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Issue Date: 25 July 2016

CASE NO. 2014-FRS-00072

In the Matter of

GREG BOUCHER,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: James P. Carey
for Complainant

Keith M. Goman
Paul S. Balanon
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER
GRANTING SUMMARY DECISION

This is a claim under the Federal Rail Safety Act's employee protection provision, 49 U.S.C. § 20109, and its implementing regulations at 29 C.F.R. Part 1982. Complainant has filed a related claim in Montana state court. Respondent BNSF moves for summary decision, asserting that Complainant has elected to seek protection under another provision of law for the same alleged unlawful act. *See* 49 U.S.C. § 20109(f). I find the motion meritorious and will grant it.

Legal Requirements on Summary Decision

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. §18.72(a) (2015); *see* 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). To defeat summary judgment, the dispute as to a material fact must be genuine; bare assertions will not suffice. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc*., 690 F.2d 1235, 1238 (9th Cir. 1982). Nor will a mere "scintilla of evidence." *Anderson*, 477 U.S. at 251 (1986). Rather, the existence of a genuine dispute depends on whether there is sufficient evidence for a reasonable factfinder to rule for the non-moving party. *See id*., 477 U.S. at 252.

Undisputed Material Facts[1]

On April 30, 2012, Complainant filed two complaints. He filed a civil action in Montana District Court (Cascade County) (Case No. DDV-12-0322), and he filed an administrative complaint with the Occupational Safety & Health Administration (OSHA No. 8-0100-12-049). The OSHA complaint is the Federal Rail Safety Act claim currently before me on this motion. *See* R.Ex. 2, 10.[2] Complainant names BNSF Railway Co. as the sole respondent in each of the two cases.[3]

The Montana civil action alleges two claims for relief: an injured rail worker's negligence claim under the Federal Employers' Liability Act (FELA),[4] and a claim under Montana law seeking damages that Respondent allegedly caused Complainant through its mismanagement.[5] R.Ex. 2. The civil complaint is an example of notice pleading; Complainant alleged few facts with specificity and essentially no specific facts in connection with the Montana state law claim. *Id*., ¶¶ 11-12. The facts Complainant was asserting were left to emerge in discovery.

On June 4, 2015, Complainant served answers to BNSF's First Interrogatories. R.Ex. 1. When asked for facts supporting any claim Complainant had for damages, Complainant stated the following with respect to the Montana state law claim:

> BNSF engaged in improper conduct constituting mismanagement, culminating in its decision to fire [Complainant] . . .; BNSF's firing of [Complainant] was improperly based at least in part on [Complainant's] back injury and his prior report of an injury related to a sliver he sustained at work. Thus, even when [Complainant] was physically capable of attempting to return to work after his surgery and rehabilitation, he was precluded from doing so because BNSF had fired him. Accordingly, [Complainant's] lost railroad earnings and benefits

[1] As I must view the evidence on summary decision in the light most favorable to Complainant (as the non-moving party), drawing all reasonable inferences in his favor, and not make credibility determinations or weigh the evidence, the recitation of facts in the text above is for purposes of this motion only.

[2] "C.Ex." refers to Complainant's Exhibits. "C.Br." refers to Complainant's brief. "R.Ex." refers to Respondent's Exhibits.

[3] Technically, BNSF is a "defendant" in the civil case. *See* R.Ex. 2.

[4] 45 U.S.C. §§ 51, *et seq*. This statutory scheme is a forerunner to modern workers' compensation; it provides remedies for workplace injuries caused by negligence. Courts – not administrative agencies – adjudicate these claims, with concurrent state and federal jurisdiction. Procedures and remedies differ from ordinary workers' compensation.

[5] *See* Mont. Code Ann. § 39-2-703.

> continue through to the present, and are ongoing. From August 2012 to June 2015, the lost earnings total approximately $145,000.

R.Ex. 1 at 4-5 (answer to Interrogatory No. 9). Complainant did not specify any further basis for damages on his Montana state law claim. *Id*.

In the OSHA administrative complaint, Complainant alleges that he injured his back at work for BNSF on October 19, 2011. R.Ex. 3 at 3-4. He reported the injury on October 20, 2011. *Id*. at 4. On the same day, he received notice that he was being investigated for late-reporting of the injury. *Id*.

But, he alleges, BNSF never pursued that investigation. Instead, it investigated Complainant's use of the words "bullshit" and "bitch" when talking to a "technical director." R.Ex. 3 at 4. As Complainant admitted at a deposition, the technical director asked him to reel up some hoses; Complainant told the director the assignment "was bullshit," that he was asking Complainant to do this too close to "quitting time," and that Complainant was "not a little bitch boy." R.Ex. 4 at 4-5; C.Br. at 13. Complainant admitted at the deposition that he might have told the technical director to go clean up the hose situation himself.[6] *Id*. at 5. Complainant argued that he was not directing the words at the technical director, and that this would have been "trivial" except that he had previously sustained "a serious on duty injury."[7] *Id*. at 5.

Following the investigation, Respondent terminated the employment on December 8, 2011. R.Ex. 8. Respondent's stated reason for the termination was Complainant's "discourteous, quarrelsome conduct, and use of unsuitable language" on October 11, 2011. *Id*.

Complainant alleged in the OSHA complaint that BNSF's termination of the employment was "due in whole or in part to" his reporting his injury.[8] *Id*. at 5. He stated that he was seeking "all relief appropriate under the circumstances" and specifically the expungement of adverse references in his personnel file, back-pay with interest, compensatory damages, punitive damages, and costs and attorney's fees. *Id.* at 6. He did not specifically request reinstatement. *Id*.

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[6] OSHA's investigation showed that these events occurred on October 11, 2011. R.Ex. 10 at 2.

[7] The allegedly "serious on duty injury" was the sliver that Complainant mentioned in the Montana state court complaint. He got the sliver in a finger at work a year earlier on October 12, 2010. C.Br. at 7. He believed it was so trivial that he did not report it; he states that such minor events are not reported at BNSF. *Id*. He removed the sliver when he got home from work. *Id.* The finger became infected, and he treated it himself. At first, it appeared that the infection had healed. But when it recurred a few days later, he reported it to BNSF as an injury. By this time a week had passed since the got the sliver in his finger. *Id*. 7-8. BNSF initiated a disciplinary proceeding against Complainant for allegedly late-reporting the injury. *Id*. Complainant agreed to a record suspension but contends that he did so only under unfair and retaliatory duress. *Id*. at 8-10.

[8] Complainant seems to be referring to the back injury but might also have been referring to the finger splinter a year earlier. It appears that the discipline imposed for the allegedly late report of the finger injury might have escalated the severity of the discipline imposed at the time of termination on December 8, 2011. *See* R.Ex. 8 ("In assessing discipline, consideration was given to your personnel record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA)"). It is possible that under PEPA, Complainant's language on October 11, 2011 would not have resulted in a termination were it not for the prior record suspension for the alleged late-reported sliver injury.

Complainant also initiated a third related action: He appealed the dismissal under the Railway Labor Act. The arbitration board decided in favor of Respondent, holding that the dismissal was consistent with the collective bargaining agreement.

Discussion

The focus of Respondent's motion is the following provision in the Federal Rail Safety Act: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f). Respondent contends that Complainant has sought protection for the same allegedly unlawful act under the Montana statute that protects rail workers against damages rail companies cause through certain conduct, citing Mont. Code Ann. § 39–2–703.

The Montana statute. Passed more than a century ago (in 1905), the Montana statute provides a cause of action to rail workers who sustain damages because of the railroad's mismanagement, negligence, or willful wrongs.[9] As the Montana Supreme Court held soon after the statute was enacted, its purpose is "to secure the safety of employees and thus, indirectly, of the public."[10] In 2000, the Montana Supreme Court applied the statute in a context very similar to Complainant's present claim. *See Winslow v. Montana Rail Link, Inc*., 302 Mont. 289, 16 P.3d 992 (Mont. 2000).

In *Winslow*, a rail worker reported a workplace hernia; the railroad investigated and found a pre-existing hernia that the plaintiff had failed to disclose; the railroad initiated discipline for the worker's alleged fraud on the hernia claim; and the railroad terminated the employment for the stated reason of the employee's dishonesty. 302 Mont. at 292. The employee sued under the same Montana statute for the railroad's "mismanagement and misconduct," seeking damages, including punitive damages. *Id*. When the railroad moved to dismiss, the trial court found very few prior cases under the statute – all were from early in the twentieth century and all involved workplace injuries, not terminations from employment. *Id*. at 294. The trial judge dismissed the claim, holding that the statute was limited to personal injuries caused by co-workers. *Id*.

The Montana Supreme Court reversed. 302 Mont. at 294. Looking to the statutory language, the court held that nothing in the statute limited its scope to personal injuries; to the contrary, its "very broad language" extended to "damages which result from mismanagement connected with

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[9] The Montana statute provides in pertinent part:

> A person or corporation operating a railway or railroad in this state is liable for all damages sustained by any employee of the person or corporation in consequence of the neglect of any other employee of the person or corporation or by the mismanagement of any other employee and in consequence of the willful wrongs, whether of commission or omission, of any other employee of the person or corporation when the neglect, mismanagement, or wrongs are in any manner connected with the use and operation of a railway or railroad on or about which the employee is employed. A contract that restricts the liability is not legal or binding.

Mont. Code Ann. § 39-2-703(1).

[10] *Lewis v. Northern Pacific Ry. Co.*, 36 Mont. 207, 218, 92 P. 469, 473 (Mont. 1907), cited with approval in *Winslow v. Montana Rail Link, Inc.*, 302 Mont. 289, 294,16 P.3d 992 (Mont. 2000).

the operation of the railroad." *Id*.[11] This includes claims asserting a railroad's "mismanagement in the handling of an employee termination." 302 Mont. at 295.[12]

In reaching this holding, the court took care to distinguish any claim that would depend on an interpretation or construction of the collective bargaining agreement. *Id*. at 295-96. The court held that the Railway Labor Act would preempt any such claim.[13] *Id*. But it found that the plaintiff's complaint did not mention the collective bargaining agreement or any rights he had under it; the claim was about the railroad's "mismanagement" of his hernia report. *Id*. at 296. As the court stated: "The source of the right to be free from mismanagement is state statutory law, § 39–2–703, MCA, and is independent of any negotiated labor agreement." *Id*.

The Ninth Circuit, which is controlling here,[14] construed *Winslow* as follows:

> In *Winslow v. Montana Rail Link, Inc*., the Montana Supreme Court recognized that MCA § 39–2–703 employs "very broad language" in defining the right of railway employees to sue for "all damages" resulting from a railway's negligence or mismanagement, including when that conduct results in the employee's discharge from employment. 302 Mont. 289, 16 P.3d 992, 996 (2000) ("*Winslow I*"); 328 Mont. 260, 121 P.3d 506, 511–12 (2005) ("*Winslow II*"). The right of railway employees to sue on the basis of negligence or mismanagement resulting in termination may be unusual in other jurisdictions, but such a right is undoubtedly recognized in Montana.

Wolfe v. BNSF Ry., 749 F.3d 859, 864 (9th Cir. 2014) (rejecting Railway Labor Act preemption and reinstating claim under § 39–2–703, MCA, together with punitive damages); *see also*, *Haux v. Montana Rail Link, Inc.*, 322 Mont. 456, 462, 97 P.3d 540 (Mont. 2004) ("*Winslow* clarified that a railroad may, through the application of § 39–2–703, MCA, be held liable for mismanagement in the handling of an employee termination").

The FRSA election provision. Congress initially passed the Federal Railroad Safety Act in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *Norfolk S. Ry. Co. v. Shanklin,* 529 U.S. 344, 347 (2000) (quoting 49 U.S.C. § 20101). The section that provided whistleblowing employees protection against retaliation was added in

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[11] As the court observed, for nearly a century, the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, has controlled compensation for rail workers' workplace injuries. 302 Mont. at 294. If compensating rail workers' injuries was the only purpose of Mont. Code Ann. § 39-2-703, the legislature might as well have repealed it. *Id*.

[12] Having found that the rail worker had pleaded a legally sufficient claim, the court reversed the trial judge's dismissal of the claim for punitive damages. 302 Mont. at 298-99.

[13] "'[T]o promote stability in labor-management relations,' the RLA requires arbitration for two classes of disputes concerning 'rates of pay, rules or working conditions.' The first class—major disputes—concerns the formation or negotiation of collective bargaining agreements. The second class—minor disputes—concerns 'controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.'" *Wolfe v. BNSF Ry.*, 749 F.3d 859, 863 (9th Cir. 2014) (citations and fn. omitted). Minor disputes arise "only when the state claim 'involve[s] duties and rights created or defined by [a collective bargaining agreement]" and is therefore "dependent on the interpretation of a CBA." *Id*.

[14] The Federal Rail Safety Act claim pending before me is Montana-based.

1980.[15] From the first enactment, the provision included the election requirement to require an employee seeking protection "'under any other provision of law in connection with the same allegedly unlawful act of an employer' to choose 'either to seek relief pursuant to this section [*i.e.,* the FRSA] or pursuant to such other provision of law.'" *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 510 (6th Cir. 2015) (citation omitted).[16] Amendments to the whistleblower provision in 2007 were designed to "'enhance [ ]' employees' 'administrative and civil remedies,' and 'to ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers,'" but the election provision was not removed. *Id*.

Though the election provision remains, adjudicators (including the undersigned administrative law judge) have thus far not found cases in which the provision applies. The Ninth Circuit, which is controlling, has not addressed this provision. The Administrative Review Board has held that the FRSA election provision does not apply when an employee simultaneously disputes disciplinary action through a grievance arbitration under the Railway Labor Act. *Koger v. Norfolk Southern Railway Co. and Mercier v. Union Pacific Railroad*, ARB Nos. 09-101 and 09-121, 2011 WL 4889278 (ARB Sept. 29, 2011).

As the Board held in *Koger*, the election provision prevents the employee from seeking the protection of the FRSA and of "another provision of law for the same allegedly unlawful act." 49 U.S.C. § 20109(f). "The plain meaning of 'another provision of law' does not encompass grievances filed pursuant to a 'collective bargaining agreement,' which is not 'another provision of law' but is instead a contractual agreement." *Koger*, slip op. at 6. The Board observed that, in the FRSA, Congress refers expressly to "collective bargaining agreements" when that is its purpose. *Id*., citing 49 U.S.C. § 20109(h). It did not mention collective bargaining agreements in the election provision, section 20109(f).

Three out-of-Circuit decisions reach the same conclusion. *See Norfolk S. Ry. Co. v. Perez*, 778 F.3d at 512 (agreeing with Secretary that plain language of the statute requires election when plaintiffs seeks protection under "another provision of law"; a collective bargaining agreement is not a provision of law because it's a contract, and the worker is not seeking protection of the Railway Labor Act when he pursues a labor arbitration); *Grimes v. BNSF Ry. Co*., 746 F.3d 184, 191 (5th Cir. 2014) (same); *Reed v. Norfolk S. Ry. Co*., 740 F.3d 420 (7th Cir. 2014).

Some district courts have held that, under certain circumstances, the election provision does not preclude an employee from simultaneously pursuing a compensation claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et seq*. *See, e.g., Davis* v. *Union Pacific R.R. Co.,*___ F. Supp. 2d ___, 2014 WL 3499228 (W.D. La. Jul. 14, 2014); *Barati* v. *Metro-North R.R.,* 939 F.

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[15] *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. 96–423, § 10, 94 Stat. 1811 (1980); *Rayner v. Smirl,* 873 F.2d 60, 63 (4th Cir. 1989).

[16] The representative who managed the bill in the House of Representatives commented that the purpose was to avoid having employees pursue simultaneous retaliation claims under the Occupational Safety & Health Act and the Federal Rail Safety Act. *Id*. Of course, the language of section 20109(f) is much broader.

Under the 1980 amendment, employees were required to pursue any retaliation claims under the arbitration provisions of the Railway Labor Act. The 2007 amendments to the Federal Rail Safety Act changed the procedure to require that employees file complaints with the Secretary of Labor (who delegated this function to OSHA).

Supp. 2d 153 (D. Conn. 2013); *Cook* v. *Union Pacific R.R. Co.,* No. 10-6339-TC, 2011 WL 5842795 (D. Or. Nov. 18, 2011).[17]

Courts have also consistently declined to apply the election provision when workers bring separate claims asserting that the employer's adverse action violated a right unrelated to the safety and security concerns protected in FRSA § 20109. *See, e.g., Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626 (4th Cir. 2015) (pursuit of race discrimination claim under 42 U.S.C. § 1981 did not preclude FRSA retaliation claim despite election provision in § 20109(f)); *Lillian v. National RR Passenger Corp.*, 2016 WL 1238782 (N.D. Ill. 2016) (same for claim Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq*.).

Though not controlling, the Fourth Circuit's discussion in *Lee* is instructive. The court held that the plain language of the election provision in 49 U.S.C. § 20109(f) is unambiguous; thus, there is no reason to look beyond the statutory language. 802 F.3d at 631. The words are not defined in the statute; thus ordinary dictionary definitions apply. *Id.* Whether the provision applies will turn on whether the complainant asserts "the same allegedly unlawful act." *Id*.

As the *Lee* court explained, the suspension of the employee was the act alleged in both the FRSA case and the section 1981 case. *Id.* But a suspension is not unlawful without more. *Id*. For the cases to involve "the same allegedly *unlawful* act," both cases must assert the same theory that makes the act unlawful. *Id.* at 631-32. In *Lee*, the section 1981 claim asserted that the suspension was unlawful because it was racially-based; in the FRSA claim, the assertion was that the suspension was unlawful because it was in retaliation for activity that the FRSA protects. *Id*. As the court held: "The 'act' may be the 'same' in both lawsuits, but the 'act' is 'allegedly unlawful' for fundamentally different reasons." *Id*. at 632. Thus, the election provision in the FRSA did not apply. *Id*. at 632-33.[18]

The election provision applies here. I find persuasive the Fourth Circuit's conclusion that the language of the statute is unambiguous: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f). But, unlike the several decisions discussed above, the other (non-FRSA) claim here is not a labor arbitration or an FELA claim. I therefore rely more on *Lee* for an analytical framework.

Unlike *Lee*, however, the alleged unlawful act Complainant here asserts is not obviously distinguishable as would be a claim for race or disability discrimination. In both the FRSA case and the Montana state law case, the alleged act is the same: a termination from employment.

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[17] On November 9, 2015, the Secretary promulgated a Final Rule, adopting revised regulations for the FRSA. *See* https://www.federalregister.gov/articles/2015/11/09/2015-28040/procedures-for-the-handling-of-retaliation-complaints-under-the-national-transit-systems-security#h-12. The Final Rule contained no regulation addressing the election provision in section 20109(f). But in the preamble, the Secretary did discuss the election provision. *See "*Comments Regarding the Proper Interpretation of the Election of Remedies, No Preemption, and Rights Retained by Employees Provisions." He recognized the developing case law detailed above and, based on this, declined commentators' requests that the regulations expressly address the election provision in subsection (f). *Id*.

[18] The court also discusses in *dicta* why it would have reached the same result even if it had found the language of 49 U.S.C. § 20109(f) ambiguous. 802 F.3d at 633-35.

The question is whether Complainant asserts that the act was unlawful for the same reason in both cases. Though the FRSA provision and the Montana statute are not identical, I find that, as applied here, Complainant is asserting the same unlawful act in the two cases.

Both the FRSA and Mont. Code Ann. § 39–2–703 were enacted essentially to secure the safety of railroad employees and the public. In both cases, Complainant asserts that the termination was unlawful because Respondent imposed it in response to his reporting a workplace injury or injuries. That is plainly the assertion in the FRSA claim. In the Montana case, Complainant stated in answer to interrogatories that the source of his damages is his reporting to Respondent the same workplace injuries to his back and finger.

In the state case, Complainant cannot be asserting simply that the termination was inconsistent with the collective bargaining agreement in that Respondent's investigation was inadequate or improper or that Respondent made errors in factfinding, did not follow established disciplinary procedures, or did not correctly apply its disciplinary rules to the facts when deciding the level of discipline to impose. All of those contentions require the interpretation or construction of the collective bargaining agreement. According to the Montana Supreme Court, a theory requiring the interpretation or construction of the collective bargaining agreement is preempted by federal law and would foreclose a claim under the state statute. *See Winslow, supra.* Complainant thus cannot simply be rehashing in Montana state court (under Mont. Code Ann. § 39-2-703) his unsuccessful labor grievance arbitration.

Rather, Complainant is asserting, as he stated in his interrogatory response, that the reason Respondent's conduct is actionable under the Montana statute is:

> BNSF engaged in improper conduct constituting mismanagement, culminating in its decision to fire [Complainant] . . .; BNSF's firing of [Complainant] was improperly based at least in part on [Complainant's] back injury and his prior report of an injury related to a sliver he sustained at work.

R.Ex. 1 at 4-5 (answer to Interrogatory No. 9). Thus, the alleged actionable mismanagement was a termination decision "based at least in part on" Complainant's reporting a workplace injury or injuries. *Id.* The conduct alleged in the FRSA claim is said to be unlawful because Complainant's reporting the same workplace injuries was at least a contributing factor in Respondent's decision to terminate the employment. The two allege the same unlawful act; any other conclusion would render the election provision in the FRSA, 49 U.S.C. § 20109(f), without meaning.

Other alleged mismanagement. Complainant argues that he will show in the Montana state case other acts of Respondent's mismanagement.[19] The argument is unavailing for several reasons.

First, the question is whether Complainant is asserting a claim for the same allegedly unlawful act in the two cases. His choice to assert other claims (or other bases for claims) in addition fails to negate that he is also asserting the same alleged unlawful act.

[19] *See* C.Br. at 25-29 (citing Complainant's deposition testimony).

Second, the FRSA allows a recovery when a complainant's protected activity is no more than *a* contributing factor to the adverse action. The adverse action could result from many factors – legitimate or not – other than FRSA-protected activity; the proof is sufficient if the protected activity is simply one of them. Complainant's assertion of mismanagement other than Respondent's basing the discharge on Complainant's reporting his workplace injuries is no different from what comes within the FRSA. The presence of other contributing factors does not negate that, among other assertions, Complainant is also asserting the same alleged unlawful act in both cases.

Third, the fact that Complainant testified at his deposition to a variety of ways in which he contends Respondent is mismanaging the railroad does not establish that he has any basis for his Montana state law claim beyond the connection to his reporting his workplace injuries. The Montana statute does not turn Montana juries into roving committees of super-managers who review rail management decisions for any acts the jurors think are wrong. The statute allows a cause of action only when the railroad's mismanagement causes the plaintiff damages. *See* Mont. Code Ann. § 39-2-703 ("A person or corporation operating a railway or railroad in this state is liable *for all damages* sustained by any employee . . . by the mismanagement [of the railroad]" (emphasis added)). Interrogatory No. 9 asked Complainant to state the basis for his claim for lost wages (past and future) and total damages. R.Ex. 1 at 4. Complainant's answer specified the mismanagement that caused him damages; it was limited to the discharge "based at least in part" on his reporting of workplace injuries and nothing else specified.

No implied repeal of FRSA election provision. Complainant next contends that the amendments to the FRSA in 2007 added two provisions to the statute that impliedly repeal the election provision in subsection (f). R.Ex. at 30-31. He relies on *dicta* in *Norfolk S. Ry. Co. v. Perez*, 778 F.3d at 514. As discussed above, the Sixth Circuit held in *Perez* that, under the plain language of the FRSA election provision, a rail employee's labor arbitration under the Railway Labor Act did not trigger the election provision. *Id.* at 512-13. In *dicta*, however, the court added that, by adding subsection (h) in the 2007 amendments to the FRSA, Congress impliedly repealed ("trump[ed]") the election provision in subsection (f) at least insofar as it would apply when an employee both filed an FRSA claim and also pursued a labor arbitration under the Railway Labor Act. *Id*. at 514.

Subsection (h) provides: "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment." 49 U.S.C. § 20109(h).

Dicta in an out-of-Circuit decision is not controlling, and with respect, I find the *dicta* in *Perez* unpersuasive.[20] When Congress was amending the statute to add subsection (h), if it concluded

[20] The *Perez* court stated in this *dicta* that requiring a complainant to elect either the FRSA claim or another claim necessarily diminishes both, which the court thought was inconsistent with the mandate of subsection (h). 778 F.3d at 514. Essentially, the court found subsections (f) and (h) irreconcilable, and then gave preference to the language added in 2007 over the language retained from the pre-amendment version. For this the court relied on *See Nat'l*

that the election provision in subsection (f) was no longer consistent with Congressional purpose, it would have deleted that subsection. Congress did not do that; it preserved the election provision.

It is for adjudicators to reconcile the provisions of the amended statute, not to favor newly added language by disregarding a portion of the statute that Congress decided to reenact unchanged. The sections are reconcilable as follows: A complainant may obtain, without diminution, any right, remedy, or privilege under any provision of law. But if the complainant is alleging the same unlawful act of the employer, she cannot seek the protection of both the FRSA and another provision of law; she must elect to seek the protection of one or the other provision.

I again respectively find unpersuasive the Sixth Circuit's *dicta* rejecting this reconciliation as follows: "Restricting an employee to only one of the numerous arrows in his quiver obviously reduces the number of options available to him. Even more fundamentally, forcing an employee

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Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662 (2007), which it cited for the proposition that the more recent of two statutes will control when they are in irreconcilable conflict.

Again, with respect, it appears to me that the Sixth Circuit's analysis finds no support in *Defenders of Wildlife*; that Supreme Court decision is entirely to the contrary. In *Defenders of Wildlife*, the Court summarized the law of implied repeal as follows:

> While a later enacted statute (such as the ESA) can sometimes operate to amend or even repeal an earlier statutory provision (such as the CWA), "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." We will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act' " or unless such a construction "is absolutely necessary ... in order that [the] words [of the later statute] shall have any meaning at all." See also *Branch v. Smith*, 538 U.S. 254, 273, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute' "); *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest"). Outside these limited circumstances, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."

Defenders of Wildlife, 551 U.S. at 662-63 (some citations omitted). As the Executive agency charged with implementation of the statutes had issued a regulation that reconciled the two statutes, the Court deferred to the Executive agency, applied that particular reconciliation, and reversed the Ninth Circuit's holding that the newer statute impliedly repealed the earlier statute. Nothing about this supports an implied repeal here.

First, as will be discussed in the text, subsections (f) and (h) are reconcilable.

Second, Complainant cites nothing to suggest that the law of implied repeal applies when there is only one statute involved, especially when it is not a statute with hundreds of subsections (essentially a complex statutory scheme codified into a single statute). In the present case, Congress redrafted section 20109. It deleted some language, added some language, and left some language unchanged. This is not an instance where Congress was writing a new statute and would have to survey the entire body of federal statutory law to determine whether the new provision would affect any pre-existing other enactment. Rather, Congress had an opportunity to reconsider the entire section 20109 at the time of the amendment in 2007; no part of it is more recent than any other part. By choosing not to modify the language of subsection (f) (the election provision) when it was rewriting section 20109, Congress effectively reenacted and ratified subsection (f). In that sense, subsections (f) and (h) were passed at the same time.

to choose either option A or option B dilutes the value of his rights under both options." *Perez*, 778 F.3d at 514.

I am unpersuaded because the court's conclusion appears to neglect that all whistleblower rights under the FRSA are rights that Congress created; they are grounded solely in the statute. From the time Congress first included whistleblower protection in the statute, Congress limited employees' rights by requiring complaining employees to elect either to seek the protection of the FRSA or the protection of some other provision of law for the same unlawful act. The election provision does not "dilute" or "diminish" an employee's rights, for the right to seek protection under the FRSA and another provision of law for the same allegedly unlawful act has never existed: Congress expressly has ruled out such a right ever since it first enacted whistleblower protection in the FRSA. Nothing about Congress' intent in the 2007 amendments to enhance employees' remedies and ensure the effectiveness of the whistleblower statute requires the elimination of the election provision.[21]

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[21] I reject any argument that the legislative history of the 2007 amendments supports a conclusion that subsection (h) must be read so broadly as to repeal the limitations that subsection (f) imposes. As the *Lee* court observed, the conference committee report stated that the 2007 amendments were intended to "'enhance[ ] administrative and civil remedies for employees' and 'ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers.'" *Lee v. Norfolk S. Ry. Co.*, 802 F.3d at 630. There is no question that Congress amended the statute in several ways to accomplish this intent. But nothing about this means that Congress intended to repeal any provisions in the statute that placed any requirement on complainants or limited their rights in any way.

For example, Congress removed requirements that employees arbitrate their whistleblower claims as they would any dispute under the Railway Labor Act, and instead empowered the Department of Labor to investigate and adjudicate these claims. *Id*. The burden of proof on employee complainants was significantly reduced by importing the contributing factor standard adopted in the Aviation Investment & Reform Act for the 21st Century. 49 U.S.C. § 20109(d)(2). District courts were authorized to enforce decisions of the Secretary of Labor. *Id*. If the Department of Labor did not process claims within a specified time limit, a complainant could exercise a "kick-out" provision and refile the case *de novo* in the district court. 29 U.S.C. § 20109(d)(3). Congress authorized awards of punitive damages up to $250,000 in appropriate cases. *Id*. § 20109(e)(3).

In addition, in subsection (g), Congress legislatively overruled a body of case law holding that the FRSA preempted state law remedies for wrongful discharge for reporting safety violations. *See, e.g.*, *Rayner v. Swirl*, 687 F.Supp. 993 (D. Md. 1988), *aff'd* 873 F.2d 60 (4th Cir. 1989). Congress also mandated that agreements such as collective bargaining agreement could not include a waiver of any rights under section 20109. *See* subsection (h) ("The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment"). This arguably would prevent a requirement in a collective bargaining agreement that FRSA claims be arbitrated; it certainly would prevent forced recourse to arbitration where the remedies available there would be less than what the Department of Labor (or a district court) could award under the FRSA. Finally, in subsection (h), Congress made explicit that nothing in section 20109 diminished rights or remedies that an employee had under another provision of law or under a collective bargaining agreement. *Id*.

I conclude that the purpose and effect of these amendments reflect a comprehensive scheme aimed at enhancing administrative and civil remedies for employees and better ensuring that employers will not retaliate for activity that the FRSA protects. But Congress could and did accomplish these purposes without repealing or limiting the election provision in subsection (f). For example, Congress decreased complainants' burden of proof (to the contributing factor standard), but it did not outright shift the entire burden of proof to the defense. Nothing about Congress' stated purpose required it to remove from the statute every limitation on the scope of an employee's rights and options under the statute.

Difference in remedy or procedure is not determinative. Complainant notes that it is possible that reinstatement might not be available as a remedy in his state court action. The argument lacks merit on multiple grounds.

First, Complainant provided in his FRSA complaint a detailed list of remedies that he seeks, and reinstatement was not among them. This is crucial because courts providing remedies in employment cases have allowed front pay in lieu of reinstatement under a variety of circumstances. For example, front pay may substitute for reinstatement, "whenever the antagonism between the plaintiff and her employer is such that it would be inappropriate to expect her to return to work." *Passantino v. Johnson & Johnson Consumer Products, Inc*., 212 F.3d 493, 512 (9th Cir. 2000) (Title VII and state law sex discrimination claim). Complainant's choice not to request reinstatement could mean that he does not want reinstatement and plans instead to show why he is entitled to front pay.

Second, Complainant offers no authority and does no more than suggest that it might be the case that the Montana trial court will be unable to order reinstatement under the state statute; his argument is simply that the very broad language of the Montana statute "does not specifically provide for reinstatement." *See* C.Br. at 25.

Third, the FRSA election provision does not turn on the burdens of proof, procedures, or remedies available in another provision of law. *See* 49 U.S.C. § 20109(f). It turns only on whether the complainant is seeking the protection of another provision of law *for the same allegedly unlawful act of the railroad carrier*. It is correct that Congress overruled any federal preemption or diminishment of other employee safeguards in other provisions of law (or under a collective bargaining agreement). *Id.* §§ 20109 (g), (h). But an application of the FRSA election provision does not diminish or preempt any right to reinstatement Complainant might have under the Montana statute.

It appears that there could be many reasons a complainant would elect to pursue a Montana state law claim under Mont. Code Ann. § 39-2-703. It appears to allow uncapped punitive damages award (limited by the Constitution only), while the FRSA is limited to $250,000. A state law plaintiff is entitled to a jury trial, which could be advantageous, especially if plaintiff seeks pain and suffering and punitive damages. A plaintiff might or might not be able to obtain an order of reinstatement, but if he cannot, it would appear that he will be entitled to recover future lost wages. Those wages could exceed a front pay award under the FRSA.[22] All of that was for Complainant to consider when he elected to file his state law complaint. But nothing about any differences in available remedies renders ineffective the FRSA election provision in section 20109(f).

Complainant has elected to pursue the Montana state law claim, thus triggering the election provision in subsection (f). Complainant next contends that it is premature to impose the requirements of the election provision. He argues that, as no remedy has been awarded in either of his cases, he need not yet elect a remedy. The argument is without merit, in that Complainant

[22] Front pay is generally for a limited time and assumes that the employee, with reasonable diligence, will find substitute employment relatively soon. A jury might more readily conclude that a rail employee plaintiff will never be able to earn as much as he did when working for the railroad.

would substitute state common law election of remedies for the provision that Congress enacted in section 20109(f).

Subsection (f) has a heading that reads: "Election of Remedies." 49 U.S.C. § 20109(f). But its text nowhere refers to "remedies" as such.[23] In unambiguous language, the text provides: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." It requires an election by an employee who would "seek protection" under the FRSA and another provision of law, not an employee who has been awarded remedies under the FRSA and another provision of law. As the Sixth Circuit stated,

> We conclude that an employee "seeks protection" under a statute only if he seeks to use it as a shelter—that is, only if the statute is the source of the substantive remedy for the harm that the employee is attempting to avert. The rights guaranteed to the employee in the statute must be the barrier that is interposed between the employee and the threatened harm; it is not enough if the statute guarantees the employee only a procedural mechanism that enables him to shelter behind some other, independent legal bulwark.

Norfolk S. Ry. Co. v. Perez, 778 F.3d at 513 (holding that an arbitration claim under the Railway Labor Act did not constitute seeking protection because the Act only sought to validate rights under the collective bargaining agreement, and the Act merely assures him of an arbitral forum in which to accomplish this).

The ARB has also indicated the absence of any link between avoiding duplicative remedies and the triggering of the election provision. *See Koger v. Norfolk S. Ry. Co. and Mercier v. Union Pacific RR.*, *supra*, slip op. at 6, 2011 WL 4889278 (ARB Sept. 29, 2011). As the Board stated in *Koger*:

> While subsection (f) cannot be read to bar concurrent whistleblower and collective bargaining claims, we *do* understand the necessity for barring duplicative *recovery* under those claims . . . . It is well-established that any relief to which Mercier is entitled would be that which would make him "whole" and would not include double recovery. *See generally Sears Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 69-70 (9th Cir. 1956) ("a plaintiff may pursue an action against an identical defendant in several courts at the same

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> Th[e] heading is but a short-hand reference to the general subject matter involved.... [H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis . . . . For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Spinner v. Landau, ARB No. 10-111 (May 31, 2012), slip op. at 6, quoting *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528-29 (1947). As the statutory text in subsection (f) is unambiguous, the heading cannot undo or limit its meaning.

> time, even though inconsistent remedies are sought. But . . . there can be only one recovery."); *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1317 (9th Cir. 1986) (same).

Id. Thus, even when the election provision in subsection (f) is not triggered, a complainant can elect to recover, for example, lost wages only once. The election provision and the avoidance of duplicative remedies are two distinct limits on a worker's rights and remedies.

Conclusion and Order

As the Montana Supreme Court has defined Mont. Code Ann. § 39-2-703, Complainant's state law claim seeks protection for the same allegedly unlawful act as he asserts in his claim under the Federal Rail Safety Act. Both assert that Respondent terminated the employment and that the termination was based at least in part on Complainant's reporting a workplace injury or injuries. Seeking the protection of both the FRSA and his state law claim as alleged is something Complainant may not do. 49 U.S.C. § 20109(f). Accordingly,

1. Respondent's motion for summary decision is GRANTED, and this matter is DISMISSED.

2. The hearing set for August 1, 2016, in Great Falls, Montana is VACATED.

3. This Order will be served by email or facsimile (as well as by U.S. mail) on counsel for Complainant and on counsel for Respondent. All other service is by U.S. mail.

SO ORDERED.

Digitally signed by STEVEN BERLIN
DN: CN=STEVEN BERLIN, OU=ADMIN LAW JUDGE, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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.

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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).