



Issue Date: 09 January 2012

CASE NO.: 2011-FRS-00025

In the Matter of:

RICK UTGAARD,
Complainant,

v.

BNSF RAILWAY,
Respondent.

**ORDER GRANTING PARTIAL SUMMARY DECISION
AND VACATING HEARING DATE**

Introduction and Procedural History

This matter arises under the employee protection provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20109. It is set for hearing on March 19, 2012 in Billings, Montana. Its relevant procedural history is as follows:

On April 29, 2011, Complainant telephoned the Occupational Safety and Health Administration on his own behalf and stated a complaint. R.App. at 95.¹ According to OSHA records, the Administrator reduced Complainant's telephonic complaint to writing ("Discrimination Case Activity Worksheet") and summarized Complainant's allegation as follows: "Complainant alleges he was discriminated against because he turned in his manager, Jerad Fritz, for not documenting his hours of service." *Id.* The "Discrimination Case Activity Worksheet" does not specify a particular alleged retaliatory adverse action; it states only that Complainant alleged that the discriminatory act occurred on "December 15, 2011." But that's not possible, as the date Complainant called in the complaint was nearly eight months *before* December 15, 2011. I take OSHA's note to mean that Complainant alleged that the retaliatory act occurred on December 15, 2010, not December 15, 2011.²

¹ "R.App." refers to Respondent's appendix to its motion for summary decision. "C.Ex." refers to Complainant's exhibits. "C.Decl" refers to Complainant's combined declaration and brief. Neither party filed evidentiary objections to the other's exhibits. Accordingly, I admit for the purposes of this motion all of the exhibits that either party submitted on or before the December 5, 2011 filing deadline. (*See* discussion below rejecting later-filed materials).

² The "Discrimination Case Activity Worksheet" contains a signature box that reads: "I certify that the complaint was filed with me on (date):" followed by space for a signature, title, and date. The record shows that the Occupational Safety & Health Administration officer who completed the form indicated a title of "Compliance Officer" and indicated a filing date of April 29, 2011. But instead of the Compliance Officer's signature, the form

Following what the Administrator described as a “limited investigation,” on June 9, 2011, he issued “Secretary’s Findings.” The Findings recite that, during the investigation, the Administrator determined that Complainant was asserting as the retaliatory adverse action that Respondent BNSF Railway had “removed [him] from service on September 20, 2010.” As Complainant did not file a complaint until April 29, 2011, and this was more than 180 days after the alleged unlawful act on September 20, 2010, the Administrator denied the claim as untimely filed.

In a fax sent on July 13, 2011, Complainant requested a hearing before an administrative law judge. He objected to the Administrator’s determination and raised two arguments. First, he contended that, “Though I was taken out of service on 9/20/2010 it wasn’t until after 10/22/2010 that I realized I was getting the shaft.” He alleged additional facts in support of this argument; I discuss those below. Second, Complainant alleged (apparently for the first time) another discriminatory act: that while he was off work on a medical leave, his manager initiated disciplinary action against him; that Complainant requested a postponement of Respondent’s investigation of the disciplinary incident until he could return to work; and that his Union representative advised him that “if [he] didn’t sign a waiver and it went to investigation, that [he] could get fired.” See Request for Hearing (undated); C.Decl. at 1. (The waiver is akin to a plea bargain, in which the worker agrees that he violated a work rule, and the Company imposes lesser discipline.) The result was a 30-day disciplinary suspension. Complainant didn’t state when this occurred, but he argued that it was fewer than 180 days before he filed his complaint with the Administrator.

In a later letter to the Chief Administrative Law Judge (received on August 9, 2011), he added a third alleged violation. As he wrote: “In February of 2011, I was denied expenses that I was owed and that is well within the 180 days. It sounds like they might finally be paying the phone bill, but I haven’t seen any of the money yet.” There is no indication that Complainant served Respondent with a copy of the cover letter or with his request for a hearing.

On November 16, 2011, Respondent moved for summary decision. I issued an order to show cause, requiring Complainant to file an opposition. I recited the general principles for summary decision and notified Complainant that, if he didn’t file an opposition on or before December 5, 2011, I might decide the claim against him without the need for a trial. I reminded him that he had a right to retain counsel at his own expense, that in some instances Respondent might be required to pay his legal expenses (if Complainant prevailed), and that that he might consider retaining counsel even if only to prepare and file an opposition to the motion, if not for the entire case.

contains the following: “(b)(7)c.” As Complainant does not dispute the identification or authenticity of the document, I accept that it is what it appears to be: the Occupational Safety & Health Administration Compliance Officer’s memorialization of Complainant’s telephonic complaint, filed April 29, 2011. (The regulations permit the filing of oral complaints, state that they “will be reduced to writing by OSHA,” and provide that they are effective on the date of the telephone call. 29 C.F.R. §1982.103 (b), (d).

Continuing to represent himself, Complainant filed a timely and detailed opposition. It includes a 16-page document in which Complainant intersperses averred facts and argument (apparently a combined declaration and brief “C. Decl.”) as well as numerous exhibits.³

Respondent’s motion addresses two of the adverse actions that Complainant has alleged: the “removal from service” (which was a compelled, safety-related medical leave) and the 30-day suspension. Respondent argues that the compelled medical leave is time-barred and fails on the merits because Complainant cannot show that any deciding official knew of Complainant’s protected activity. As to the disciplinary action, Respondent argues that: (1) Complainant failed

³ The combined declaration and brief was not signed under penalty of perjury and therefore was not technically sufficient. In a telephone conference on December 22, 2011, I alerted Complainant that he needed to sign, file, and serve a verification. He filed the verification on January 5, 2012. His late-filing of the verification was proper, as I had requested and allowed it.

But Complainant also submitted untimely materials that I strike and will not consider. Our procedural rules provide that “a party opposing the motion [for summary decision] may not rest upon the mere allegations or denials of such pleading [as the complaint. The party] must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. §18.40(c). Opposing answer briefs are due within 10 days of service of the motion or “such other period as the administrative law judge may fix,” and may include affidavits or other evidence the party wishes to submit. *Id.* § 18.6(b). “Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed.” *Id.*

Here, I set a filing deadline for Complainant’s opposition of December 5, 2011, which was longer than the period that that rules generally allow. (Respondent served the motion by mail on November 14, 2011. Without an order of the administrative law judge, the opposition would have been due on November 29, 2011. *See* 29 C.F.R. §§ 18.4(c), 18.6(b).) The opposition filings should have included all of Complainant’s arguments, affidavits, and any other exhibits he wished to submit. *See* 29 C.F.R. §18.6(b).

Instead, after filing his extensive opposition, Complainant continued to submit additional materials to this Office. On January 4, 2012, nearly a month after the filing deadline, Complainant submitted his “Complainant Utgaard’s Order to Show Cause,” which is another combined brief and declaration (5 pages). On the following day, he submitted a letter stating that he was submitting “enough evidence to allow [his] case to go to trial.” He enclosed an “Exposure Record Request,” dated March 5, 1998, and bearing an exhibit tag (14a); an email dated September 1, 2011 and bearing an exhibit tag (4d) (2 pages); a copy of his initial request for a hearing before an administrative law judge; a copy of a letter that Complainant wrote to this Office on November 1, 2011, seeking a continuance of an earlier trial setting; copies of twelve separate certificates of service related to prior filings; and “Complainant Utgaard’s Motion for Evidentiary Hearing” (18 pages).

I strike these additional filings for two reasons. First, I expressly ordered that Complainant submit any opposition to the motion on or before December 5, 2011. He actually did file an opposition at that time. He did not request an extension of time to submit additional materials. He never requested leave to file the materials late. He offered no explanation for the delay. And most of the materials are not relevant to the motion and none appears to have been newly discovered after Complainant filed his timely opposition.

Second, our rules – as with the rules of any court – contemplate a limited exchange of briefs so that the record on any motion may be closed and the motion decided in a fair and reasonably expeditious manner. If parties are allowed to submit materials by drib and drab *ad nauseum*, no motion could be decided without excessive delay. That’s why our rules exclude even reply briefs, absent leave of the administrative law judge. And these additional (late) submissions were not replies: Respondent didn’t respond to Complainant’s opposition, and thus there was nothing further to which Complainant could be replying.

Finally, I find nothing in Complainant’s added filings that changes the result. Complainant addresses certain newly alleged violations at considerable length. I am giving him an opportunity to amend his complaint to add those. They can be fully litigated if Complainant files the amendment. Complainant offers nothing to disturb the findings in the text on the two issues that the present ruling decides.

to exhaust administrative remedies because he didn't file a complaint with the Occupational Safety & Health Administration, (2) that Complainant offers no facts to tie the disciplinary action to his protected activity; and (3) Respondent would have disciplined Complainant even absent his protected activity.

In his opposition, Complainant generally offers a point-by-point refutation. He also tenders more new allegations. He states that Respondent has been denying him overtime. C.Br. at 9. He also alleges that Respondent has been subjecting him to "intimidation" that has been "ongoing ever since Mr. Miller took over as Supervisor in Glendive." *Id.* Finally, he states that after the Administrator denied his claim, he tried to add "several items to his case but was told [apparently by OSHA] that his case was closed." *Id.*

Pleadings and Scope of This Action

The implementing regulations provide that complaints should be filed with Occupational Safety & Health Administration. 29 C.F.R. § 1982.103(c). The formal requirements are loose and limited:

No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

29 C.F.R. § 1982.103(b).

Once a complaint is filed, the Administrator must notify the respondent. *Id.* § 1982.104(a). A respondent may – but is not required to – answer within 20 days of receipt of notice. *Id.* § 1982.104(b). Initially, the Administrator must conduct a limited investigation to determine if the complaint on its face, together with supplemental interviews, alleges "the existence of facts and evidence" to make out a *prima facie* case; if it does not, the complaint is dismissed without more. 29 C.F.R. § 1982.104(e). (That is what happened in the present case.) If there is a *prima facie* showing, the Administrator investigates the merits, reaches a determination, and issues written findings and a preliminary order. *Id.* §1982.105(a). Any party desiring review of the findings or order must file a timely written request for hearing, stating whether the objections are to the findings or to the order. *Id.* §1982.106(a). The case is then referred to this Office for *de novo* adjudication. *Id.* §1982.107(b).

Unless the implementing regulations specify otherwise, proceedings before this Office are conducted under our generally applicable rules of procedure and evidence found at part 18 of title 29 of the Code of Federal Regulations. 29 C.F.R. §1982.107(a). Those rules provide that a "complaint" is "any document initiating an adjudicatory proceeding," regardless of how the document is designated. 29 C.F.R. §18.2(d). Pleadings, including complaints, may be amended as follows:

If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary

to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint.

Id. § 18.5(e).

In the present case, Complainant has continued to raise an ongoing series of new alleged adverse actions, all said to be in retaliation for his initial complaint that his manager “performed covered service without documenting it.” *See* Determination Letter from Federal Railroad Administration (July 9, 2010), C.Ex. 4b. Complainant’s initial complaint was that he was involuntarily placed on a medical leave. In his request for a hearing, he added an allegation related to a disciplinary suspension. The record is silent as to whether Respondent filed an answer to the complaint before Complainant raised this second claim. I therefore construe the allegation of the retaliatory suspension as Complainant’s amendment to his complaint as a matter of right. *See* 29 C.F.R. §18.5(e). Respondent has addressed both of these allegations in this motion for summary decision, and I will decide the motion on both claims.

What remains, however, are Complainant’s most recent allegations that Respondent (1) didn’t reimburse Complainant (or took too long to reimburse him) for approximately \$140 in cell phone charges (*see* C.Ex. 7); (2) denied him pay for 13 minutes of work on September 19, 2010⁴ (*see* C.Ex. 6); (3) engaged in ongoing intimidation “since Mr. Miller took over as Supervisor in Glendive”; and (4) did “several [unspecified] items” that Complainant reported to the Administrator only after the Administrator had dismissed his complaint. It appears that Complainant raised these four new allegations for the first time in his opposition to this motion.

Respondent’s motion does not address these newest allegations, as the briefing on the motion appears to be Respondent’s first notice of them. I will allow Complainant an opportunity to amend his complaint to plead the new allegations if he can meet certain specified requirements.

Discussion

On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v.*

⁴ It appears that, under the applicable collective bargaining agreement, Respondent must pay a worker called to perform work outside his normal work hours (and not continuous with other work) for a minimum of two hours and forty minutes. C.Ex. 6f.

Catrett, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.⁵

I. Complainant's Allegation of a Retaliatory Compelled Medical Leave Is Time-Barred.

An employee who alleges a violation of the Act must commence an action “by filing a complaint with the Secretary of Labor” within 180 days after the date on which the alleged violation occurred. 49 U.S.C. §20109(d)(1), (d)(2)(A)(ii); 29 C.F.R. §1982.103(d). Here, Complainant failed to file his complaint timely.

There is no dispute that Respondent removed Complainant from service on September 20, 2010 and placed him on a medical leave. R.App. 42, 147. The Company's stated reason was that it needed to determine whether Complainant was medically able to work safely. The issue arose after Complainant reported back pain when driving Company vehicles as well as fatigue, possibly from sleep apnea. Complainant contends that the Company's placing him on an involuntary medical leave was in retaliation for the protected activity in which he engaged when he wrote a complaint to the Federal Railroad Administration on May 4, 2010. *See* C.Ex. 4a, 4b. The interval from September 20, 2010, when Complainant was placed on the medical leave, to the date Complainant filed his complaint with OSHA, April 29, 2011, is 221 days.⁶ Complainant's filing fell outside the applicable 180-day limitations period.

Consistent with Supreme Court holdings in Title VII cases,⁷ the Secretary provided in the implementing regulations for equitable tolling of the limitations period in Federal Railroad Safety Act claims. *See* 29 C.F.R. § 1982.103(d). As the regulation states: “The time for filing a complaint may be tolled for reasons warranted by applicable case law.” *Id.*

Generally, equitable tolling may be available in whistleblower cases under three circumstances: “when the defendant has actively misled the plaintiff regarding the cause of action;⁸ when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4, *citing School Dist. of City of Allentown*

⁵ The facts in this Discussion section are undisputed when the evidence is taken in the light most favorable to Complainant, who is the non-moving party. I find these facts for purposes of this motion only.

⁶ I take official notice of the calendar.

⁷ *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

⁸ Where the employer has actively misled the employee, the doctrine is more correctly equitable estoppel, not equitable tolling. *See Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4. This includes, for example, “where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” *Id.* at 5. In some Circuits, this element of the employer's misleading the plaintiff is generally required for equitable tolling at least in employment discrimination cases. *See Williamson v. Indiana University*, 345 F.3d 459, 463 (7th Cir. 1003); *Amini v. Oberlin College*, 259 F.3d 493, 498 (6th Cir. 2001); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999); *see also Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750, 752-53 (D.C. Cir. 1998).

v. Marshall, 657 F.2d 16 (3rd Cir. 1981); *Williams v United Airlines, Inc.*, ARB No. 08-063 at 2 (Sept. 21, 2009) (*citing same*).⁹

In his opposition to summary decision, Complainant does not assert that equitable tolling rescues him from the limitations period. He does offer two arguments, however, that I construe as requests for equitable tolling. First, he argues that he didn't immediately realize that being removed from service and put on a medical leave were adverse actions because he thought he'd be able to return to work and would be paid back wages for the time off. C.Decl. at 9; Request for hearing ("I honestly thought I would be right back to work with back pay"). He states that he only realized the action was adverse when it was combined with other hostile activities: denying him overtime, not waiting for a disciplinary action until he returned to work, and "other things." *Id.*¹⁰ Second, he argues that, once he realized that the action was adverse, he "started having anxiety attacks, memory loss and depression." *Id.*

Even assuming that Complainant's first argument is legally sufficient,¹¹ it fails on the facts. In his letter to the Chief Administrative Law Judge in which Complainant objected to OSHA's denial of his claim and requested a hearing, Complainant specified the date on which he realized that the action was adverse. As he wrote:

Though I was taken out of service on 09/20/2010 it wasn't until after 10/22/2010 that I realized I was getting the shaft. It was on this date that I faxed the [medical] information requested by [Field Manager] Brett Ouellette [about my ability to work safely] only to find out that wasn't good enough. After I faxed the information to him, I never heard from him, so I called him back. He then [wanted more].¹²

⁹ Although *Williams* appears to have arisen in the Ninth Circuit (as did the present case), the Board relied on the Third Circuit authority in *Marshall* for its holding.

¹⁰ Respondent notes that Complainant admitted at his deposition that he "found it hard to believe that a person could be taken [off work] because they have sleep apnea." R.App. at 47. This, however, fails to negate that he thought he'd be restored to service without loss of pay, thus rendering the forced temporary medical leave, in his view, not adverse at the time it occurred.

But Complainant does miss the mark when he conflates an argument that he didn't realize until a later date that the action was adverse and a wholly different argument: that Respondent's conduct did not adversely affect him emotionally until a later date. Complainant admits that the medical leave was unpaid and that he went on unemployment compensation. C.Decl. at 7. He thus knew immediately that Respondent's action was adverse in the sense that Respondent stopped paying him. It might not have affected him emotionally until later, but the statutory limitations period runs from his being put on notice that his pay status was being discontinued, not from when he later reacted emotionally. As even the latter of these dates is outside the limitations period, I need not belabor the issue.

¹¹ *But see Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1173 (9th Cir. 2000) (rejecting equitable tolling when plaintiff knew or should have known during the limitations period of the existence of a *possible* claims).

¹² Complainant clarified at his deposition that his claim was not based on an assertion that the Company acted adversely to him by delaying his return to work; rather, his claim was limited to the Company's placing him on the medical leave in the first place. R.App. at 62. His theory is more that it was not until he concluded that the Company was delaying his return to work that he realized the medical leave was adverse.

Accepting *arguendo* Complainant's contentions, the 180-day limitations period was tolled until October 22, 2010. But this remains unavailing, as the date on which Complainant filed his complaint was 189 days later, still beyond the limitations period.

On the present record, Complainant's second argument – that the retaliation caused him anxiety attacks, memory loss, and depression – fails as well. Arguably, these facts go to the second of the three alternative bases for equitable tolling: occasions on which a plaintiff “in some extraordinary way” has been prevented from filing the claim. See *Williams, supra*.

Complainant's argument fails, however, because he has not shown a mental incapacity sufficient to warrant equitable tolling. See *Wilkie v. Department of Health and Human Services*, 638 F.3d 944 (8th Cir. 2011) (expert testimony that plaintiff seemed “pretty stressed and depressed” held insufficient basis for equitable tolling).

As the *Wilkie* Court stated:

We have held that “a plaintiff seeking tolling on the ground of mental incapacity must come forward with evidence that a mental condition prevented him from understanding and managing his affairs generally and from complying with the deadline he seeks to toll.” “Courts that have allowed equitable tolling based on mental illness have done so only in exceptional circumstances, such as where the complainant is institutionalized or adjudged mentally incompetent.” We have observed “that the standard for tolling due to mental illness is a high one.”

Id. at 950 (citations omitted). See also, *Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010) (in a habeas case, “the burden of demonstrating the appropriateness of equitable tolling for mental illness lies with the plaintiff; in order to carry this burden, she must offer a “particularized description of how her condition . . . severely impair[ed] her ability to comply with the filing deadline, despite her diligent efforts to do so” – citations omitted); *Cox v. Sears, Roebuck & Co.*, 1994 WL 143019 (M.D. Fla. 3/31/1994) (stress and depression insufficient); *Kerver v. Exxon Products Research Co.*, 40 FEP 1567, 1568-69 (S.D. Tex. 1986) (same when plaintiff continued to handle his own affairs and did not consider himself mentally ill or incompetent); *cf. Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (when employer's repeated sexual abuse, rape, and assault of plaintiff left her severely impaired and unable to function in many respects, led to repeated suicide attempts, and left her unable to read, open mail, or function in society, and “completely psychiatrically disabled during the relevant limitation period,” equitable tolling excused a late-filed Title VII charge).

Here, Complainant offers some medical records from family practitioner Bruce R. Swarny, MD. The records show that Dr. Swarny saw Complainant for complaints of depression, anxiety, and memory on three occasions from December 24, 2010 through March 24, 2011. Initially, Dr. Swarny diagnosed a Depressive Episode and Generalized Anxiety Disorder, then changed the diagnosis to “Anxiety State Unspecified.” The industry standard for diagnosis of mental disorders, the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., Text Revision) (DSM-IV-TR), does not recognize a diagnosis of “Anxiety State Unspecified.” But in any event, what Dr. Swarny notes as his objective observations of Complainant throughout the treatment period are that, although his mood was initially depressed and later anxious, he had

good attention; good judgment; clear, spontaneous, normal speech; was fully oriented; and was well-groomed.

Complainant doesn't suggest that he was institutionalized or adjudged mentally incompetent at any relevant time – or at all. Nor has he offered a “particularized description” of how his subjective feelings of anxiety, depression, and memory loss prevented him from making a phone call to OSHA or otherwise filing his complaint for more than 180 days. If anything, Dr. Swarny's records imply that Complainant had the attention, judgment, and ability to communicate that would allow him to file his complaint timely. Complainant has offered nothing like the facts of *Stoll*, where the plaintiff showed that she was “completely psychiatrically disabled” and could not function in society or even open or read the mail at any relevant time.

I do not doubt that Complainant found the alleged events distressing. For purposes of summary decision, I must – and do – view the evidence in the light most favorable to Complainant and assume that Complainant was anxious, depressed, and sustained some memory loss. But his showing falls far short of the “extraordinary” circumstances that would prevent his filing the complaint timely.

Accordingly, Complainant's claim based on his removal from service and being placed on a medical leave is denied as time-barred.

II. Complainant Has Failed to Establish a Prima Facie Case Based on the Disciplinary Suspension.

Complainant's second alleged violation of the Act centers on Respondent's pursuing disciplinary action against Complainant while he was on the medical leave, resulting in a 30-day suspension. Respondent argues that it is entitled to a favorable decision on this claim for three reasons. First, Complainant failed to exhaust administrative remedies because he did not file the complaint with the Occupational Safety & Health Administration. Second, Complainant offers no evidence either that the decision-makers had knowledge of his protected activity or that his engaging in protected activity was a factor that contributed to the Company's decision to pursue disciplinary action. Third, Respondent argues that, based on the undisputed facts, it would have taken the same disciplinary action even if Complainant had not engaged in protected activity. I reject the first argument. As the second argument has merit, I need not reach the third.

A. Complainant May Pursue Added Claims Here Without Returning to OSHA So Long As the Added Claims Reasonably Relate to Those He Earlier Raised at OSHA.

The general procedural regime for complaints, investigations, initial findings and preliminary orders, and litigation state that a complainant “should” be filed with OSHA,¹³ which then investigates and issues Secretary's findings,¹⁴ from which any party desiring review may object

¹³ 29 C.F.R. § 1982.103(c). Use of the word “should,” rather than “must,” implies that there are exceptions in proper cases.

¹⁴ 29 C.F.R. §§ 1982.104, 1982.105.

and file a request for hearing with the Chief Administrative Law Judge.¹⁵ Respondent argues that this regulatory regime creates a jurisdictional prerequisite that a complainant “exhaust administrative remedies” at OSHA before pursuing the matter into litigation before an administrative law judge. Had Complainant not initiated his claim at OSHA in the first instance, the argument might have had merit, but under the circumstances presented here, it does not.

First, Respondent misplaces its reliance on federal trial court decisions that hold a plaintiff’s failure to exhaust remedies before the appropriate administrative agency deprives the district court of jurisdiction; that is, administrative exhaustion is a jurisdictional prerequisite for federal court action.¹⁶ What Respondent neglects is that an administrative law judge conducting a *de novo* hearing before the Department of Labor Office of Administrative Law Judges is merely executing one phase of the administrative procedure that Congress and the Department of Labor have established; it is a part of the administrative process. This Office is an administrative agency, not a court; Complainant is in the process of availing himself of the very administrative remedy that Respondent argues he has failed to exhaust.

Second, Complainant did file a complaint with OSHA. He called and spoke to an OSHA official on the telephone. When reducing the complaint to writing, the OSHA official didn’t note what discriminatory act Complainant alleged. OSHA was empowered to interview Complainant as part of a limited or a full investigation and ask him for all facts underlying his claim. An OSHA investigator was in a position to elicit from Complainant specific allegations. Indeed, implicit in the regulatory scheme of allowing free-form, loose complaints – including oral complaints in a telephone conversation – is that OSHA will follow up with interviews in a limited investigation.

But under the applicable regulation, it is not for an administrative law judge to review the adequacy of an OSHA investigation. Administrative law judges may not remand to OSHA “for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits.” 29 C.F.R. § 1982.109(c). Typically, the way in which an administrative law

¹⁵ 29 C.F.R. § 1982.106.

¹⁶ Respondent cites two federal district court decisions for this proposition. *Zhu v. Federal Housing Finance Board*, 389 F.Supp.2d 1253, 1271-72 (D. Kan. 2005); *Bozeman v. Per-Se Technologies, Inc.*, 456 F.Supp.2d 1282, 1357 (N.D. Ga. 2006).

Respondent also misplaces its reliance on *Jain v. Empower IT, Inc.*, ARB No. 08-077 (Oct. 30, 2009). That case was a labor condition application case arising under the Immigration and Nationality Act. The implementing regulations for that Act provide that, “No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted.” 20 C.F.R. § 655.806(a)(2). The regulations allow an administrative law judge to review the Administrator’s decision only in two instances: “First, where the Administrator determines, after investigation, that there is no basis for finding that an employer committed violations, and second, where the Administrator determines, after investigation, that the employer has violated the INA. *Jain* at 9, (citing 20 C.F.R. § 655.820(b)(1), (2)). Nothing in the Federal Railroad Safety Act cabins an administrative law judge’s authority to review OSHA’s findings in the same manner; nothing provides that, if OSHA makes a preliminary finding that a complainant has failed to make out a *prima facie* case necessitating a full investigation, there is no appeal. The regulatory scheme is entirely to the opposite, with the administrative law judge assigned to address issues even when OSHA did not. See 29 C.F.R. §1982.109(c), and discussion in the text below.

judge would address the additional issues on the merits would be through an amendment to the complaint to add those issues. That is what I will allow here.¹⁷

Finally, it could well be that Complainant in fact did raise these additional allegations with OSHA. Complainant telephoned OSHA after it dismissed his claim and stated additional allegations. Nothing on the record specifies what those allegations were. Complainant states only that OSHA declined to consider them, as it had already dismissed the case that it opened after the initial complaint.

Again, OSHA arguably should have done more. If it didn't want to reopen the case that it had dismissed, it should have opened a new file with the additional allegations. The regulations require no more than a phone call to file a complaint; that's what Complainant did. When OSHA declined to consider the new allegations, it effectively dismissed them, allowing Complainant to include them in any request for review before an administrative law judge.¹⁸

In all, I conclude that Complainant may amend his complaint in this forum to include additional allegations of unlawful retaliatory acts so long as they reasonably relate to the allegations he raised in his complaint to OSHA.

B. Complainant Failed to Offer Evidence that the Company Official Pursuing Disciplinary Action Against Him Knew of His Protected Activity.

As it applies here, the Federal Railroad Safety Act makes unlawful a railroad carrier's suspension of an employee if it is "due, in whole or in part," to the employee's lawful, good faith act done . . . to file a complaint . . . applicable to railroad safety or security." 49 U.S.C. § 20109(a)(3). The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121, et seq. See 49 U.S. § 20109(d). The burdens established in AIR 21 cases require a complainant to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. See 49 U.S.C. § 42121(b)(2)(B). If

¹⁷ Courts hearing employment discrimination claims routinely allow plaintiffs to add allegations beyond those raised before the administrative agency (Equal Employment Opportunity Commission) so long as they are "reasonably related" and, for example, involve additional incidents of discrimination carried out in the same manner as those in the administrative charge. See *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 177 (2d Cir. 2005); *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003). The result would differ, for example, if the plaintiff brought a hostile work environment charge and attempted in a later court proceeding to add an incident of disparate treatment or vice versa. See *Cottrill v. MFA, Inc.*, 443 F.3d 629, 634-35 (8th Cir. 2006); *Chacko V. Patuxent Institute*, 429 F.3d 505, 511 (4th Cir. 2005). Similarly, the result could differ if the plaintiff pointed to different decision-makers. See *Chacko, supra*; *Vasquez v. County of Los Angeles*, 349 F.3d 634, 645 (9th Cir. 2003).

¹⁸ Complainant might be raising a third argument, but it is one that I reject. He states: "Mr. Fritz actively misled the plaintiff by using his union rep., Mr. Wyckoff to either mislead or not represent the plaintiff to the extent that he was entitled to." C.Decl. at 10. Complainant argues at length about his dissatisfaction with his union's representation. *Id.* at 11-16. But he says nothing to describe or identify what the misrepresentation was or show that it delayed his filing the complaint. Nor does he offer any evidence to support his conclusion that his union representative was somehow the Company's agent or dupe. This is insufficient to raise a genuine issue going to equitable estoppel.

he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); *see also Barker v. Ameristar Airways, Inc.*, ARB No. 05-058 (Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (Jan. 31, 2008), slip op. at 4.

Respondent contends that no one involved in the decision to discipline Complainant was aware at any relevant time that it was Complainant who had complained to the Federal Railroad Administration. As Complainant's manager and the decision-maker on the suspension, Jarad Fritz stated in a declaration that he was aware that someone had filed a complaint with the Federal Railroad Administration because an inspector from that agency told him, but neither the inspector nor anyone else identified who had filed the complaint. R.App. at 139. Mr. Fritz didn't suspect it was Complainant and only learned that it was him "after May 2011," when Occupational Safety & Health Administration served a copy of the OSHA complaint on Respondent. *Id.*

Complainant does not address this argument directly.¹⁹ He does, however, state: "Not only did Mr. Utgaard openly talk about his sleep apnea but he also talked about turning Mr. Fritz into the [Federal Railroad Administration] for Hours of Service." C.Decl. at 3.

This statement, however, is insufficient to bring Mr. Fritz' declaration into dispute. It amounts to nothing more than speculation about what Mr. Fritz might have heard. *See Muino v. Florida Power & Light*, ARB No. 06-092 at 8-9 (Apr. 2, 2008) (affirming summary decision: speculation insufficient to create a genuine issue of material fact to show that the decision-maker had knowledge of the protected activity). Complainant does not dispute that Mr. Fritz was the decision-maker; he offers nothing to suggest that any other manager was involved. The implication is that Complainant's protected activity couldn't have contributed to Mr. Fritz' decision to impose discipline because Mr. Fritz didn't know that Complainant was the person who had engaged in the protected activity.

As Complainant is unable to show that Respondent's decision-maker had knowledge of Complainant's protected activity, his claim based on the disciplinary suspension fails as a matter of law.

¹⁹ There are suggestions in Complainant's papers that he needs more time for discovery. If he is asserting this argument, I reject it. The case was docketed on July 13, 2011, nearly six months ago. On August 3, 2011, I set it for a trial on December 15, 2011, with a discovery cut off date in late November 2011. That put the parties on notice that they needed to get their discovery done.

A complainant is obliged to prove that the deciding officials knew of his protected activity. Complainant is charged with knowledge of this requirement. He should have been developing his proof on it since the case was referred here in July 2011, with an eye to concluding the development by the initial discovery cut-off date more than four months later in late November 2011. He also is charged with understanding the discovery tools available to him. (Respondent had engaged in interrogatory, deposition, and requests for production, which also alerted Complainant to these tools.) Complainant did request numerous document demands through subpoenas, but none of these is aimed at showing that any Company deciding official had knowledge that it was Complainant who filed the Federal Railroad Administration complaint. Complainant never states what additional discovery he needs or why he hasn't had an opportunity to complete it. This is not an adequate showing to deny a motion for summary decision as premature when the case is this close to the March 19, 2012 trial date.

Order

Respondent's motion for summary decision on Complainant's currently pending allegations (forced medical leave and 30-day suspension) is GRANTED.

Within 21 days, Complainant may file an amendment to his complaint to add allegations of other adverse actions he claims to be in retaliation for his protected activity on May 4, 2010; provided, however, that any such amendment must include a definite statement of the facts alleged (*i.e.*, not just vague references to "several items" or to "ongoing intimidation"); a statement of the date on or about each alleged adverse action occurred; and a statement of the date that he first raised this alleged adverse action in a complaint (or any kind of report or statement) to any agency of the U.S. Department of Labor (including an identification of which agency – such as Occupational Safety & Health Administration or the Office of Administrative Law Judges).

It must be possible to ascertain from the facts Complainant pleads whether the new claim is reasonably related to those Complainant previously raised with the Occupational Safety & Health Administration. If the claim is not reasonably related to those the Complainant previously raised with OSHA, he should file a new complaint with OSHA, rather than amend here.

If Complainant contends that, although he did not include the particular newly pleaded adverse action in his initial OSHA complaint on April 29, 2011, the later-filed complaint relates back in time to the initial OSHA complaint, he will state that as a contention and plead all facts necessary to support it.

Complainant is advised that, if he chooses to amend his complaint, he should include all claims he believes in good faith, after reasonable investigation, that reasonably relate to those he previously raised with OSHA. I am unlikely to allow any further amendment beyond this one absent a showing of events arising *after* Complainant files this next amendment. Other than such potential newly arising claims, Complainant's pleading must be complete at this time.

Complainant is again advised that there are technical legal demands applicable to any amended complaint he might file under this Order. Complainant may retain an attorney or a non-attorney representative at his own expense to represent him, either for preparation of an amended complaint or for any other purpose related to this matter.²⁰

If Complainant does not have on file in this Office an amended complaint conforming to the requirements above (or an order extending time) within 21 days of the date this Order issues, I will dismiss Complainant's case in its entirety. If Complainant files a timely amended complaint, Respondent will file an answer within 21 days of the filing of the amended complaint.

²⁰ As I stated in a previous Order, in certain cases in which the complainant is the prevailing party, the respondent may be required to pay the complainant's reasonable attorney's fees.

In view of there being no currently pending allegations, and considering that, if Complainant raises new allegations in an amended complaint, time for discovery will be necessary, the trial setting for March 19, 2012 in Billings, Montana is VACATED.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge