows from the plain language of the statute and advances the overall safety purposes of the FRSA.

For the foregoing reasons, Respondent's motion to dismiss is hereby **DENIED**.

SO ORDERED.

Digitally signed by STEPHEN PURCELL
DN: CN=STEPHEN PURCELL,
OU=ADMINISTRATIVE LAW JUDGE,
O=Office of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN L. PURCELL
Chief Administrative Law Judge

SERVICE SHEET

Case Name: **WILLIAMS_WEBSTER_JR_v_GRAND_TRUNK_WESTERN__**

Case Number: **2013FRS00033**

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I hereby certify that a copy of the above-referenced document was sent to the following this 6th day of August, 2013:

Digitally signed by KAREN A. TANAVAGE
DN: CN=KAREN A. TANAVAGE, OU=SECRETARY, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

KAREN A. TANAVAGE
SECRETARY

Regional Administrator
Region 5
U. S. Department of Labor, OSHA
Room 3244
230 South Dearborn Street
CHICAGO IL 60604
{Hard Copy - Regular Mail}

Regional Solicitor
U. S. Department of Labor
Room 844
230 South Dearborn Street
CHICAGO IL 60604
{Hard Copy - Regular Mail}

Robert B. Thompson, Esq.
Robert E. Harrington, III, Esq.
Harrington, Thompson, Acker & Harrington, Ltd.
180 North Wacker Drive
Suite 300
CHICAGO IL 60606
{Hard Copy - Regular Mail}

Grand Trunk Western Railway Company
24002 Vreeland Road
FLAT ROCK MI 48134
{Hard Copy - Regular Mail}

Webster Williams, Jr.
P.O. Box 551
TAYLOR MI 48180
{Hard Copy - Regular Mail}

Constance Valkan, Esq.
17641 S. Ashland Avenue
HOMEWOOD IL 60430
{Hard Copy - Regular Mail}

Directorate of Whistleblower Protection Programs
U.S. Department of Labor, OSHA
Room N-3112, FPB
200 Constitution Avenue, NW
WASHINGTON DC 20210
{Hard Copy - Regular Mail}

Mary Ann Howe, CFE
Assistant Regional Administrator Region V
Whistleblower Protection Program
U.S. Department of Labor, OSHA
365 Smoke Tree Plaza
NORTH AURORA IL 60542
{Hard Copy - Regular Mail}

Joseph D. Weiner, Esq.
Littler Mendelson, P.C.
1300 IDS Center
80 South 8th Street
MINNEAPOLIS MN 55402-2136
{Hard Copy - Regular Mail}