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Issue Date: 09 November 2009

CASE NO.: 2009-FRS-00010

In the Matter Of:

ANDREW BARATI,
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

CASE NO.: 2009-FRS-00011

In the Matter Of:

ANTHONY SANTIAGO
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

CASE NO.: 2009-FRS-00012

In the Matter Of:

LARRY W. ELLIS
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

CASE NO.: 2009-FRS-00013

In the Matter Of:

RALPH TAGLIATELA
Complainant

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.
Respondent

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION WITH RESPECT TO COMPLAINANT ANTHONY SANTIAGO

This case arises from a complaint filed by Anthony Santiago (Complainant) under the employee protection provisions of the Federal Rail Safety Act (the "FRSA"), 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 September 30, 2009, Respondent filed a Motion for Summary Decision. Complainants' and the Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA's) memorandums in opposition were filed on October 22 and 23, 2009, respectively.[1]

I. Standard of Review - Summary Decision

The standard for granting summary judgment or decision is set forth at 20 C.F.R. §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56.[2] Section 18.40(d) permits an Administrative Law Judge to enter summary decision, "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision." 20 C.F.R. §18.40(d) (1994). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id.* at 249.

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[1] Mr. Santiago's claim against Metro North under the FRSA has been consolidated with the claims of three other Metro North employees, Andrew Barati, (2009-FRS-00010), Larry Ellis (2009-FRS-00012) and Ralph Tagliatella (2009-FRS-00013). Metro North has filed motions for summary disposition in each case which are opposed by the Complainants and the Assistant Secretary.

[2] Rule 56(c) provides that summary decision shall be rendered "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323.

II. Elements of a Complaint Under the FRSA

The whistleblower protection provision of the FRSA provides that actions under the statute are governed by the analytical framework and burdens of proof applied under the Wedell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2)(A)(i). To prevail in an AIR 21 case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer knew about such activity, that the employer subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). If the employer has violated AIR 21, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv). *See, e.g., Patino v. Birken Manufacturing Co., ARB No. 06-00125, ALJ No. 2005-AIR-00023 (ARB July 7, 2008); Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004).

In the present case, neither party disputes that Complainant engaged in activity protected under the FRSA when he reported his work injury, or that Metro North was aware of the protected activity. The dispute appears to be whether Metro North's action in changing the status of Complainant's injury from occupational to non-occupational is an unfavorable personnel action under the FRSA and whether the protected activity was a contributing factor in any such unfavorable personnel action.

As an initial matter, Metro North argues that Complainant Santiago's claim must be dismissed as the action giving rise to the claim predates passage of the amendments to the FRSA. Mot. at 9-12. Metro North argues that the FRSA was amended on October 16, 2008, and the factual allegations forming the claim under Section 20109 occurred prior to October 16, 2008. Metro North maintains that the statute may not be applied retroactively. Mot. at 10-12. Complainant argues that Metro North delayed, denied or interfered with his medical treatment when it notified him that it had changed the classification of his injury from occupational to non-occupational on October 27, 2008, after the amendments to the FRSA became effective. Metro

North is correct that the statute does not have retroactive effect. If the change in classification of the injury occurred prior to October 16, 2008, the claim is barred. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994). Metro North argues that its decision to change the status of Complainant Santiago's injury from occupational to non-occupational occurred on October 10, 2008, citing the affidavit of Dr. Hildebrand. Mot. at 6-8. Complainant maintains that the decision was made on October 27, 2008 when it was communicated to the Complainant and his treating physician by letter. A careful examination of Dr. Hildebrand's affidavit does not establish that Metro North or its contract physicians actually made the determination to change the status of Complainant's injury on October 10, 2009. Thus, I find that there remains a dispute as to when Metro North changed the classification of Complainant's injury. The parties will have an opportunity to establish the date the allegedly unlawful conduct complained of occurred.

With regard to the merits of the Complainant's claim of retaliation under the FRSA, Metro North asserts that changing the classification of Complainant's injury to non-occupational is not an unfavorable personnel action under Section 20109(a)(4) of the FRSA. Mot. 12-15. The Assistant Secretary argues that changing the classification of Complainant's injury is an unfavorable personnel action under the FRSA. Sec. at 5-7.

The parties agree that in determining whether the complained of conduct is an unfavorable personnel action, the Supreme Court's *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the Department of Labor, including the AIR 21, incorporated into the FRSA. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ NO. 2005-STA-00002 (ARB Sept. 30, 2008). Mot. at 13; Sec. Opp. at 5-6. The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that they "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57. The question for resolution is whether Metro North's action in changing the injury classification to non-occupational would deter a similarly situated employee from reporting a safety concern or a work-related injury. The question cannot be answered without some contextual/factual reference which is lacking at this stage in the proceedings.

Metro North also contends that construing a change in an injury classification from "occupational" to "non-occupational" as constituting "interference with medical... treatment" under Section 20109(c) of the FRSA is an overly broad construction of the statute. Mot. at 3-5. The Complainant and the Assistant Secretary argue that such action falls within the terms of the FRSA. C. Opp. at 7; Sec. at 4-5.

Section 20109(c)(1) prohibits a railroad carrier from delaying or interfering with the medical or first aid treatment of an employee who is injured during the course of employment. Section 20109(c)(2) prohibits a railroad carrier from disciplining, or threatening to discipline an employee for requesting medical or first aid treatment, or for following the orders or treatment plan of a treating physician. The reference to "following the orders or treatment plan of a treating physician" evidences Congress' intent that the employee protection provisions provided, extend beyond the immediate emergency care provided at the time of a work injury. The amendments to the FRSA in Section 20109(c) are intended to improve railroad safety by

encouraging employees injured on the job to report such injuries and to seek appropriate medical care without fear of reprisal. Read together, these provisions protect employees from interference with medical care or the treatment plan of a treating physician during the course of treatment and recovery from a work injury. Reading the statutory provisions as applying only to care provided in the immediate aftermath of a work injury, as Metro North suggests, is inconsistent with the language and intent of the statute.[3] Accordingly, an employer's changing the classification of an injury occurring at the workplace to a non-occupational injury may rise to the level of "interference with medical treatment" depending upon the circumstances.

Here, Metro North argues that changing the classification of the Complainant's injury from occupational to non-occupational did not constitute an interference with medical care. Mot. at 6-9. In this regard, Metro North states the Complainant was free to pursue any medical care he deemed appropriate and submit the charges to his health insurance carrier. *Id.* at 8. The Assistant Secretary asserts that the change in status did interfere with medical treatment because the change denied Complainant the care recommended by his treating physician. Sec. Opp. 5-7. The parties agree that if the injury is occupational Metro North is responsible for all of the medical care. If the injury is considered non-occupational, the employee may pursue medical care through his employer-sponsored private health insurance policy. Mot. at 8; Sec. Opp. at 6-7. In the present case, Mr. Santiago claims that the medical care recommended by his treating physician was not covered by the private health insurance policy. This presented him with the choice to either forgo the treatment recommended by his physician or pay for it from his own funds. The parties' submissions demonstrate there are genuine issues of material fact in dispute as to whether Metro North's action in reclassifying Mr. Santiago's injury as non-occupational interfered with the medical treatment recommended by his physician. Therefore, summary disposition is not appropriate.

Metro North next contends that it is entitled to summary disposition on the question of whether the change in status of the Complainant's injury was related to his protected activity in reporting the injury. Metro North maintains that the change in classification of the injury was based solely upon the medical opinions of its contract physicians and not on Complainant's protected activity. Metro North relies upon an affidavit from its contract physician to support its assertion. In contrast, Mr. Santiago suggests that Metro North's physicians have a financial incentive to minimize costs associated with occupational injuries. One of the ways this can occur is by denying treatment or tests that would be charged to Metro North. The issue of whether Metro North's decision to change the classification of Santiago's injury from occupational to non-occupational was motivated or contributed to by Complainant's protected

[3] The purpose of the statute is to encourage employees to report safety hazards and or work-related injuries in an effort to improve railroad safety. Placing responsibility on the railroads for covering employee's job-related injuries and reporting such injuries to the Federal Railroad Administration (FRA) serves the purpose of encouraging railroads to improve safety in the workplace. Congress was aware of concerns expressed by the Administrator of the FRA as to the effect some railroad policies have on an employee's willingness to report work related injuries and the effect such reluctance has on the data the FRA uses in its efforts to improve railroad safety. *See 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. 84 (2007) (statement of Joseph H. Boardman, Administrator, Federal Railroad Administration).

activity is clearly in dispute and cannot be resolved on the evidence before me. It is likely to require credibility findings which cannot be made on the record before me at present. Therefore, this issue is not amenable to summary disposition.

Finally, Metro North contends that its Attendance Policy does not violate Section 20109(a)(4) of the FRSA. Mot. at 15-16. Conversely, the Assistant Secretary argues that Metro North's Attendance Policy penalizes employees who are injured at work and report such injuries in violation of the FRSA. Sec. Opp. at 7-9. The Assistant Secretary argues that the Attendance Policy as applied to Mr. Santiago and others violates the FRSA because it penalizes employees for exercising rights protected under the FRSA.

The attendance policy informs employees that they are permitted to use sick leave for personal illness or injury. Mot. at Ex. H. The Secretary states that the reference to injury includes work-related injuries. Opp. at 7. Metro North concedes that the attendance policy does not expressly state that absences due to occupational injuries are not considered in assessing unsatisfactory attendance, but asserts that such absences are tracked in the attendance system using a distinct code and that "occurrences" under the attendance policy which could lead to discipline, do not include absences bearing the code used for occupational injuries. Mot. at 15-16. The parties' representations clearly reflect that there is a factual dispute as to precisely what the attendance policy means and how it is applied. Whether the policy counts absences due to occupational injuries for purposes of possible discipline or for considering craft transfers and promotions is an issue of material fact with regard to the question of whether the Attendance Policy violates the FRSA.[4]

Based upon the above, I find that disposition of this case on summary decision is inappropriate because there are genuine issues of material fact in dispute. Accordingly, the Respondent's Motion for Summary Decision is hereby **DENIED.**

SO ORDERED.

Colleen A. Geraghty

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

[4] Additionally, I note that with regard to Mr. Santiago, there does not appear to be an allegation that the application of the allegedly unlawful attendance policy to him resulted in any adverse consequences.