

U.S. Department of Labor

**Occupational Safety and Health Administration
201 Varick Street, Room 670
New York, NY 10014
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March 2, 2010

Stephen Powell, Esq.
Port Authority Trans-Hudson Corporation (PATH)
225 Park Avenue South, 14th Floor
New York, NY 10003

Via Certified Mail #7009 1680 0002 2755 6394, RRR

RE: Port Authority Trans-Hudson Corporation (PATH) / Laura Vernace / 2-4173-09-064

Dear Mr. Powell:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Laura Vernace (Complainant) against the Port Authority Trans-Hudson Corporation (PATH or Respondent) on May 1, 2009 under the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109. In brief, Complainant has alleged she received a charge letter ordering her to a disciplinary hearing and that her work position was abolished, in retaliation for reporting to Respondent a workplace injury.

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, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

Respondent is a railroad carrier within the meaning of 49 U.S.C. §20102. Respondent is engaged in the business of passenger operations between New Jersey and New York and is connected to the general railroad system of transportation. Therefore, Respondent is a covered employer within the meaning of 49 U.S.C. §20109.

Complainant has been an employee of PATH since November, 1990. On the night of April 1, 2009, Complainant sat down in a chair in PATH's Main Relay Room at the World Trade Center. The back of the chair broke, causing Complainant to fall backwards out of the chair. As a result, she was injured. Complainant reported this work-related injury to her supervisor.

Complainant says that before she sat down in the chair she examined it to make sure that it was in good shape. She says that this is her pattern and practice, because some chairs at PATH are defective. Complainant further says that any defect in the chair was not readily apparent. After her fall, she found that the chair had been taped underneath to hold it together.

On April 24, 2009, Frederick Childs, Superintendent of PATH Power, Signals & Communications Division, sent Complainant a certified letter¹ alleging that her accident was the result of her failure to exercise constant care and utilize safe work practices to prevent injury to herself. He ordered her to come to a disciplinary hearing.

Complainant alleged that as a result of her injury her job was abolished. The job was not abolished it was just removed from the schedule because there were not enough employees to fill all of the vacant positions. It was summer and Respondent had to make a decision - remove the vacation relief position or the Complainant's position from the schedule. Because it was summer and a number of people were going to be on vacation Respondent decided to remove Complainant's position until she was able to return to duty. There is no indication of retaliation in this decision.

Complainant's *prima facie* case and PATH's explanation

FRSA prohibits a railroad carrier from discriminating against an employee for notifying the carrier of a work related injury. 49 U.S.C. §20109 (a)(4). Complainant was injured on duty and reported that injury. Twenty-three days later, she received the charge letter alleging that her accident was the result of her failure to exercise constant care and utilize safe work practices to prevent injury to herself. Specifically, the charge against the Complainant was that she did not inspect a chair before sitting in it.

PATH claims that chairs in its facilities are governed by PATH Book of Rules, Rule N.4:

Tools, materials, machines, chairs or other devices that are provided for employees' use must be inspected by the employee prior to use to ensure that they are in proper working condition. Defective equipment must be reported to the supervisor/foreman.

The first part of this rule requires employees to exercise caution; the second part of this rule requires employees to report defective equipment. According to the Complainant, the chair had been taped underneath; Respondent says that it found no tape on the chair and the chair was never reported as being broken before Complainant's fall. Respondent says that it conducted an investigation after the Complainant's fall; however, there is no written record of that investigation or the findings of that investigation. No one other than the Complainant was charged with a violation of PATH rules.

Complainant engaged in protected activity when she reported to Respondent a work-related injury. See 49 U.S.C. § 20109(a)(4). Respondent was aware of the protected activity because it received her report of injury. Respondent took adverse action against Complainant when it sent her a charge letter ordering her to come to a disciplinary hearing. The preponderance of the

¹ These letters are known as "charge letters."

evidence indicates that PATH's decision to hold a disciplinary hearing was a result of Complainant reporting her workplace injury.

Respondent asserts that the disciplinary hearing was intended to investigate the circumstances surrounding the chair injury. Yet to support its decision to hold a disciplinary hearing, Respondent catalogs a history of concerns it has had with the Complainant's past attendance, including a full history of her injuries and absences for her entire 19 year career. None of this information about prior injuries bears on the allegation of failing to exercise care when sitting down in a chair, which is the only charge in the charge letter. Respondent could have investigated the circumstances surrounding Complainant's fall from the chair without sending the charge letter ordering Complainant to come to a disciplinary hearing. Absent clear and convincing evidence that Respondent would have taken the same adverse action in the absence of the protected activity, OSHA finds that there is reasonable cause to believe that Respondent violated FRSA. OSHA hereby orders the following to remedy the violation.

Order

Respondent shall expunge all files and computerized data systems of references to the disciplinary hearing that was announced on April 24, 2009. This includes, but shall not be limited to, the letter itself and any subsequent memorandums or letters referencing the scheduling of the disciplinary hearing.

Respondent shall pay Complainant's attorney fees in the amount of \$11,250.

Because Respondent demonstrated an indifference to Complainant's rights by sending a charge letter when Complainant reported her injury, Respondent shall pay punitive damages in the amount of \$1,000.

Respondent shall provide to all employees a copy of the FRSA Fact Sheet and the Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry included with this Order.

Respondent shall post for a period of 180 days the Notice to Employees included with this Order in all of its 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



www.osha.gov

With copies to:

Respondent

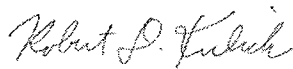
OSHA Regional Administrator
201 Varick Street, Room 670
New York, NY 10014

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 the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under Federal Rail Safety Act 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,



Robert Kulick
Regional Administrator

cc: Chief Administrative Law Judge, USDOL/OALJ
USDOL/SOL-FLS
Federal Railroad Administration
Charles C. Goetsch, Esq. (Via Certified Mail #7009 1680 0002 2755 6400, RRR)