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In the Matter of:

ROBERT HENDERSON,

ARB CASE NO. 11-013

COMPLAINANT,

ALJ CASE NO. 2010-FRS-012

v.

DATE: OCT 26 2012

WHEELING & LAKE ERIE RAILWAY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Karl Frisinger, Esq., Minneapolis, Minnesota

For the Respondent:

Thomas E. Dover, Esq.; Julie L. Juergens, Esq.; and Joseph J. Santoro, Esq.;
Gallagher Sharp, Cleveland, Ohio

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce,
Administrative Appeals Judge; and Luis A. Corchado, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Robert Henderson claimed that his former employer, Wheeling & Lake Erie Railway (W&LE), violated the FRSA when it discharged him

¹ 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 and 29 C.F.R. Part 18, Subpart A.

from employment. W&LE filed a Motion for Summary Disposition (Motion), and a Department of Labor (DOL) Administrative Law Judge (ALJ) granted the Motion and dismissed the complaint. Henderson appealed to the Administrative Review Board (ARB). For the following reasons, we reverse the ALJ's ruling and remand this case for further proceedings.

BACKGROUND²

W&LE is a regional railroad that operates in Ohio, Pennsylvania, West Virginia, and Maryland. W&LE employed Robert Henderson as a Carman and Car Inspector. His responsibilities included maintaining, repairing, and inspecting freight cars owned or operated by W&LE. Al Luckring was his direct supervisor. W&LE provides its employees with an Operating Manual containing its Safety and Operating Rules. Employees are also required to follow the rules contained in W&LE's Employee Policy Manual.

On December 15, 2008, Henderson visited a doctor and complained of back pain he believed was caused by the condition of equipment at work. On January 26, 2009, Henderson was driving one of W&LE's vehicles when the passenger side airbag deployed and hit him on the right side of his head. He reported the incident to Luckring, but he did not realize at the time that he had suffered a personal injury as a result of the airbag deployment.³ Several days after the incident, however, Henderson had difficulty sleeping because of neck pain but continued to work, thinking the pain would subside. On February 6, Henderson visited a doctor and told him the neck pain was caused by an airbag hitting him. Henderson also reported the cause of his injury to the Railroad's benefits consultant on or about February 17, 2009.

Henderson was experiencing intermittent back pain in January and February 2009 but continued to go to work. On March 1, 2009, his back pain was so intense that his son had to tie his shoes so he could go to work. Henderson called Luckring prior to working his shift to let him know that he was in pain but would attempt to work his shift. Later that day, Henderson complained to Luckring that he was experiencing back pain caused by the poor condition of W&LE's trucks. He finished his work but went home early with Luckring's permission. Henderson and his colleagues repeatedly complained about the poor condition of the Railroad's trucks.⁴

² The facts recited below are taken from the ALJ's October 28, 2010 Decision and Order, pp. 4-10, unless otherwise indicated. We view these facts in the light most favorable to Henderson, the party responding to the motion for summary decision. *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 6 (ARB Nov. 20, 2009). We do not suggest that any of these facts have been decided on the merits.

³ Deposition of Robert C. Henderson at 15.

⁴ Motion, Exhibit (RX) H at 23-24.

On March 2, Henderson returned to the doctor because of back pain. He believed the pain was caused over time by a variety of poor working conditions including “trucks with no seat cushions, bad suspensions, and poor yard conditions.”⁵ Prior to March 2009, he never filled out an injury report because he assumed his back pain would subside.

Henderson had conversations with Joseph Burley, W&LE’s Director of Human Resources, on March 2, 3, and 5. In the course of those conversations, Henderson told Burley that his back pain was the result of “riding around in Wheeling’s poorly maintained yard and trucks.”⁶ According to Burley, he asked Henderson if he had completed an injury report, and Henderson indicated that he had not.⁷ Burley told Henderson that W&LE would need to investigate whether Henderson had violated company rules by failing to report a personal injury. In a letter dated March 6, 2009, W&LE directed Henderson to attend a formal investigation “to ascertain the facts and determine your responsibility, if any, in connection with the alleged failures listed below when you allegedly sustained a personal injury to your back and allegedly failed to report the personal injury prior to leaving company premises”⁸

Henderson submitted a disability claim form and two personal injury reports to W&LE on March 16, 2009. Both injury reports indicated that Henderson sought medical attention for pain caused by his use of W&LE’s equipment.

W&LE conducted an investigative hearing on April 9, 2009. According to W&LE, the company did not learn of Henderson’s back injury until March 2 and did not learn of his neck injury until March 5, 2009. Henderson stated at the hearing that he verbally reported the airbag incident and his back pain to Luckring when they occurred, but admitted that he did not submit written Personal Injury Reports on the same days as he reported the injuries.⁹

In a letter dated May 14,¹⁰ W&LE discharged Henderson for violating five W&LE rules: Operating Rule I (duty to prevent injury to self and others); Operating Rule B (duty to obey company rules); Safety Rule A (duty to exercise care); Safety Rule

⁵ Decision and Order Granting the Respondent’s Motion for Summary Disposition, Dismissing the Complaint, and Cancelling the Hearing Set for November 16, 2010 (D. & O.) at 6.

⁶ Complaint at 2; D. & O. at 5-6.

⁷ Deposition of Joseph Burley at 69.

⁸ RX N.

⁹ RX H at 22-24, 26, 32-34.

¹⁰ The letter is dated May 14, 2005, which W&LE confirmed was a typographical error.

R (duty to report an injury “not later than the end of tour of duty”); and the Dismissible Offenses Policy (major offenses that can result in dismissal).

Henderson filed his claim of FRSA retaliation with the Department of Labor’s Occupational Safety and Health Administration (OSHA) on October 29, 2009. OSHA concluded that Henderson’s protected activities were not a contributing factor in his termination. Henderson filed objections and requested a hearing with the Office of Administrative Law Judges. The assigned ALJ conducted a telephone conference with the parties. The parties engaged in discovery, after which W&LE filed its Motion. W&LE argued that Henderson failed to establish a prima facie case of retaliation under the FRSA, and that there was no genuine issue of material fact in dispute regarding the grounds for his dismissal. Henderson responded to the Motion with evidence and argued that his evidence established genuine issues of material fact requiring a hearing. On October 28, 2010, the ALJ issued a “Decision and Order Granting the Respondent’s Motion for Summary Disposition, Dismissing the Complaint, and Cancelling the Hearing Set for November 16, 2010.” She concluded that Henderson failed to raise a genuine issue of material fact as to whether he violated W&LE’s rules requiring prompt reporting of personal injuries, and granted W&LE’s Motion for failure on Henderson’s part to raise any genuine issue of material fact to support his claim that his discharge violated the FRSA. Henderson appealed the ALJ’s ruling to the Board.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the FRSA. The Secretary has delegated that authority to the Administrative Review Board.¹¹ We review a grant of summary decision de novo under the same standard that ALJs must employ.¹²

DISCUSSION

1. Employee Protections for Reporting Workplace Injury

Henderson claims that his discharge from employment on May 14, 2009, was in retaliation for notifying W&LE of work-related personal injuries in March 2009, in violation of the FRSA. FRSA Section 20109(a)(4) prohibits a railroad carrier from discriminating against an employee who engages in protected activity, such as reporting a work-related injury or illness:

¹¹ Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). See 29 C.F.R. Part 24.

¹² *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

(a) IN GENERAL.—A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee.^[13]

FRSA section 20109, entitled "Employee protections," provides that any whistleblower protection action brought under the FRSA is governed by the legal burdens of proof set forth under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, at 49 U.S.C.A. § 42121(b).¹⁴ To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action.¹⁵ If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of a complainant's protected behavior.¹⁶

In 2007, Congress amended the FRSA to include the anti-retaliation measures at issue in this case, as well as to bestow jurisdiction for deciding them on the Department of Labor. Prior to those FRSA amendments, rail employees' whistleblower retaliation complaints were subject to mandatory dispute resolution under the Railway Labor Act.¹⁷ Recognizing that these anti-retaliation measures were insufficient, Congress significantly

¹³ 49 U.S.C.A. § 20109(a)(4); *see generally* *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012).

¹⁴ *See* 49 U.S.C.A. § 20109(d)(2)(A).

¹⁵ 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); *see* *Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight).

¹⁶ 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). *See* *Santiago*, ARB No. 10-147, slip op. at 6.

¹⁷ 75 Fed. Reg. 53,523 (Aug. 31, 2010).

expanded them in FRSA amendments, passed in 2007 and 2008. We addressed the legislative history of these whistleblower amendments in some depth in *Santiago v. Metro-North Commuter R.R. Co., Inc.*¹⁸ We summarize that history below because it provides context to the case before us.¹⁹

A series of hearings in the 110th Congress signaled increasing public and Congressional concern with rail safety, including chronic under-reporting of rail injuries, widespread harassment of employees reporting work-related injuries, and interference with medical treatment of injured employees.²⁰ In particular, testimony before Congress identified numerous management policies that deterred employees from reporting on-the-job injuries including subjecting employees who report injuries to increased monitoring and scrutiny from supervisors, which could lead to discipline and termination, supervisors accompanying employees on their medical appointments and attempting to influence employee medical care, sending employees to company physicians instead of physicians of their own choosing, and light-duty work programs, which have the injured employee report to work, but perform no work, to avoid having to report the injury as a lost work day to the Federal Railroad Administration.²¹

Congress significantly expanded rail employee protections in Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, signed into law on August 3, 2007. In relevant part, these amendments to 49 U.S.C.A. § 20109 (1) extended FRSA liability to contractors, subcontractors, and officers and employees of the rail carrier; (2) defined protected activity to include explicit protection for employees who “notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;” and (3) transferred the enforcement authority of the whistleblower provisions to the Secretary of Labor. These 2007 amendments contained subsection 20109(a)(4), the anti-retaliation provision at issue in this case.²²

¹⁸ See *Santiago*, ARB No. 10-147, slip op. at 12-14.

¹⁹ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (“safety legislation is to be liberally construed to effectuate the congressional purpose.”).

²⁰ See, e.g., Reauthorization of the Federal Rail Safety Program: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Jan. 30, 2007); Fatigue in the Rail Industry: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Feb. 13, 2007); Rail Safety Legislation: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (May 8, 2007); Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. (Oct. 22, 2007).

²¹ See generally “Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America’s Railroads,” Hearing Before the House Committee on Transportation and Infrastructure, 110th Cong. (2007) (H. Hrg. 110-84) (Oct. 22, 2007).

²² 49 U.S.C.A. §§ 20109(a), (a)(4), (d).

Congress was not finished with amending the rail employee protection measures however. On May 1, 2007, Representative Oberstar, then Chairman of the House Committee on Transportation and Infrastructure, introduced the Federal Railroad Safety Improvement Act of 2007 (H.R. 2095), which contained additional whistleblower provisions, as well as a separate stand-alone section (Section 606) entitled “Prompt medical attention.” Section 606 created an affirmative duty on the part of railroads to refrain from interfering with the medical treatment of injured employees. Section 606 ultimately was incorporated within the railroad anti-retaliation provisions at 49 U.S.C.A. § 20109(a) and became law on October 16, 2008.²³

We view this history as a progressive expansion of anti-retaliation measures in an effort to address continuing concerns about railroad safety and injury reporting. The 2007 FRSA amendments contained increased protections for railroad whistleblowers. These provisions were amended again in 2008, by inclusion of the “prompt medical attention” language. Together, these amendments convey congressional intent to comprehensively address and prohibit harassment, in all its guises, of injured rail employees.

2. Remand for Failure to Address Each Element of FRSA Claim

Pursuant to 29 C.F.R. § 18.40(d), an ALJ may “enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”²⁴ To determine whether there is any genuine issue regarding a material fact, the ALJ must examine the elements of the complainant’s claims to sift the material facts from the immaterial.²⁵ Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. Drawing from the federal law pertaining to summary judgment motions in federal court, we adopt the principle that a “genuine issue” exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings testimony is tested by cross-examination and amplified by exhibits and

²³ Rail Safety Improvement Act of 2008, PL 110-432 (Oct. 16, 2008).

²⁴ 29 C.F.R. § 18.40(d) (2012); *see Siemaszko*, ARB No. 09-123, slip op. at 3. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (discussing summary judgment principles in federal courts). We have previously expressed that 29 C.F.R. § 18.40 generally incorporates into the administrative proceedings the summary judgment procedure described in Rule 56 of the Federal Rules of Civil Procedure. *See Trammell v. New Prime, Inc.*, ARB No. 07-109, ALJ No. 2007-STA-018, slip op. at 4-5 (ARB Mar. 27, 2009).

²⁵ *See Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 4 (ARB July 28, 2011). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“Only disputes over facts that might affect the outcome of the suit” preclude summary judgment.).

presumably more context.²⁶ When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case.²⁷ The moving party must come forward with an initial showing that it is entitled to summary decision.²⁸

Though not very clearly, 29 C.F.R. § 18.40 appears to incorporate two well-recognized methods by which a respondent can demonstrate the lack of a genuine issue of material fact. One method is to assert that the complainant lacks evidence to support an essential element of his case.²⁹ In such a case, the complainant must specifically identify facts that, if true, could meet his burden of proof at an evidentiary hearing on the merits.³⁰ Another method of testing the pleadings – the one used by W&LE in this case – is for the respondent to attach affidavits or other documents and evidence, which purport to state the undisputed facts and challenge the complainant to produce admissible, contrary evidence that creates a genuine issue of fact.³¹ In this latter method, the opposing party must do more than identify specific facts but must go beyond asserting facts and attach admissible contradictory evidence to raise a genuine issue of material fact.

Stated more simply, the complainant must identify the specific facts and/or evidence he will bring to trial and such facts and evidence, if believed at trial, must be enough to allow for a ruling in his favor on the issue in question. The burden of producing evidence “is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant’s] claim.”³²

²⁶ *Anderson*, 477 U.S. at 252 (“whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”).

²⁷ *Siemaszko*, ARB No. 09-123, slip op. at 3.

²⁸ 29 C.F.R. § 18.40(d); see *Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-009, slip op. at 3 (ARB Apr. 23, 2003). See also *American Int’l Group, Inc. v. London Am. Int’l Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

²⁹ See 29 C.F.R. § 18.40(a) (allows motion to be filed “with or without affidavits”). This is similar to the rules of federal civil procedure.

³⁰ *Anderson*, 477 U.S. at 256 (at this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party’s pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof).

³¹ See 29 C.F.R. § 18.40(c).

³² *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson*, 477 U.S. at 252.

In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.³³ Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense. We now examine the ALJ's summary decision.

The ALJ ultimately concluded that W&LE was entitled to summary decision because Henderson failed to raise "any genuine issue of material fact as to whether he violated the rule requiring prompt reporting of personal injuries, a major offense which can result in dismissal under the Railway's work rules."³⁴ Although the ALJ correctly cited the elements necessary to establish a whistleblower claim under the FRSA, she failed to explain their application to the facts alleged before us. 29 C.F.R. § 18.41(a)(2)(i) requires that a summary decision shall include a statement of the reasons for the findings on all issues presented. Even though W&LE did not expressly challenge the elements of protected activity and adverse action, the ALJ needed to expressly identify the alleged protected activity and adverse action to analyze whether a genuine issue of material fact existed on the issue of causation. Without identifying the alleged protected activity and adverse action, the ALJ cannot determine if the facts and evidence in the record support the claim that protected activity was a contributing factor in the adverse action.³⁵ The ALJ's opinion does not explicitly identify the alleged protected activity or adverse action in Henderson's case.

In many cases, despite our ability to review motions for summary judgment *de novo*, these errors may have required us to remand the summary decision for the ALJ to explain what the ALJ understood were the alleged protected activity and adverse action. However, in this case, the record demonstrates that both parties acknowledge that Henderson reported or attempted to report (1) an injury from an air bag (the "Air Bag Injury") allegedly occurring in January 2009, and (2) a back injury (the "Back Injury") allegedly occurring on February 26, 2009.³⁶ For purposes of this appeal, we will assume without deciding that Henderson's reports of the Air Bag Injury and Back Injury were

³³ *Siemaszko*, ARB No. 09-123, slip op. at 3. *See also Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

³⁴ D. & O. at 14.

³⁵ *See Melendez v Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 12 (ARB July 14, 2000) (the failure of the ALJ to first identify which of a manufacturing technician's activities qualified for protection made it "impossible to determine" which of the respondent's actions were taken for wholly legitimate reasons).

³⁶ *See* RX M, O; Complainant's Response Opposing Wheeling & Lake Erie Railway Company's Motion for Summary Disposition (Complainant's Response to the Motion), Exhibit (CX) 11, 14.

protected activity. We do not assume that this is the extent of the alleged protected activity. As for the adverse action element, it is undisputed that W&LE terminated Henderson's employment on May 14, 2009, a presumptively adverse action.

3. Remand for Contributing Factor Analysis

The ALJ's opinion does not analyze whether Henderson's alleged protected activity contributed to the termination of his employment. Instead, the ALJ addressed Henderson's pretext and disparate treatment claims, but Henderson need not point to specific facts or proffer evidence related to either of these claims to survive summary decision on the issue of causation.³⁷ Further, the ALJ appeared to base her summary dismissal solely on a finding that Henderson violated a dismissible offense, similar to the "legitimate business reason" burden of proof analysis that does not apply to FRSA whistleblower cases.³⁸ Under the FRSA whistleblower statute, the causation question is not whether a respondent had good reasons for its adverse action, but whether the prohibited discrimination was a contributing factor "which, alone or in connection with other factors, tends to affect in any way" the decision to take an adverse action.³⁹ If W&LE met its burden of demonstrating that no genuine issue of material fact existed on the issue of contributory factor, the burden shifts to Henderson to present sufficient facts or evidence raising a genuine issue of material fact.⁴⁰

W&LE failed to meet its burden in its motion for summary decision and, instead, raised genuine issues of fact by its own submissions. W&LE filed a motion arguing that the reporting of the Back Injury and Air Bag injury had nothing to do with the termination. Yet, W&LE submitted a copy of a brief termination letter⁴¹ that states in the first sentence that the letter "is in reference to the formal investigation . . . in connection

³⁷ In proving that protected activity was a contributing factor in the adverse action, "a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail." *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 18 (ARB May 31, 2006). Alternatively, a complainant can prevail by showing that the respondent's reason, while true, is only one of the reasons for its adverse conduct and that another reason was the complainant's protected activity. *Id.* at 19.

³⁸ See *Zinn v. Am. Commercial Lines Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 11 (ARB Mar. 28, 2012).

³⁹ *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012).

⁴⁰ *Anderson*, 477 U.S. at 256 (at this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof).

⁴¹ The termination letter was erroneously dated May 14, 2005 rather than 2009.

with [Henderson] allegedly sustaining a personal injury to [his] back”⁴² This first sentence alone implicates an alleged report of a work injury. The letter continues by referencing an alleged “failure to report” by a specific time, again potentially suggesting that there was a reporting. Further into the opening paragraph of the termination letter, W&LE references the Air Bag Injury, also suggesting that it was reported. The termination letter references a “formal investigation” related to these reported injuries and a termination following the investigation. Viewing these statements in the light most favorable to Henderson, we conclude that an evidentiary hearing must resolve whether the reference to protected activity in these letters suggests that protected activity was a contributing factor. At such a hearing, a respondent may be able to explain or minimize the intent of these statements, but it cannot accomplish this on a motion for summary decision.

The termination letter was not the only exhibit generating issues of fact on causation. W&LE also submitted a copy of a letter dated March 6, 2009, that also referenced the same injuries and the launching of a “formal investigation.” The potential rule violations listed were (1) the “alleged failure to exercise care to prevent injury to yourself”; (2) alleged failure to plan your work to avoid injury”; and (3) “alleged failure to report a personal injury before leaving company premises.”⁴³ We understand that W&LE may have a legitimate basis for such rules, but these two documents alone create an inference that Henderson’s report of work injuries may have been a contributory factor in his termination. We appreciate the bind that this may place on employers; however, on a motion for summary decision, it would be improper to ignore the inextricably intertwined alleged protected activity and the adverse action and somehow conclude that they had nothing to do with each other. Ultimately, we find that W&LE did not meet its initial burden of demonstrating that there were no genuine issues of material fact on the issue of causation. Therefore, summary decision was improper on this basis alone.

Aside from the factual issues W&LE’s exhibits created, Henderson proffered substantial evidence that his protected activity may have contributed to his termination. Much of his evidence appears to be undisputed. He reported back pain and complained about the condition of his employer’s trucks to his supervisor on March 1, 2009.⁴⁴ On March 2, 2009, Henderson notified Wheeling’s Director of Human Resources that he was experiencing work-related back pain and inquired about disability benefits.⁴⁵ Finally, Henderson submitted a disability claim form and two personal injury reports to W&LE by certified mail (received March 16, 2009).⁴⁶ It also appears undisputed that Henderson was terminated on May 14, 2009.

⁴² RX T.

⁴³ RX N.

⁴⁴ D. & O. at 5-6; Motion at 4-5.

⁴⁵ D. & O. at 6; Motion at 4.

⁴⁶ D. & O. at 7; CX 3; Motion at 10-11.

Four days after his March 2nd protected activity, W&LE sent Henderson a letter dated March 6, 2009, directing him to attend a formal investigation to determine his responsibility in connection with violation of four company rules. W&LE ultimately fired him these same reasons on May 14, 2009. The temporal proximity between his protected activity and the adverse action is sufficient to raise an inference of causation.⁴⁷

In addition to the temporal proximity, Henderson's evidence supports a presumptive inference that his protected activity and adverse action may be inextricably intertwined, creating a presumptive inference of causation that prevents a summary decision on this issue. We explained recently in *DeFrancesco v. Union R.R. Co.*⁴⁸ that causation in FRSA cases like this case creates a difficult obstacle for employers.⁴⁹

In *DeFrancesco*, we considered the application of the FRSA to the discharge of an employee who reported a work-related injury. The employee reported his injury, which led to an investigation into his disciplinary history and prior injury reports, and the investigation resulted in DeFrancesco's suspension. The ALJ conducted a hearing and concluded that DeFrancesco engaged in protected activity, but his protected activity did not contribute to his suspension. On appeal we held that, if DeFrancesco had not reported his injury, the respondent would not have conducted the investigation that resulted in the discipline. We concluded that DeFrancesco's injury report was a contributing factor in his suspension as a matter of law, and we remanded the case to the ALJ to determine whether the respondent could show by clear and convincing evidence

⁴⁷ See, e.g., *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (the 8th Circuit reversed the Secretary for failing to appreciate that a 30-day temporal gap in that case was sufficient to support an inference of retaliation). See also *Barker v. UBS AG*, __ F. Supp. 2d __, 2012 WL 2361211 *8 (D.Conn. 2012) (suggesting that a range up to five months could be a sufficiently close temporal gap to support an inference of unlawful discrimination under the whistleblower protection provision of the Sarbanes-Oxley Act); *Goldstein v. Ebasco Constructors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec'y Apr. 7, 1992), reversed on other grounds sub nom., *Ebasco Constructors, Inc. v. Martin*, 986 F.2d 1419 (5th Cir. 1993) (causation established where seven or eight months elapsed between protected activity and adverse action). See also *Livingston v. Wyeth*, 520 F.3d 344 (4th Cir. 2008); *Beliveau v. U.S. DOL*, 170 F.3d 83, 87 (1st Cir. 1999) (environmental whistleblower case) (temporal proximity may often be the "most persuasive factor" in a circumstantial evidence case).

⁴⁸ ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB Feb. 29, 2012).

⁴⁹ *Id.* at 5-8; see also *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012), where we held that, because the complainant's protected disclosures caused the respondents to conduct an investigation that led to the complainant's discharge, the complainant established the "contributing factor" element of his claim arising under the whistleblower protection provision of the Energy Reorganization Act. We noted that the complainant's disclosures were "inextricably intertwined" with the investigations that resulted in his discharge because the content of those disclosures gave the respondents the reasons for their personnel actions against the complainant. *Id.*, slip op. at 8.

that it would have suspended DeFrancesco in the absence of his protected activity.⁵⁰ In *DeFrancesco*, after the complainant submitted credible evidence at the evidentiary hearing, he established causation presumptively, and the presumption could not be refuted in that case.

In this case, where no hearing has occurred, the record raises a presumptive inference of causation. If Henderson had not reported his back pain, he would not have been investigated and ultimately fired for failing to fill out a timely injury report. And if he had not claimed that the pain was work-related, he would never have been investigated (and ultimately fired) for failing to exercise occupational safety in connection with his injury. Here, as in *DeFrancesco*, the inference of causation may be presumed automatically, but as a presumptive inference. This presumption is supported by sound policy reasons. The FRSA's legislative history, as outlined above, reveals a Congressional intent to comprehensively address the problem of railway retaliation for occupational injury reporting. Effective enforcement of the Act requires presumptive causation under circumstances such as Henderson's, where viewing the "untimely filing of medical injury" as an "independent" ground for termination could easily be used as a pretext for eviscerating protection for injured employees.

This is not to say, of course, that an employee who reports a work-related injury may never be the subject of disciplinary actions. Today, we find that a presumptive inference of contributory factor defeats W&LE's motion for summary decision on that issue. Typically, a presumption is rebuttable at an evidentiary hearing on the merits but that issue is not before us. Furthermore, W&LE, like any respondent, may still prevail by establishing its affirmative defense, namely, showing by clear and convincing evidence that it would have taken the same adverse action in the absence of protected activity. In any case, Henderson has proffered sufficient evidence to create a presumptive inference of causation to defeat W&LE's motion for summary decision.

4. Remand Regarding W&LE's Affirmative Defense of Clear and Convincing Evidence

Because the ALJ's opinion suggests that she may have considered the affirmative defense W&LE raised in its motion for summary decision,⁵¹ we now consider whether W&LE demonstrated that it was entitled to summary decision as a matter of law on its affirmative defense. Because the burden is high, resolving the issue of W&LE's affirmative defense by summary decision is challenging. It is a fact-intensive determination, involving questions of intent and motivation, since Henderson argues that W&LE's asserted reasons were not the real reasons for its actions.

⁵⁰ *Id.*, slip op. at 8.

⁵¹ It is difficult to determine if the ALJ addressed W&LE's affirmative defense, because she failed to explicitly address each element of a FRSA cause of action or explain her application of the burdens of proof.

In such circumstantially-based cases, the fact finder must carefully evaluate all evidence, as a whole, of the employer's "mindset" regarding the protected activity and the adverse action taken.⁵² The fact finder should examine each piece of evidence in connection with all the other evidence to determine if it supports or detracts from the employee's claim of discrimination. "Circumstantial evidence may include a wide variety of evidence, such as motive, bias, work pressures, past and current relationships of the involved parties, animus, temporal proximity, pretext, shifting explanations, and material changes in employer practices, among other types of evidence."⁵³ This analysis requires us to determine, on the record as a whole, how clear and convincing W&LE's lawful reasons were for terminating Henderson's employment. In analyzing the affirmative defense, it is not enough to confirm the rational basis of W&LE's employment policies and decisions. Instead, we must assess whether they are so powerful and clear that termination would have occurred apart from the protected activity.

The ALJ made several errors regarding W&LE's affirmative defense, requiring a remand. She appears to have improperly imposed the burden upon Henderson of proving in rebuttal that he was not fired for the reason offered by W&LE. The ALJ's finding, even if true, does not entitle W&LE to summary decision in its favor under the applicable burdens of proof. Since Henderson has established causation (sufficient to withstand summary disposition), the burden shifts to W&LE to establish its affirmative defense by clear and convincing evidence. Even where a respondent asserts legitimate, non-discriminatory reasons as part of its affirmative defense, a complainant can create a genuine issue of fact by pointing to specific facts or evidence that, if believed, could discredit the respondent's reasons, making them less convincing on summary decision.

Additionally, the ALJ improperly decided questions of fact at the summary decision stage. It appears undisputed that W&LE's company rules expressly require an employee who has experienced an injury "on railroad property" to report the injury "promptly to the designated officer" and to complete a written report on a designated form "immediately if possible, but not later than the end of tour of duty."⁵⁴ The ALJ incorrectly stated however, that "[f]ailure to file such a report is cause for dismissal."⁵⁵ W&LE's policy manual states that "[f]ailure to report a personal injury or false statements made concerning a personal injury will result in dismissal." This rule does not require a *written* report. A different W&LE rule requires prompt filing of a written report, but it does not state that failure to do so will result in dismissal.⁵⁶ Henderson admitted that he

⁵² *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

⁵³ *Id.*

⁵⁴ Motion, Exhibit D at WLE00159.

⁵⁵ D. & O. at 11.

⁵⁶ *Id.* at 9.

did not file written injury reports on the same day as he verbally reported his injuries. Nevertheless, Henderson alleges that the cumulative nature of his injuries did not lend themselves to strict enforcement of W&LE's injury reporting requirements.⁵⁷ The ALJ gives short shrift to his argument by merely repeating the undisputed fact that Henderson did not report his injuries in a timely fashion. Certainly Henderson did not file a *written* report of his injuries until sometime after he experienced them, but Henderson proffered evidence that he *orally* reported his back injury on the very day he recognized it as an injury, that is, March 1, 2009. Burley (W&LE's Human Resources Director) conceded that in the case of cumulative trauma injuries, when the person knows he has an injury is subjective and can only be determined by the injured individual.⁵⁸ Henderson alleges that no single event caused his back injury. On February 26, 2009, when he went home with back pain, he did not view it as an "injury" – he had a sore back like he had many other days after a day of work. When the pain did not disappear after a few days of rest (as it had in the past), he called his supervisor on March 1, 2009, and informed him that he intended to work that day but that he was experiencing back pain from the poor condition of W&LE's trucks. Henderson claims he timely reported his back injury on March 1, 2009.⁵⁹ Henderson did not fill out an injury report because he thought the pain would subside. The ALJ did not view this evidence in the light most favorable to Henderson. She improperly weighed the evidence of disputed facts with respect to when exactly Henderson recognized that he had been injured, when he reported it, and whether W&LE's rules applied to cumulative trauma.

The record reflects a number of additional disputed facts that preclude a summary decision and create triable questions of fact regarding W&LE's affirmative defense. Disparate treatment has long been recognized as circumstantial evidence relevant to whether an employer engaged in unlawful conduct. Although as we explained above, a complainant need not establish disparate treatment to prove causation, it is nevertheless relevant to the reasons W&LE fired Henderson. Whether or not Henderson is ultimately able to demonstrate disparate treatment, on the record before us, "the question whether two employees are similarly situated is a question of fact."⁶⁰ The ALJ erred by deciding this issue on summary decision.

W&LE claims that it fired Henderson because he was a repeat violator, having violated the "Blue Flag Rule" in 2006 and because of the seriousness of his violations.⁶¹

⁵⁷ *Id.* at 13-14.

⁵⁸ *Id.* at 14.

⁵⁹ Complainant's Response to the Motion at 14.

⁶⁰ *Mandell v. County of Suffolk*, 316 F.3d 368, 379 (2d Cir. 2003).

⁶¹ D. & O. at 4, 11.

However, there remain disputed facts concerning whether the deciding official was aware of the 2006 violation and whether he relied upon it when Henderson was fired in 2009.⁶²

Henderson also alleged certain other undisputed facts, which have been used successfully in other whistleblower cases to establish circumstantial evidence of discriminatory motive. The ALJ should consider these facts on remand. For example, prior to his termination, Henderson was considered “a good worker.”⁶³ Henderson also presented substantial evidence of selective enforcement. One of the bases upon which Henderson was fired was that he drove unsafe trucks and thereby failed to exercise care to prevent injury to himself (and others). It appears undisputed that other carmen drove these same trucks but were not disciplined for doing so.⁶⁴ Henderson also presented evidence that W&LE’s managers failed to maintain a safe workplace thus calling into question the legitimacy of W&LE disciplining Henderson for failing to work safely.

For all these reasons, we find that W&LE did not adduce sufficient undisputed facts to convince us by clear and convincing evidence, as a matter of law, that Henderson would have been terminated had he never reported his occupational injury.

CONCLUSION

In sum, the ALJ erred by failing to sufficiently address the elements of a FRSA case and by failing to apply the correct FRSA burdens of proof to the facts alleged by the parties. Further, the record raises sufficient questions of disputed fact on the issue of causation to survive summary decision. Finally, W&LE did not produce sufficient undisputed facts to convince us by clear and convincing evidence that Henderson would have been terminated in the absence of his reports of work-related injury.

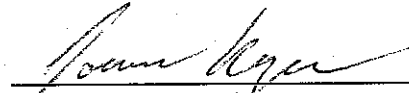
⁶² See Complainant’s Response to the Motion at 6.

⁶³ D. & O. at 8.

⁶⁴ Complainant’s Initial Brief at 15.

Accordingly, we **VACATE** the D. & O. and **REMAND** this case for further proceedings consistent with this opinion.

SO ORDERED.



JOANNE ROYCE
Administrative Appeals Judge



PAUL M. IGASAKI
Chief Administrative Appeals Judge



LUIS A. CORCHADO
Administrative Appeals Judge

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : *Robert Henderson v. Wheeling & Lake Erie Railway Company*
ARB CASE NO.: 11-013
ALJ CASE NO. : 2010-FRS-012
DOCUMENT : ORDER

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