



**Issue Date: 24 February 2014**

**CASE NO.: 2014-FRS-00029**

**IN THE MATTER OF**

**KEVIN SHELTON,  
Complainant**

**v.**

**BNSF RAILWAY COMPANY,  
Respondent**

**ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION**

This case arises under the “whistleblower” protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (“9/11 Act”) Pub. L. No. 110-53. (Aug. 3, 2007), as further amended by Pub. L. No. 110-452 (Oct. 6, 2008). The FRSA prohibits covered employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee for engaging in certain protected activity related to the terms and conditions of his employment.

On February 10, 2014, Respondent, BNSF Railway Company (“BNSF”), filed a Motion for Summary Decision. BNSF asserts that there is no genuine issue of fact and that it is entitled to judgment as a matter of law because Complainant, Kevin Shelton (“Complainant”), failed to timely file his complaint against Respondent within 180 days of the alleged adverse employment action.

Complainant asserted in a letter notifying this Court of his appeal that the date of his second notice of termination from BNSF should apply, and therefore his claim was filed timely. Complainant, who is proceeding *pro se*, did not file a reply to Respondent’s motion.

**I. BACKGROUND**

BNSF is a railroad carrier engaged in interstate or foreign commerce within the meaning of 49 U.S.C §20109. Kevin Shelton is a covered “employee” within the meaning of 49 U.S.C. § 20109. Specifically, Complainant was an engineer at BNSF.

On May 17, 2012, Complainant was notified by letter that he was “hereby dismissed effective immediately” for “acting in a discourteous manner and exhibiting acts of hostility.” (EX-1A). Complainant does not dispute this finding. (Compl. Letter, p. 1-3).

On June 7, 2012, Complainant cooperated with an investigation related to an incident in May 2012 that resulted in a derailment. (Emp. Mot., p. 2). During the investigation, Jack Sweeny, union representative of the Brotherhood of Locomotive Engineers and Trainmen (“BLET”), read the following into the record:

**On May 17, Carrier severed its employer/employee relationship with Mr. Shelton** when they terminated his employment with the BNSF. Therefore, Mr. Shelton is no longer subject, uh, to BNSF’s rules and cannot be disciplined.

(EX-2, p. 20).

On June 29, 2012, Complainant received a second letter stating that he is “hereby dismissed effective immediately” for failure to properly control slack in a train” in the May 2012 incident. Complainant does not dispute this finding, and considers this his “second termination.” (Compl. Letter, p. 2). However, Complainant asserts that the OSHA representative who investigated his claim should have applied the “second dismissal” date of June 29, 2012, not May 17, 2012, the date of his “first termination,” as the commencement of the timely filing period for his whistleblower claim. (*Id.*).

Respondent explained its reason for the additional personnel action following the May 17, 2012 termination of Complainant. The purpose of adding the additional reason for dismissal was to “put itself in a stronger position when Complainant appealed his dismissal under the collective bargaining agreement [“CBA”] and the union,” and that this is common practice when dismissing employees who have “grievance-and-appeal rights” under a CBA. (Emp. Mot., p. 2-3; EX-1.).

On November 14, 2012, Complainant filed his complaint with OSHA alleging that Respondent retaliated against him. (EX-2). On October 29, 2013, Complainant’s complaint was dismissed for being untimely, in that it was filed on the 181<sup>st</sup> day after the alleged adverse employment action.<sup>1</sup> *Id.*

On November 22, 2012, Complainant notified this Court of his appeal of the OSHA decision. He stated that this appeal involved his second whistleblower complaint under 49 C.F.R. § 20109 and that the first complaint was summarily discharged without notification to him. (Compl. Letter, p. 1). He stated that the original complaint was filed in “May/June 2012,” and when he contacted the first OSHA investigator in mid-November 2012 to find out about the original complaint, the investigator said that complaint was “long gone.” *Id.* at 1-2. Complainant claims that was the first time he was notified of the first complaint’s dismissal. Complainant has not presented evidence, such as affidavits, to verify his assertions. Complainant also contends that Anthony Incristi, investigator of his second OSHA complaint,

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<sup>1</sup> Complainant asserted in his initial complaint that he was discharged on June 6, 2012, and thus it appeared at the start of the investigation that the complaint was timely. (EX-2, p. 1).

incorrectly used the statement by Mr. Sweeny, the union representative, to corroborate his assumption regarding the correct date to apply.<sup>2</sup> *Id.*

### III. DISCUSSION

#### A. Summary Decision

The standard for granting summary judgment or decision is set forth at 29 C.F.R. § 18.40(d) (2008), which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary judgment for either party “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision.” If the moving party meets the initial burden of showing no genuine issue of material fact the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097, 2110 (2000); *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004). An issue is material if the allegations are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Section 18.40(c) provides that when a motion for summary judgment or decision is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there is a genuine issue of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery. In reviewing a request for summary decision, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 262.

The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. The non-movant’s evidence, if accepted as true, must support a rational inference that

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<sup>2</sup> In addition to his contention that Mr. Incristi, the second OSHA investigator, incorrectly applied the first termination date to his 180-day period to file a complaint, Complainant stated other reasons why he believes the investigator incorrectly dismissed his complaint. Complainant asserts that Mr. Incristi did not mention an addendum delivered to his first investigator that Complainant engaged in “protected activity” with Mr. Sweeny and that BNSF attempted to undermine it, and Mr. Incristi did not mention his original complaint or dismissal in issuing the October 29, 2013 dismissal letter. These issues will not be addressed here, as the focus of Respondent’s Motion for Summary Decision and whether this case will proceed involves the issue of timeliness.

the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-movant fails to sufficiently show an essential element of his case, there can be “no genuine issue as to any material fact,” entitling the movant is entitled to summary judgment, since a complete failure of proof concerning an essential element of the non-movant’s case necessarily renders all other facts immaterial.” *Id.* at 322-323; *Celotex Corp.*, 477 U.S. at 322-323.

The ALJ cannot summarily try the facts. Rather, the ALJ must apply the law to the facts that have been established by the parties. *See 10 A. Wright and Miller, Federal Practice and Procedure*, § 2725, at 104 (1983). A motion cannot be granted merely because the movant’s position appears more plausible or because the opponent is not likely to prevail at trial. *Id.* at 104-5. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. *Id.* at § 2728, at 186. Accordingly, “if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper.” *Id.* § 2725, at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end, and summary decision must be denied. *Id.* at 187.

In order to withstand Respondent’s Motion, it is not necessary for Complainant to prove his allegations. Instead, “he must only allege the material elements of his prima facie case. *Johnson v. BNSF Rwy. Co.*, Case No. 2011-FRS-21, slip op. p. 5 (Sept. 14, 2011), citing *Bassett v. Niagara Mohawk Power Co.*, Case No. 1986-ERA-2, slip op. at p. 4 (Sec’y July 9, 1986). “Timely filing or meeting requirements to toll the statutory time limit is an essential requirement.” *Id.*

## **B. Timeliness – The Filing Period**

The applicable statutory period in which an employee alleging retaliation in violation of the FRSA must file a complaint is **180 days** after the alleged violation occurred. 49 U.S.C. § 20109(d)(2)(A)(ii).

The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the respondent’s employment decision. *Ross v. Florida Power & Light Co.*, Case No. 96-ERA-36 (Dec. 3, 1997). “Final” and “definitive” notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change; “unequivocal” notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Rollins v. American Airlines, Inc.*, ARB No. 04-140, Case No. 2004-AIR-9, slip op. at 2-3 (ARB Apr. 3, 2007). The United States Supreme Court has held that the proper focus is on the time of the discriminatory act, not on the point at which the consequences of the act became painful. *Chardon v. Fernandez*, 454 U.S. 6, 9, 102 S. Ct. 28 (1981); *Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498 (1980).

In the instant matter, Complainant does not dispute that he was informed of Respondent’s decision to terminate his employment on May 17, 2012. Complainant filed a complaint with OSHA on November 14, 2012. Complainant argues that the November 14 complaint to OSHA,

which he calls his “second complaint,” was filed for the “second dismissal,” which he says occurred on June 29, 2012. Thus, applying the “first termination date” of May 17, 2012 to the 180-day period for filing is improper.

Respondent contends that the first date, May 17, 2012, is controlling and that it issued a second termination on June 29, 2012 to strengthen its position against Complainant in a union grievance.

Respondent cites *Johnson v. BNSF Rwy. Co.*, 2011-FRS-21 (Sept. 14, 2011), as being analogous to this case. In *Johnson*, the complainant argued that he was fired twice because there were two separate adverse employment actions taken against him on August 12, 2010 and September 2, 2010, respectively. *Johnson*, slip op at 6. BNSF, the respondent in that case as well, reasoned that it took the second termination action to strengthen its position with the employee’s union. *Id.* at 3. The court ruled that the complainant was terminated August 12, 2010. *Id.* at 6. Regarding the September 2, 2010 termination, the court stated, “[c]omplainant could not be severed from employment which he did not have in September, notwithstanding the wording of the September 2, 2010 letter.” *Id.* at 6. Therefore, his complaint of March 1, 2011 was outside of the 180-day filing period and was untimely.

Accordingly, I find that Complainant was given final and unequivocal notice of Respondent’s employment decision on May 17, 2012. The statement of Mr. Sweeny at the June 7, 2012 investigation was properly applied in corroborating the date of separation and termination of the employer-employee relationship. (EX-3). Consequently, the 180-day period for filing a complaint began on May 18, 2012, the day after the alleged violation, and ended November 13, 2012.<sup>3</sup> 49 U.S.C. § 20109(d)(2)(A)(ii). Complainant’s filing of his whistleblower complaint on November 14, 2012 falls outside the 180-day period, and is untimely.

### C. Equitable Tolling

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 administrative action, but rather analogous to statutes of limitation and thus may be tolled by equitable consideration. *Donovan v. Hakner, Foreman & Harness, Inc.*, 736 F.2d 1421 (10<sup>th</sup> 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). The *Allentown* court warns that the 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. *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991).

Although Complainant has not raised any equitable tolling arguments, I will address the issue nonetheless. As stated in *Allentown* and *Johnson*, “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)

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<sup>3</sup> Also, November 13, 2012 was not a weekend or holiday that would have prevented him from filing on the 180<sup>th</sup> day to fall within the statutory period.

where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.” *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 August 31, 2005).

Even if Complainant had raised an argument for equitable tolling, it would not apply to this case 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. *Johnson*, slip op. at p. 8.

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.

### **III. ORDER**

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

**SO ORDERED** this 24th day of February, 2014, at Covington, Louisiana.

**CLEMENT J. KENNINGTON**  
**Administrative Law Judge**