

U.S. Department of Labor

Occupational Safety and Health Administration
William R. Cotter Federal Building
135 High Street – Suite 361
Hartford CT 06103
(860) 240-3154
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www.whistleblowers.gov



May 15, 2014

Metro North Commuter Railroad Co.
Sofia C. Hubscher, Esq. Deputy General Counsel
347 Madison Avenue, 19th floor
New York, New York 10017

VIA UPS # 1ZX104980395596659

Re: Metro North Commuter Railroad Co. / Williams / 1-0080-14-022

Dear Ms. Hubscher:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Richard Williams (Complainant) against Metro North Commuter Railroad Inc. (Respondent) on December 18, 2013 under the Federal Railroad Safety Act, 49 U.S.C. §20109. In brief, Complainant alleged that Respondent disciplined him in retaliation for following his doctor's orders not to work due to illness.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region I, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

Complainant was disciplined on June 21, 2013. On December 18, 2013, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of FRSA. As this complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20109 and 49 U.S.C. §20102. The Metro-North Commuter Railroad Company is a suburban commuter rail service that is a subsidiary of the Metropolitan Transportation Authority (MTA), a public benefit corporation. Metro-North runs service to its northern suburbs in New York and Connecticut, as well as to other regions, including, in conjunction with New Jersey Transit, to parts of New Jersey. Respondent operates 120 stations.

Complainant is an employee within the meaning of 49 U.S.C. §20109. Complainant works for Respondent as an electrician. Complainant is a member of the International Brotherhood of Electrical Workers and is covered by a collective bargaining agreement. Complainant and Respondent are, therefore, covered by FRSA.

FRSA was modified when Public Law 110-432 was enacted on October 16, 2008 to add new protections to railroad workers. Specifically, §20109(c)(2) prohibits a railroad from disciplining an employee “for following orders or a treatment plan of a treating physician.”

Complainant had a surgical procedure on May 31, 2013. From May 31, 2013 through June 5, 2013, Complainant was under the care of his treating physician who prescribed narcotic pain medication. The physician excused Complainant from work between May 31, 2013 and June 5, 2013 because he was taking medication that precluded him from safely performing his job duties. Complainant gave the doctor’s note to Respondent immediately upon his return to work.

The absences on from May 31, 2013 through June 5, 2013 were counted against Complainant and caused him to fall in violation of Respondent’s attendance policy. As a result, Respondent issued Complainant a letter of warning on June 21, 2013, which is the first step in the disciplinary process.

Complainant filed a FRSA complaint on December 18, 2013, alleging he was disciplined in violation of the Federal Railroad Safety Act, 49 U.S.C. 20109(b)(1) and 49 U.S.C. 20109(c)(2).

Complainant engaged in protected activity under FRSA when he followed his primary care physician’s orders from May 31, 2013 through June 5, 2013 by remaining out of work. Respondent does not dispute knowledge of Complainant’s protected activity.

Complainant experienced an adverse action on June 21, 2013 when Respondent issued him a letter of warning that constituted the first step in the attendance disciplinary process.

Complainant followed his physician’s treatment plan by remaining out of work from May 31, 2013 through June 5, 2013. Complainant’s absence was a contributing factor in the adverse action

Respondent states that it expunged Complainant’s June 21, 2013 letter of warning.

Respondent argues that:

A warning letter does not constitute discipline under any of the collective bargaining agreements between Metro-North and its employee unions. Metro-North expunges records of employee warning letters after a year if the employee maintains satisfactory attendance during that time period.

And,

Warning letters issued without disciplinary consequences should not be considered as discipline under the specific definition in subsection (c)(2).

However, OSHA finds that issuance of a warning letter to an employee in connection with facts such as exist in this matter is an adverse action under FRSA because it could reasonably dissuade this employee or other employees from engaging in activity protected under §20109(c)(2) or other FRSA provisions.

OSHA finds reasonable cause to believe that Respondent has violated FRSA and issues the following order.

ORDER

1. Respondent shall notify Complainant in writing that the disciplinary notice dated June 21, 2013 has been expunged from Complainant's files.¹
2. Respondent shall pay Complainant \$1,000.00 in compensatory damages for mental anguish.
3. Respondent shall pay Complainant's attorney reasonable attorney's fees.
4. Respondent shall post in a conspicuous employee area the attached "Notice to Employees" for a period of one hundred eighty days

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400 North
Washington, D.C. 20001-8002
Telephone: (202) 693-7300
Fax: (202) 693-7365

With copies to:

All parties to this case

Regional Administrator
U. S. Department of Labor - OSHA
JFK Federal Building
Room E-340
Boston, MA 02203

In addition, please be advised that the U.S. Department of Labor does not represent any complainant or respondent in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of the complaint. The rules and procedures for the handling of FRSA cases can be found in Title 29, Code of Federal Regulations Part 1982 and may be obtained at www.whistleblowers.gov.

¹ Respondent stated in a letter to OSHA, dated April 29, 2013, that this has already been done.

Sincerely,

A handwritten signature in blue ink, appearing to be the initials 'ML'.

Supervisory Investigator

cc: Charles Goetsch, Esq. (VIA UPS #1ZX104980396527061)
USDOL-Chief Administrative Law Judge,
USDOL-SOL/FLS Division
USDOT-FRA



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER BY THE U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION:

METRO-NORTH COMMUTER RAILROAD COMPANY (Metro-North) has taken affirmative action to ensure the rights of its employees under the Federal Railroad Safety Act (FRSA). Effective immediately, Metro North will be accepting documentation (i.e. doctors' notes) from medical providers that validates that the employee has been under their care during the period of the employee's absence from work. The period of absence that is covered by the note will not be considered in determining an employee's adherence to the attendance policy.

PURSUANT TO THE FRSA, METRO-NORTH WILL NOT:

1. Discharge or in any manner discriminate against any employee because such employee has engaged in any activity, filed any complaint or instituted or caused to be instituted any proceeding under or related to the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself/herself or others of any right afforded by the FRSA.
2. Discharge, demote, suspend, threaten, harass, intimidate or in any other manner discriminate against an employee because such employee has reported a workplace injury or illness.
3. 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.
4. 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.

Metro-North Commuter Railroad Company

Date

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE
MUST REMAIN POSTED AND MUST BE NOT ALTERED, DEFACED, OR COVERED BY
OTHER MATERIAL.**