



In the Matter of:

PHILLIP R. TUCKER,

ARB CASE NO. 2018-0050

COMPLAINANT,

ALJ CASE NO. 2012-FRS-00063

v.

DATE: June 3, 2020

CSX TRANSPORTATION, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Phillip R. Tucker; *pro se*; Wadley, Alabama

For the Respondent:

**James S. Urban, Esq. and Sarah L. Thompson, Esq.; *Jones Day*;
Pittsburgh, Pennsylvania**

**BEFORE: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge*;
James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges***

DECISION AND ORDER

This cases arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).¹ Phillip R. Tucker (Complainant) filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that CSX Transportation, Inc. (Respondent) violated the FRSA by discharging him from employment in retaliation for activity protected by the FRSA. For the following reasons, we deny the complaint.

¹ 49 U.S.C. § 20109 (2008), as implemented by federal regulations at 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18, Subpart A (2019).

BACKGROUND

Respondent hired Complainant on July 28, 2002. Complainant primarily worked as a conductor and, at times, a locomotive engineer.² He was assigned to work on the “extra board,” a rotating list of employees who filled vacancies on short notice.³ Pursuant to Respondent’s minimum availability policy, employees who “mark off” as being unavailable to work are disciplined under a progressive system.⁴

On March 8, 2012, Complainant contends he was injured while working as a conductor in Banks, Alabama when his foot slipped and his right knee popped.⁵ He alleges he mentioned his injury to a co-worker, Eric Mills, and the contract van driver. The next day, he was at home when he bent over to pick something up and his knee gave way.⁶

On Sunday, March 11, 2012, Complainant marked off from work for a doctor’s appointment with the alleged intention of seeing a doctor or being in place to see a doctor on Monday. However, he did not see a doctor or attempt to see a doctor that day.⁷

On Monday, March 12, 2012, Complainant reported to work. His engineer, Mike Thompson, saw him limping and asked if he was okay. Complainant was unable to recall what he said specifically, but stated he told Mr. Thompson what happened. Mr. Thompson stated Complainant told him he pulled a muscle when bending over to pick up laundry.⁸

On Tuesday, March 13, 2012, Tucker’s supervisor, trainmaster Thomas Marchese called Complainant to inquire why he marked off on March 11th.

² Phillip R. Tucker Deposition Transcript (“Tucker Dep.”) at 34:8-10, 34:20-35:1, 38:6-25.

³ *Id.* at 35:16-36:9, 39:8-10.

⁴ *Id.* at 48:18-50:8; Respondent’s Exhibit (“RX”) 5.

⁵ *Tucker v. CSX Transp., Inc.*, ALJ No. 2012-FRS-00063, slip op. at 3 (ALJ May 24, 2018).

⁶ *Id.* at 3-4.

⁷ Tucker Dep. at 80:3-6, 14-16, 19-23; 93:9-20.

⁸ *Tucker*, ALJ No. 2012-FRS-00063, slip op. at 4-5; RX 13.

Complainant alleges he told Marchese he was injured and Marchese screamed and intimidated him, then hung up. Marchese claims Complainant told him he did not have an appointment or see a doctor on March 11th, which Complainant later admitted to in his deposition. Marchese immediately pulled Complainant from service for falsely marking off. After his phone conversation with Marchese, Complainant saw a doctor and obtained a note excusing him from work for March 11-14, 2012, for a mild left calf sprain that occurred on March 10, 2012.⁹

On March 15, 2012, Complainant was charged with falsely marking off, a violation of General Regulations 2 (GR-2) rule 4, which prohibits employees from being dishonest.¹⁰ Respondent's Individual Development & Personal Accountability Policy states dishonesty is a serious violation and, if found guilty, an employee can be dismissed for it.¹¹ An internal hearing was held on March 22, 2012.¹² Respondent determined Complainant violated GR-2 and, on April 17, 2012, Assistant Division Manager Rod Logan decided to dismiss Complainant.¹³

On April 19, 2012, Complainant asked Mr. Marchese where to send an MRI bill for his work-related injury. Mr. Marchese informed Complainant there was no record of him having a work injury and denied his request.¹⁴

Complainant was informed that Respondent terminated his employment via letter dated April 20, 2012.¹⁵ Following his dismissal, he filed a complaint with OSHA on May 10, 2012. OSHA determined his discharge did not violate the FRSA and denied the complaint. Complainant then requested a hearing before an Administrative Law Judge (ALJ). A hearing was scheduled for September 12, 2013, but was vacated for settlement discussions. No further information was received from the parties and the ALJ presumed the case was settled. However, after no settlement was submitted for approval, the ALJ contacted the parties and they responded that they had not reached a settlement and "had essentially forgotten about the case."¹⁶

⁹ *Tucker*, ALJ No. 2012-FRS-00063, slip op. at 4-5; RX 16.

¹⁰ *Id.* at 2; RX 7, 17.

¹¹ RX 8.

¹² *Tucker*, ALJ No. 2012-FRS-00063, slip op. at 4-5; RX 12.

¹³ *Id.*; RX 18-19.

¹⁴ *Id.*

¹⁵ *Id.* at 2; RX 19.

¹⁶ *Tucker*, ALJ No. 2012-FRS-00063, slip op. at 1.

A hearing was scheduled for December 5, 2017. Prior to the hearing, Respondent filed a Motion for Summary Decision. On May 24, 2018, the ALJ issued a Ruling on Motion for Summary Decision, dismissing the complaint because there was no genuine issue of material fact to allow a finding that Complainant engaged in protected activity due to Complainant's own admissions.¹⁷

Complainant appealed the ALJ's ruling to the Board on June 8, 2018.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions in cases arising under the FRSA and to issue agency decisions in these matters.¹⁸ The ARB reviews an ALJ's decision granting summary decision using a de novo standard.¹⁹ Summary decision is appropriate if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.²⁰ In reviewing such a motion, the evidence before the ALJ is viewed in the light most favorable to the non-moving party; the Board may not weigh the evidence or determine the truth of the matter; our only task is to determine whether there is a genuine conflict as to any material fact for hearing.²¹

DISCUSSION

FRSA complaints are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21). 49 U.S.C. § 20109(d)(2)(A)(i); *see* 49 U.S.C. § 42121(b) (2000).

¹⁷ *Id.* at 2, 5-7.

¹⁸ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); *see* 29 C.F.R. § 1982.110(a).

¹⁹ *Mehen v. Delta Air Lines*, ARB No. 2003-0070, ALJ No. 2003-AIR-00004, slip op. at 3 (ARB Feb. 24, 2005).

²⁰ 29 C.F.R. § 18.72(a); *Franchini v. Argonne Nat'l Lab.*, ARB No. 2013-0081, ALJ No. 2009-ERA-00014, slip op. at 10 (ARB Sept. 28, 2015).

²¹ *Franchini*, ARB No. 2013-0081, slip op. at 10-11; *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 2011-0013, ALJ No. 2010-FRS-00012, slip op. at 9 (ARB Oct. 26, 2012).

To prevail under the FRSA a complainant must establish, by a preponderance of the evidence, that: (1) he engaged in protected activity as statutorily defined; (2) he suffered an unfavorable personnel action; and, (3) the protected activity was a contributing factor in the unfavorable personnel action.²² If a complainant meets this 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 absent the complainant's protected activity.²³

The issue on appeal is whether the pleadings, affidavits, and other evidence show there is a genuine issue as to a material fact regarding whether any protected activity contributed to Complainant's dismissal. After reviewing the evidence presented in the light most favorable to Complainant, we agree with the ALJ's conclusion on this issue because Complainant has proffered no evidence that any alleged protected activity contributed to his discharge.

Complainant contends he engaged in protected activity in his phone call on March 13, 2012, when he attempted to tell Mr. Marchese he was injured at work and again on April 19, 2012, when he asked Mr. Marchese where he should send an MRI bill for his work-related injury.

In this case, there is no dispute that Complainant did not report a work-related injury until April 19, 2012, two days after Respondent's Assistant Division Manager Rod Logan determined Complainant should be dismissed. Complainant conceded he did not inform Mr. Marchese he was injured on his job during the March 13, 2012 phone call, but rather stated he was hurt and could not walk.²⁴ Further, Complainant also conceded his April 19, 2012, was the first time he reported a work-related injury to his manager.²⁵ As Complainant conceded he did not report a work-related injury until two days after the decision to dismiss him was made, he cannot establish he engaged in protected activity that contributed in any way to his dismissal.

²² 49 U.S.C. 42121(b)(2)(B)(iii); *D'Hooge v. BNSF Rys.*, ARB Nos. 2015-0042, -0066, ALJ No. 2014-FRS-00002, slip op. at 6 (ARB Apr. 25, 2017), *appeal dismissed*, *BNSF Ry. Co. v. U.S. Dep't of Labor*, No. 17-71854 (9th Cir. 2017).

²³ 49 U.S.C. 42121(b)(2)(B)(iv); *D'Hooge*, ARB Nos. 2015-0042, -0066, slip op. at 6.

²⁴ Tucker Dep. at 44:4-46:23, 94:8-13, 98:7-13, 107:17-108:3; Complainant's Brief at 2.

²⁵ *Id.* at 98:7-15.

Complainant also contends he engaged in protected activity because he followed his doctor's orders and refused to work when it would be unsafe.²⁶ However, per his own admission, Complainant marked off work on March 11, 2012, for a doctor's appointment but did not attempt to see a doctor until March 13th.²⁷ As he did not see a doctor until two days after he marked off, he could not have been following a doctor's orders when he marked off on March 11th. Further, even if Complainant could not have worked safely on March 11th, he neither raised a hazardous safety condition nor communicated he felt it was unsafe for him to work.

Pursuant to Complainant's own admissions, he has not established any genuine issues of material fact to allow a finding other than he marked off for a doctor's appointment when he did not have an appointment, he did not communicate on March 11th that he could not safely work, and he did not report a work-related injury until two days after the decision to dismiss him was made. As such, he cannot establish he engaged in protected activity that contributed to his dismissal. Thus, the ALJ properly granted the Respondent's motion for summary decision.

CONCLUSION

Respondent is entitled to summary decision as a matter of law. Accordingly we **AFFIRM** the ALJ's Order Granting Respondent's Motion for Summary Decision and **DENY** Complainant's complaint.

SO ORDERED.

²⁶ Respondent asserts that Complainant did not raise these arguments before OSHA and thus failed to exhaust his administrative remedies. However, a complainant may add allegations with the ALJ that were not raised at OSHA. 29 C.F.R. § 18.36 ("The judge may allow parties to amend and supplement their filings."); *Barboza v. BNSF Ry. Co.*, ALJ No. 2017-FRS-00111, slip op. at 7, 8 n.11 (ALJ Aug. 29, 2018), *aff'd* (adopt and attach) ARB No. 2018-0076, ALJ No. 2017-FRS-00111 (ARB Dec. 19, 2019).

²⁷ Tucker Dep. at 93:13-95:7.