



**Issue Date: 29 October 2015**

Case No.: **2014-FRS-00093**

In the Matter of:  
**JERMAHL BOBBITT,**  
Complainant

v.

**BNSF RAILWAY COMPANY,**  
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S  
MOTION FOR SUMMARY DECISION**

This matter arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 (“FRSA”) as amended by Section 1521 of the Implementing Regulations of the 9/11 Commission Safety Act of 2007 (“9/11 Act”), Pub. L. No. 110-53. (Aug. 3, 2007), the applicable regulations contained in Title 29 of the Code of Federal Regulations at Part 1982, and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008.) No hearing has been set in the matter since there is a threshold question of timeliness. For the reasons set forth below, BNSF Railway Company’s (“Respondent”) motion for summary decision is hereby granted.

**PROCEDURAL HISTORY**

On March 11, 2013, Jermahl Bobbitt (“Complainant”) filed a complaint with the Department of Labor, Occupational Safety and Health Administration (OSHA), alleging that Respondent retaliated against him for reporting an on-the-job injury he suffered on March 1, 2013, (“Action No. 1”) in violation of the Federal Rail Safety Act (“FRSA”) 49 U.S.C. §20109. On July 12, 2013, Complainant voluntarily withdrew his complaint, and OSHA closed the matter on July 15, 2013.

Complainant filed a second complaint (“Action No. 2”) with OSHA on March 1, 2014. On April 24, 2014, OSHA found that as a result of Complainant’s failure to timely express an interest in pursuing his complaint, there was no reasonable cause to believe Respondent violated the FRSA in its termination of Complainant. Complainant objected to OSHA’s findings and appealed its decision by letter received May 5, 2014. Thereafter, the claim was transferred to the Office of Administrative Law Judges for a hearing.

On June 10, 2014, I issued an Order notifying the parties that the case had been assigned to me and of my intent to schedule a telephone conference. On July 25, 2014, I issued an Order on Telephone Conference Held on July 2, 2014. The parties were given until January 30, 2015

to file dispositive motions. On July 28, 2014, Respondent filed BNSF Railway Company's Motion for Summary Decision and Incorporated Memorandum in Support (hereinafter referred to as "Respondent's Motion for Summary Decision," with its exhibits referred to as "EX") regarding Action No. 2, which is the matter now pending before this court.

On October 6, 2014, Complainant requested an additional three months "to heal and comply with any orders given." (Complainant Facsimile dated October 6, 2014, at 2).

### **SUMMARY DECISION STANDARD**

In cases before this tribunal, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure.<sup>1</sup> An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law.<sup>2</sup> "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense, and, therefore, affect the outcome of the litigation."<sup>3</sup> The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses.<sup>4</sup>

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and that is supported by sufficient evidence.<sup>5</sup> The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth "specific facts" showing that there is a genuine issue of fact for hearing.<sup>6</sup> Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial," there is no genuine issue of material fact, and the moving party is entitled to summary decision.<sup>7</sup> In assessing a motion for summary decision, the administrative law judge must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party.<sup>8</sup>

### **SUMMARY OF PERTINENT FACTS**

Respondent hired Complainant on March 12, 2012. (*See Respondent's Motion for Summary Decision* at EX 1). Prior to the start of his shift on February 26, 2013, Complainant reported to Respondent's Mechanical Foreman Sean Bussey ("Foreman Bussey") that his work boots were unsafe due to a lack of tread. (*See id.* at EX 2). Due to safety concerns, Foreman Bussey informed Complainant that he would not be permitted to work until he purchased new boots. (*Id.*). Sometime after Complainant's shift was to begin, Foreman Bussey provided

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<sup>1</sup> *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010).

<sup>2</sup> 29 C.F.R. § 18.40(d); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB June 28, 2011).

<sup>3</sup> *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323-24 (1986)).

<sup>4</sup> *Celotex*, 477 U.S. at 323-24.

<sup>5</sup> *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006).

<sup>6</sup> 29 C.F.R. § 18.40(c); *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6.

<sup>7</sup> *Celotex*, 477 U.S. at 322-23.

<sup>8</sup> *Mara*, ARB No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6.

Complainant a form subsidy for the purchase of new boots. (*Id.*). During a conversation regarding Complainant's purchase of new boots and inability to work until such time, Complainant informed Foreman Bussey that he believed Respondent's use of bicycle helmets for ATV purposes was inadequate and unlawful. (*See id.* at EX 2, 3).

Complainant returned to work on February 28, 2013, for a meeting with Mechanical Foreman James "Michael" Viglietti ("Foreman Viglietti") and Assistant General Foreman Bryan Antczak ("Assistant Foreman Antczak") to discuss text messages Complainant sent to Foreman Viglietti and Complainant's grievance regarding Respondent's use of bicycle helmets for ATV purposes. (*See id.* at EX 6, 8).

Later that night, Complainant returned to work the third shift, and again met with Foreman Viglietti and Assistant Foreman Antczak to discuss Complainant's grievance regarding Respondent's use of bicycle helmets for ATV purposes. (*See id.* at EX 10). At approximately 2:15 a.m. on March 1, 2013, Complainant reported that he strained his back while lacing/connecting air hoses between two railcars. (*Id.* at EX 9). Foreman Viglietti and Assistant Foreman Antczak assisted Complainant to a hospital for treatment. (*Id.* at EX 10).

On March 7, 2013, Respondent informed Complainant of an investigation beginning on March 15, 2013, for purposes of ascertaining the facts surrounding behavior and comments made by Complainant to Foremans Bussey and Viglietti, Assistant Foreman Antczak, and Assistant General Foreman LaShavio Little between February 26, and March 1, 2013. (*Id.* at EX 11). Complainant informed Respondent via email dated March 11, 2013, that he would be unable to attend the hearing on March 15, 2013 and subsequently requested an extension of the hearing date to April 5, 2013. (*Id.*). Respondent granted Complainant's extension request. (*See id.* at EX 12).

Complainant filed Action No. 1 pursuant to the whistleblower provisions of the FRSA on March 11, 2013, alleging that Respondent retaliated against him for his back injury report based on Respondent's intent to conduct an investigation and hold a conduct hearing. (*See id.* at EX 17). By letter dated April 17, 2013, Respondent terminated Complainant's employment. The dismissal letter stated the following, in pertinent part:

As a result of investigation held on April 5, 2013 at 1000 hours at Holiday Inn – University of Memphis, 330 Innovation Dr. Memphis, TN, 38152 [Complainant is] hereby dismissed effective immediately from employment with [Respondent] for quarrelsome, discourteous and hostile conduct, including comments and behavior that was threatening, harassing, and malicious over the course of February 26 – March 1, when interacting with company officers Sean Bussey, LaShavio Little, Bryan Antczak, and James Viglietti and while working as a carman at the Memphis Tennessee Mechanical Car Facility.

(*Id.* at EX 13).

On July 12, 2013, Complainant voluntarily withdrew Action No. 1, and OSHA closed the matter on July 15, 2013. (*Id.* at EX 20, 21).

Complainant filed Action No. 2 on March 1, 2014. (*Id.* at EX 23). He alleged retaliation by way of termination for his back injury report from March 1, 2013. (*Id.*). On April 24, 2014, OSHA issued its findings that there was no reasonable cause to believe Respondent violated the FRSA in its termination of Complainant. (*Id.* at EX 26). Complainant appealed the decision by letter received May 5, 2014, and requested a hearing before this office.

### APPLICABLE LAW

The FRSA prohibits a rail carrier engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness.<sup>9</sup> Additionally, the FRSA incorporates the procedures and burdens of proof for claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21<sup>st</sup> Century (AIR 21).<sup>10</sup>

To prevail under AIR 21, a 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 the unfavorable personnel action.<sup>11</sup> 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.<sup>12</sup>

A complaint under FRSA must be filed “not later than 180 days after the date on which the alleged violation...occurs.”<sup>13</sup> The statute of limitations in a whistleblower case begins to run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision such as termination.<sup>14</sup> “Final” and “definitive” notice has been interpreted to mean communication that leaves no further chance for action, discussion, or change.<sup>15</sup> “Unequivocal” notice refers to communication that is not ambiguous or misleading.<sup>16</sup> The date an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of an adverse action.<sup>17</sup> In determining when the statute of limitations begins to run, an employee is assumed to have a “reasonably prudent regard for his rights.”<sup>18</sup> Voluntary withdrawal of a complaint does not toll the statute of limitations.<sup>19</sup>

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<sup>9</sup> 49 U.S.C.A. § 20109(a)(4).

<sup>10</sup> (49 U.S.C. §42121(b)(2)(B)); *Araujo v. New Jersey Transit Rail Operations, Inc.*, No. 12-2148, F.3d, 2013 WL 600208 (3<sup>rd</sup> Cir. Feb. 19, 2013) slip op. at 12.

<sup>11</sup> *Powers v. Union Pacific RR Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030, slip op. at 11-13 (ARB, Apr. 21, 2015).

<sup>12</sup> *Id.*

<sup>13</sup> 49 U.S. C. § 20109(d)(2)(A)(ii).

<sup>14</sup> *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003).

<sup>15</sup> *Id.*

<sup>16</sup> *Larry v. The Detroit Edison Co.*, No. 86-ERA-49, slip op. at 2 (Sec’y July 18, 1990).

<sup>17</sup> *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 3 (ARB Aug. 31, 2005); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111 and 98-128, ALJ No. 97-ERA-00053, slip op. at 35-36 (ARB Apr. 30, 2001).

<sup>18</sup> *Id.*

<sup>19</sup> *Hester v. Blue Bell Services*, No. 86-STA-00011 (Sec’y July 9, 1986).

A court may hold that time limitation provisions in like statutes are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to the administrative action, but rather analogous to statutes of limitation and thus may be tolled by equitable consideration.<sup>20</sup> Restrictions on equitable tolling must be scrupulously observed; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may be an otherwise meritorious cause.<sup>21</sup> “Tolling might be appropriate (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.”<sup>22</sup>

## DISCUSSION

### A. The Parties’ Arguments

Respondent contends it is entitled to summary decision because “[e]mployment actions falling outside [the] 180-day statutes of limitations period are untimely and cannot serve as the basis for a complaint.” (*See id.* at 11).<sup>23</sup> Specifically, Respondent argues that Complainant has no viable claim for any adverse employment action that took place prior to September 2, 2014, and that Complainant’s voluntary withdrawal of Action No. 1 had no effect on the tolling of the FRSA’s statute of limitations period. In the alternative, Respondent argues that Complainant should be judicially estopped from asserting any FRSA claim due to Complainant’s lack of reporting “in his Bankruptcy Court filings.” (*Id.* at 13).

Complainant, who is proceeding pro se, did not file a reply to Respondent’s motion.<sup>24</sup>

### B. Analysis

#### I. *Timeliness*

Because voluntary withdrawal does not toll the statute of limitations under the FRSA, the 180-day statute of limitations for Complainant’s claim began to run on the date that Respondent provided Complainant with final, definitive, and unequivocal notice of his termination. While there is no evidence of record to show the precise date when Complainant received the April 17, 2013, dismissal letter, Complainant does not dispute that he was informed of Respondent’s

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<sup>20</sup> *Donovan v. Hakner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984); *School District of Allentown v. Marshall*, 657 F. 2d 16 (3rd Cir. 1981); *Coke. v. General Adjustment Bureau, Inc.*, 654 F.2d 584 (5th Cir. 1981).

<sup>21</sup> *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991).

<sup>22</sup> *Johnson*, slip op. at 7-8; *Allentown*, 657 F.2d at 19-20; *see also Prybys v. Seminole Tribe of Florida*, Case No. 1995-CAA-15 (ARB Nov. 27, 1996); *see also Halpern v. XL Capital, Ltd.*, Case No. 2004-SOX-54 (ARB Aug. 31, 2005).

<sup>23</sup> Given that Action No. 1 was filed prior to Complainant’s termination on April 17, 2013, never amended, voluntarily withdrawn by Complainant, and ultimately closed by OSHA on July 15, 2013, Respondent has based its argument around the instant complaint (Action No. 2), which was filed on March 1, 2014.

<sup>24</sup> “[While] a *pro se* complainant may be held to a lesser standard than legal counsel with regard to matters of procedure, the burden of proving the [necessary] elements...is no less.” *Flener v. H.K. Cupp, Inc.*, 90-STA-42 (Sec’y Oct. 10, 1991).

decision to terminate his employment by letter dated April 17, 2013. Additionally, given the unmistakable language of the letter, I find it provided notice that was neither ambiguous nor misleading. Additionally, I find that said letter left no further chance for action, discussion, or change. This finding is further supported by the fact that issuance of the letter was Respondent's final employment action with regard to Complainant.

Given the FRSA statute of limitations, Complainant had no more than 180 days, or until October 14, 2013, to file Action No. 2 regarding his termination. Nonetheless, Complainant waited approximately 318 days after final, definitive, and unequivocal notice of his termination was given by Respondent to file Action No. 2. There is no evidence in the record to dispute the fact that more than 180 days had passed before Complainant filed a complaint under FRSA. Thus, even when viewing the matter in a light most favorable to Complainant, his claim was untimely, as I find that well over 180 days passed before he filed Action No. 2 on March 1, 2014.

## *II. Equitable Tolling*

Although Complainant has not raised any equitable tolling arguments, I will address the issue nonetheless. However, I find that even if Complainant had raised an argument for equitable tolling, it would not apply to this matter because the factors required for equitable tolling are not met. No evidence was presented to show that Respondent actively misled Complainant, that Complainant was prevented from asserting his rights in some extraordinary way, or that Complainant raised the claim in the wrong forum.<sup>25</sup>

## **CONCLUSION**

I find that there are no genuine issues of material fact relative to Complainant's filing of his claim, that it is time-barred under 49 U.S.C. § 20109(d)(2)(A)(ii), and that Respondent is entitled to judgment as a matter of law.

## **ORDER**

Accordingly, **IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**, and Complainant's claim against Respondent is **DISMISSED**.

PETER B. SILVAIN, JR.  
Administrative Law Judge

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<sup>25</sup> *Johnson*, slip op. at 8.

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).