U.S. Department of Labor

Occupational Safety and Health Administration
1999 Broadway, Suite 1690
Denver, CO 80202-3025
Telephone: 720.264-6550; Facsimile: 720.264-6585

CERTIFIED MAIL:

August 16, 2010

Scott A. Hagen
Attorney at Law
Ray Quinney & Nebeker P.C.
36 South State Street
Suite 1400
Salt Lake City, Utah 84111

RE: Utah Transit Authority/Mylar/8-1700-08-008

Dear Mr. Hagen:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mark Mylar, ("Complainant") against Utah Transit Authority ("Respondent") on January 7, 2008, under the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. In brief, Complainant alleged that in retaliation for his bringing up a concern regarding railroad security, Respondent terminated his employment.

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

Secretary's Findings

Respondent is a covered railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102. Respondent is a public transportation system and is a political subdivision of the state of Utah; providing mass transportation services to the public through bus service, light rail service, van-pool service and commuter rail service, which began service to the public in April 2008. Respondent is, and at all relevant times was, a commuter railroad and is a covered employer within the meaning of 49 U.S.C. §20109.

Complainant was employed by Respondent as a Rail Operations Supervisor and is therefore an employee within the meaning of 49 U.S.C. §20109.

On December 21, 2007, Respondent terminated Complainant's employment. On January 7, 2008, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the FRSA. As the complaint was filed within 180 days of the alleged adverse action, it is deemed timely.

Complainant began working for Respondent on or about November 5, 2007, as a Rail Operations Supervisor. At the time of his employment, Complainant had approximately 16 years of rail

road experience and held a Class I Engineers card. Prior to his employment with Respondent, Complainant had worked for the Santa Fe Railroad and Utah Railways. Complainant was hired to supervise and train employees to become licensed locomotive engineers, in order to operate Respondent's short haul commuter rail system called "FrontRunner."

On December 17, 2007, Complainant received an e-mail from his supervisor, Susan Duffy (hereinafter, Duffy), who is the Manager of Rail Operations. Duffy's e-mail discussed "bungalow keys:"[1] how Respondent's employees could use the keys, as well as latch-out and training issues relating to the keys. Later that evening, Complainant replied to Duffy's e-mail with his concerns about the security of the bungalow keys. Complainant, in that e-mail, expressed his concern that Respondent's management employees needed to control more effectively the bungalow keys for FrontRunner than had been done with Respondent's light rail system because failure to do so could be "a very serious TSA/FRA/GCOR rule violation."

The following day, Duffy called Complainant into her office and discussed his reply to her e-mail. Duffy questioned Complainant about who had lost keys in the light rail system, but Complainant could not give her any specific names or incidents. Duffy documented the meeting as a coaching session and had told Complainant that he was not a "team player."

Two days after expressing his concern about Respondent's control of bungalow keys, on December 19, 2008, Duffy drafted a memo to human resources which stated that Complainant should be terminated due to his not performing his job duties in accordance with management directives or policy and failure to be a team player. Duffy commented in her letter to human resources that Complainant's "...approach to date has been to undermine the management and bargaining unit staff" and that Complainant "would be more of a detriment to our success than a benefit."

On December 21, 2007, Duffy summoned Complainant into her office and terminated Complainant's employment.

Respondent asserts that this incident was the last of three incidents where Complainant did not live up to Respondent's expectations as a team player or to Respondent's organizational teamwork philosophy.

The first incident occurred on November 30, 2007. During a ride on FrontRunner for stakeholders and elected officials, Complainant had attempted to board a train that had been "blue flagged" by Rail Operations Technician, Bob Slovensky (hereinafter, Slovensky). Slovensky informed Complainant that Complainant could not board the train until Slovensky cleared the blue flag and only after Complainant received approval to do so. Complainant questioned Slovensky as to why he could not board. A verbal altercation ensued. Slovensky's supervisor, Bryan Sawyer (hereinafter, Sawyer), Complainant's Manager of Technical Services & Quality Assurance/Manager of Rail Vehicle Maintenance, witnessed the confrontation. Sawyer intervened and resolved the conflict. Later, Sawyer informed Duffy about the incident between Complainant and Slovensky. Duffy called Complainant into her office to discuss this incident.

The second incident between Complainant and Slovensky occurred four days later, on December 3, 2007. Complainant directed Slovensky to clean the ice and snow off the back deck of a

[1] A "bungalow" is a term for the shed-like structure that houses the railroad controls and switches for signals and tracks. A bungalow key unlocks the door to that structure, allowing access to the bungalow. Bungalows are usually located near crossings and signals.

locomotive. A verbal altercation ensued between the two employees as to who was to clear the snow and ice. Complainant and Slovensky each stated that it was not his job. Slovensky called Sawyer and informed him of the incident between Complainant and himself. Sawyer called Motive Power, Respondent's contractor, to remove the snow and ice. Sawyer subsequently informed Duffy of the incident between Complainant and Slovensky, but neither was counseled or otherwise disciplined for it.

49 U.S.C. § 20109(b)(1)(A)(1) protects employees who report, in good faith, a hazardous safety or security condition.

Complainant engaged in protected activity when he replied to Duffy's e-mail and raised a concern about the security and distribution of bungalow keys. Respondent knew about Complainant's protected activity because Duffy received the e-mail reply and discussed it with Complainant the next day. Respondent took adverse action against Complainant when it terminated Complainant's employment the day after Duffy discussed his reply to her e-mail.

A discriminatory nexus between Complainant's protected activity and the adverse action that was taken against him is suggested by the short time period between the protected activity (December 17, 2007) and the adverse action (Complainant's discharge on December 21, 2007). In addition, Respondent harbored discriminatory animus toward the Complainant when Duffy immediately communicated her displeasure verbally about Complainant's concerns over the bungalow keys. Moreover, Respondent relies upon Complainant's altercation with Slovensky as a reason for discharge, but failed to take disciplinary action against an employee (Slovensky) with a disciplinary history of having altercations with other employees.

A preponderance of the evidence indicates that Complainant's protected activity was a contributing factor in the termination of his employment. Respondent argues that Complainant failed to "be a team player" when he engaged in two altercations with another employee; yet, Respondent only addressed the first incident with a coaching session and failed to address the second incident. Moreover, Slovensky did not receive discipline for either incident despite having a history of discipline for altercations with other employees.

OSHA finds that there is reasonable cause to believe that Respondent violated FRSA and hereby orders the following to remedy the violation.

Order

Respondent shall immediately reinstate Complainant to the same or equivalent job, including restoration of seniority and all rights and benefits that Complainant would have earned but for the retaliation.

Respondent shall pay Complainant $116,059.48 in lost wages for the period of December 21, 2007 until the date upon which a bona fide offer of reinstatement is made. Respondent shall pay *interest* at the rate paid on tax overpayments determined under Section 6621 of the Internal Revenue Code.

Respondent shall pay Complainant compensatory damages in the amount of $398.46 for cost associated with seeking new employment; $10,994.48 for cost associated with Complainant's

mortgage refinancing; and health insurance cost of $3,451.86. The total amount of compensatory damages due to Complainant: $14,844.80

Respondent shall pay Complainant's attorney's fees in the amount of $6,080.91.

Respondent shall expunge all of Complainant's records of any derogatory reference to Complainant's exercise of Complainant's rights under the jurisdiction of the Occupational Safety and Health Administration.

Respondent shall provide to all employees a copy of the FRSA Fact Sheet included with this Order.

Respondent shall permanently post the Notice to Employees included with this Order in all stations in areas where employee notices are customarily posted.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and 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
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
(202) 693-7542, Facsimile (202) 693-7365

With copies to:

Mark Mylar
c/o Erik Strindberg, Attorney
Strindberg & Scholnick, LLC
785 North 400 West
Salt Lake City, UT 84103
(801) 359-4169, Facsimile (801) 359-4313

Gregory J. Baxter, Regional Administrator
1999 Broadway, Suite 1690
Denver, CO 80202
(303) 264-6550, Facsimile (303) 264-6585

Department of Labor, Regional Solicitor
1999 Broadway, Suite 1600
Denver, CO 80202

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue NW, N2716
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party 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 *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony 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 FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under FRSA are handled in accordance with the rules and procedures for the handling of AIR-21 cases. These procedures can be found in Title 29, Code of Federal Regulations Part 1979, a copy of which may be obtained at http://www.osha.gov/dep/oia/whistleblower/index.html.

Sincerely,

Gregory J. Baxter
Regional Administrator

cc: Erik Strindberg, Attorney at Law
Chief Administrative Law Judge, USDOL/OALJ
USDOL/SOL-FLS
USDOL/SOL-Regional Solicitor, Region VIII
Federal Railroad Administration