

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 December 2017

CASE NO.: 2017-FRS-00014

In the Matter of:

BLAKE LITTLE,
Complainant,

v.

**UNION PACIFIC RAILROAD
COMPANY,**

Respondent.

Appearances: Carisa German-Oden, Esq.
Joseph M. Miller, Esq.
Benjamin B. Saunders, Esq.
for Complainant

Robert J. Gibbons, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

ORDER GRANTING SUMMARY DECISION

This matter arises under the employee protection provisions of the Federal Rail Safety Act and its implementing regulations.¹ Complainant alleges that Respondent refused to rehire him into his prior job when he had been off work after an injury, following his treating physician's orders or treatment plan.² Complainant filed an administrative complaint with the Occupational Safety & Health Administration on October 9, 2014. Respondent moves for summary decision, asserting that the filing was untimely. The parties have fully briefed the motion, and I will grant it.

¹ 49 U.S.C. Section 20109; 29 C.F.R. Part 1982.

² See 49 U.S.C. § 20109(c)(2).

Undisputed Material Facts³

While working as a conductor for Union Pacific on January 27, 2002, Complainant injured his wrist and ankle. R.Ex. A.⁴ On June 30, 2003, Complainant brought a rail workers' compensation action in Arizona state court against Respondent under the Federal Employers Liability Act.⁵ R.Ex. B. After a defense verdict, the court entered judgment for Union Pacific. *Little v. Union Pac. R.R. Co.*, No. C2003-3706 (Ariz. Super. Ct. Dec. 29, 2004). R.Ex. C. Complainant did not appeal, and the judgment became final.

For nearly eight years following this injury in 2003, Complainant did not ask to return to his prior job at Union Pacific. Between 2004 and 2011, he worked in lawn and tree care. C.Ex. 2 at 62-66.

Initial request to return to work (2011). In early 2011, Complainant decided to go back to work at Union Pacific. C.Ex. 2 at 37. His primary care physician signed a medical release dated February 25, 2011. C.Ex. 3. The doctor stated that Complainant had voiced a desire to return to Union Pacific; that he had "100% physically recovered from injuries sustained to the left wrist and right ankle"; and that he could return to work for Union Pacific. C.Ex. 3.

Union Pacific received Complainant's doctor's release in February 2011 but apparently did not respond at that time. C.Ex. 2 at 78.

On June 15, 2011, the chairman of Complainant's local union (Dan Torres) emailed two Union Pacific managers: Superintendent Lance Hardisty and Administrative Manager Mary Gulley.⁶ He wrote:

I'm writing to you today because I have a document that's on my desk regarding conductor Blake little employee #0344860. He has called my office on a daily basis since I took office and has evidently been released from any medical issues according to the document he had sustained while working for the union pacific. Mr. Blake holds seniority in Tucson. I'm requesting immediate attention to this so I know where you both are on this issue and so that I can relay the information back to him as I have no answer for him as to what he needs to do next to get this done with.

R.Ex. D [sic].

Superintendent Hardisty responded on June 24, 2011. He wrote, in relevant part:

³ As I review the facts on summary decision in the light most favorable to the non-moving party (here, Complainant), I make these findings for purposes of this motion only.

⁴ Respondent submitted exhibits (R.Ex.) A – L. Complainant submitted exhibits (C.Ex.) 1 – 14. Without objection, I admit all of these exhibits.

⁵ 45 U.S.C. §§ 51, *et seq.*

⁶ *See* the letterhead on R.Ex. E, which shows the managers' titles.

Based on the medical opinions provided by Mr. Little's treating physician in November 2004, Mr. Little is permanently disabled and not able to perform train service for the Union Pacific Railroad. I have received no information that contradicts the opinions of Mr. Little's treating physicians. After a thorough review of this matter, I must respect[fully] deny Mr. Little's request to return to work for this Company.

R.Ex. E.

I find that one sentence in this language opens the door to a possibility of a different result, namely: "I have received no information that contradicts the opinions of Mr. Little's treating physicians [as of November 2004]." I read Hardisty to suggest that additional medical evidence might show that Complainant is no longer disabled and could return to work.

Complainant saw Hardisty's response in "roughly" June or July 2011. C.Ex. 2 at 42-44. He thought that "his letter denying my return obviously was not accurate." *Id.* at 47.

Union Chairman Torres also disagreed with the denial of Complainant's request to return to work. In a letter to Hardisty on July 1, 2011, he picked up on the opening about medical evidence in Hardisty's June 2011 letter. He wrote that, regardless of Complainant's limitations in 2004, he "has been cleared by a license[d] physician to perform duties for the Union Pacific Railroad. He should be allowed to return to work after he has satisfied the Union Pacific's medical department requirements." R.Ex. F. Torres added that, since Union Pacific was "denying his request" to return to work, Complainant was invoking his right to a medical panel evaluation under Article 59, Section B [of the collective bargaining agreement]. *Id.*⁷

Hardisty answered on July 8, 2011. His response firmly closes the door he left open in the June 24, 2011 letter. Hardisty declined to convene a medical panel because, in Union Pacific's view, the issue of Complainant's medical capacity had "already been determined" in a way that was permanent. As Hardisty wrote:

⁷ This appears to refer to Article 59, Section B of the Western Lines Agreement. (R.Ex. I at 2). The referenced section provides in relevant part:

A trainman who has been removed from his position or restricted from performing service to which he is entitled by seniority because of his physical condition [...] can invoke the following provisions:

* * *

2. A special panel of doctors consisting of one doctor selected by the Company and one doctor selected by the trainman or his representative will be convened. The two doctors will confer. If they cannot agree on the physical condition of the trainman, they will select a third doctor specializing in the disease, condition, or physical ailment from which the trainman is alleged to be suffering.

3. Such panel of doctors will fix a time and place for the trainman to meet with them for examination. The decision of the majority of said panel of doctors on the trainman's physical fitness to remain in service or to have restrictions modified will be controlling on both the Company and the trainman.

As a result of the 2004 trial brought about by Mr. Little against the Union Pacific it was concluded by his treating physicians that Mr. Little was medically and *permanently* disqualified to work in train service. Accordingly, there is no dispute, *it has already been determined* that Mr. Little is incapable of returning to the Union Pacific Railroad as a train service employee and your request to establish a three (3) doctor panel pursuant to Article 59, Section B is hereby respect[fully] declined.

R.Ex. G (emphasis added).

Complainant saw Hardisty's letter of July 8, 2011 later that month – he does not recall the exact date – and continued to discuss the issues with his union representatives. C.Ex. 2, pp. 48-49, 51-52. He understood that Union Pacific had denied his demand for a three-doctor medical review panel. R.Ex. H, pp. 48-49. There is no evidence that either Complainant or his union did anything further at this time to pursue Complainant's request to return to work at Union Pacific.

Second request to return to work (2014). Complainant's next contact with Union Pacific was nearly three years later. On March 18, 2014, William Smith, a union official, wrote on Complainant's behalf to Union Pacific Labor Relations Manager Rebecca Cates.⁸ C.Ex. 2 at 55-56. Complainant saw the letter later that month (March 2014). C.Ex. 2 at 49.

Smith styled his letter as an “appeal on the claim of [Mr. Little]...for reinstatement to service with seniority unimpaired, compensation for all time lost and restoration of vacation credits from May 20, 2011, until he is returned to service.” R.Ex. I at 1. Smith argued that Union Pacific was asserting an estoppel and that no estoppel applied. *Id.* He argued that a three-doctor medical evaluation of Complainant was needed to decide whether Complainant was medically capable of returning to his job. *Id.* at 2. Smith argued that, based on its mistaken understanding of the law, Union Pacific had found Complainant medically disqualified “regardless of any medical expert's determinations.” *Id.* at 3.

On May 7, 2014, Labor Relations Manager Cates answered. She wrote that “Mr. Little is barred from bringing this action because he is bound by the legal principle of collateral estoppel.” R.Ex. J at 1. She explicitly argued the point, citing medical testimony from Complainant's 2004 trial and related case law. *Id.* at 2-6 and 8-10. She argued that, as a result of the FELA litigation in 2004, “a re-determination of Claimant's physical condition has been foreclosed.” As she wrote:

Claimant sued the Carrier based on his assertion that he was permanently disabled and could not return to work as a Railroad Conductor [I]t is the Carrier's position, which has been uniformly upheld in numerous cases, that an employee who claims he has a permanent disability, has in essence severed his employment relationship by his own actions.

⁸ The jobs of these two people are reflected in R.Ex. I.

R.Ex. J at 10.⁹

Filing date. Complainant filed his administrative complaint with the Occupational Safety & Health Administration on October 9, 2014. R.Ex. K.

Legal Analysis

Legal requirements for 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 (2015); 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 draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.72(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

I. Complainant’s OSHA Complaint Was Not Timely Filed As To The Denial Of Employment In 2011.

A complainant alleging a violation of the employee protection provisions of the Federal Rail Safety Act must file a complaint with OSHA “not later than 180 days after the date on which the alleged violation . . . occurs.” 49 U.S.C. § 20109; C.F.R. § 1982.103. The limitations period begins when the employee “knows or reasonably should know that the challenged act has occurred.” *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (5th Cir. 1982). The employee should know of the act’s occurrence when he receives “final, definitive, and unequivocal notice” of the adverse action. *Jenkins v. U.S. Environmental Protection Agency*, ARB No. 98-146 at 13 (ARB Feb. 28, 2003). This requires a communication that is “conclusive” and “free of misleading possibilities.” *Dugger v. Union Pacific RR. Co.*, ARB No. 16-079 at 2 (ARB Aug. 17, 2017).

The date the employee learns *of the employer’s reasons* for the adverse actions does not affect the date that the limitations period begins to run; the relevant date is when the employee knows or should have known of the adverse action itself. *See Coppinger-Martin v. Nordstrom, Inc.*, ARB No. 07-067 (ARB Sept. 25, 2009). Thus, in *Coppinger-Martin*, the complainant did not learn about the employer’s true reasons for her termination until six months after she was notified of the termination. The ARB held that the limitations period began to run when Complainant first received notice of the termination, not when she learned the reasons for it. *See*

⁹ Cates added that Smith’s self-styled “appeal” also was barred under the time requirements in the collective bargaining agreement (the “Agreement Schedule”). *Id.* at 7.

also *Halpern v. XL Capital, Ltd.*, ARB No. 04-120 (ARB Aug. 31, 2005) (holding that a whistleblower did not need evidence of retaliatory motive to file a complaint).

There is no question that Union Pacific initially declined Complainant's request for reinstatement to his prior job on June 24, 2011. As Superintendent Hardisty wrote: "I must respect[fully] deny Mr. Little's request to return to work for this Company." Arguably, however, Hardisty's letter was equivocal, as it elsewhere suggested that there might be a different result if the Company received additional medical evidence sufficient to demonstrate that Complainant had recovered his ability to do the job.

But when the union responded to that opening, argued that the Company should consider Complainant's medical release letter, and asked for a medical review panel, Hardisty refused. He wrote on July 8, 2011, that Union Pacific would not go forward with a review of its decision by convening a three-member medical panel under the collective bargaining agreement. He explained that the FELA litigation in 2004 established as "already determined" that Complainant's inability to do the Union Pacific job was "permanent." Subsequent medical developments therefore were irrelevant.

Hardisty's explanation for declining a medical review panel expresses the finality of Union Pacific's decision. Viewing Complainant's inability to do the job as permanently determined, Union Pacific closed the one avenue that Hardisty's first letter left open: evidence of Complainant's recovering his ability to work. Having received this second answer from Hardisty, neither Complainant nor his union followed up until three years later; even that follow-up was expressly styled as an "appeal" of the earlier decision. All of this is consistent with a finding that, in his second letter (July 8, 2011), Hardisty communicated that Union Pacific's denial of Complainant's application to return to work was final.

In a Title VII case, every "discrete discriminatory act starts a new clock for filing charges alleging that act." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).¹⁰ "Discrete acts such as termination, failure to promote, denial of transfer, or *refusal to hire* are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114 (emphasis added).

Union Pacific's refusal to rehire Complainant was a discrete act that became complete on July 8, 2011.¹¹ The limitations period was triggered when Complainant read Hardisty's letter of that date no later than the end of July 2011. Assuming that he read the letter on July 31, 2011, the limitations period on his filing an OSHA complaint ran 180 days later, on Friday, January 27,

¹⁰ The Court was distinguishing "continuing violation" cases, on which the limitations period does not begin to run until the ongoing violation ceases. See *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) (Title VII and 42 U.S.C. § 1981) (college's denial of tenure was the alleged discriminatory act; the terminal contract that followed the denial of tenure was not a continuing violation and did not restart the limitations period).

¹¹ Complainant does not contend that Union Pacific's second refusal to rehire was a continuing violation, and it was not. See *Johnsen, supra*, at 5; see also *Delaware State College, supra*.

2012.¹² Complainant did not file a complaint with OSHA until October 9, 2014. The filing therefore was untimely as to Union Pacific's denial of his request for rehire in 2011.

What remains is whether Complainant's repetition on March 18, 2014, of the request for a three-member medical panel (aimed at his getting reinstated to work at Union Pacific) started a new running of the 180-day limitations period. I conclude that it did not.

II. Complainant's Renewed Request For Employment In 2014 Did Not Restart The Limitations Period.

An employee does not reset the limitations period simply by repeating the same request and obtaining the employer's repetition of the same denial (or other adverse determination). *Sweatt v. Union Pac. R.R. Co.*, No. 14-CV-7891, 2016 WL 128036 at *3 (N.D. Ill. Jan. 12, 2016), *aff'd*, 678 F. App'x 423 (7th Cir. 2017) (Title VII) (reasoning that the limitations period "would be meaningless if [employee] could reset it simply by requesting the same surgery a second time and again being told 'no'"). "When an initial discriminatory act is time-barred, a later related event is not actionable if it is merely a consequence of the first; to be actionable, the later event must involve an independent act of discrimination." *Brown v. Unified School Dist. 501, Topeka Pub. Schools*, 465 F.3d 1164, 1187 (10th Cir. 2006) (Title VII and 42 U.S.C. § 1981); *see Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980). Thus, after an employer previously informed an employee that he was not eligible for rehire, the employer's repetition of this statement when employee's union referred him for work did not restart the limitations period. *See Johnsen v. Houston Nana, Inc.*, ARB No. 00-064 at 4-5 (ARB Jan. 27, 2003).

Complainant attempts to do here what this case law does not permit. In 2014, he renewed with some added legal argument (about estoppel) the same request for a medical review panel that he made – and Union Pacific rejected – in 2011. The purpose was the same: to achieve his return to employment with the Company. Union Pacific had already denied these requests. Complainant's renewal of the same requests followed by Union Pacific's repetition of the same denials does not restart the 180-day filing requirement on a claim that had become stale on January 27, 2012. *See Sweatt, Brown, Johnsen, supra.*

Complainant raises two related arguments to avert this result. Each is unavailing.

First, Complainant argues that there is a genuine issue of material fact about whether Hardisty had considered Complainant's doctor's medical release when Hardisty responded to Torres on June 24, 2011 and July 8, 2011. But this is not material to the outcome.

In his letter of July 8, 2011, Hardisty stated that Union Pacific would not consider additional medical evidence because the question of Complainant's ability to do the job had already been determined in the negative in the FELA litigation in 2004 and was permanent, not open to revision based on updated medical information. Union Pacific would not return Complainant to his job regardless of what a medical review panel might say. Given that Hardisty stated that the

¹² Represented by counsel, Complainant does not assert – nor are there facts on the record to support – application of equitable tolling.

issue already had been determined in a manner that was permanent, the existence of other information he could have considered (such as the medical release from Complainant's primary care physician) was not an indication that Union Pacific's decision was anything other than final.

Moreover, the question whether Union Pacific considered every fact that it could have considered is immaterial. For the present purposes, it is irrelevant whether Union Pacific's consideration of Complainant's request to return to work was thorough, thoughtful, fair, accurate, a proper application of collateral estoppel, or even lawful. The relevant question is whether Union Pacific communicated to Complainant its denial of the employment in a way that was "final, definitive and unequivocal." *See Jenkins, supra*. In 2011, Union Pacific denied Complainant's request and reiterated its denial in a way that was unequivocal when Complainant requested a medical panel. Hardisty said nothing in his letter of July 8, 2011, to mislead Complainant into a belief that the Company would not make a final decision until it reviewed his doctor's release. The statement of July 8, 2011, leaves nothing open, and that is the question relevant to triggering the running of the limitations period.

Complainant's second argument is similar to his first, but focuses on his subjective perception. He asserts that he *believed* Hardisty's letters relied on outdated information about his medical eligibility and thus were not final. This argument fails for two reasons.

Again, the finality of Union Pacific's decision differs from whether its reasoning was based on complete information (or instead could have been supplemented with more current information). Accepting for these purposes that Complainant believed that Union Pacific should have considered his doctor's release, that does not mean that he believed Union Pacific in fact *would* consider the release before making a final decision. What Hardisty wrote was that Union Pacific's decision was based on Complainant's permanent condition in view of the 2004 FELA litigation and irrespective of any later medical opinion. That raises no doubt about the finality of the decision that Union Pacific communicated, and again, a denial of the employment opportunity is what triggers the limitations period, not the adequacy, fairness, or legality of the employer's decisionmaking.

Second, a complainant's subjective belief that the employer's adverse decision is not final is insufficient, standing alone, to defeat summary decision.¹³ Notice of the adverse action triggers the limitations period as soon as the employee "knows *or reasonably should know* that the challenged act has occurred." *Allen, supra*, 665 F.2d at 692 (emphasis added). The "reasonably should know" prong of this test means that Respondent is still entitled to summary decision if it can establish that a reasonable person would have known that the adverse action had occurred in July 2011.

I find that, Complainant's subjective beliefs notwithstanding, no reasonable person could understand Mr. Hardisty's letters in June and July 2011 as anything other than a final, definitive,

¹³ As this is a motion for summary decision, I do not evaluate Complainant's credibility; I accept for this motion Complainant's statement of his subjective belief about the finality of Union Pacific's denial of re-employment in 2011.

unequivocal denial of Complainant's request to be returned to his prior job. As discussed above, Hardisty's letter of July 8, 2011, closed any door that he left open in the June 2011 letter. He explained that, because of the FELA litigation, new medical evidence would not change the result. That removed the only contingency; it meant that Union Pacific had reached a final decision not to return Complainant to its employ. Accordingly, Complainant should have known by the end of July 2011, when he read Hardisty's second letter, that the adverse action had occurred. That triggered the 180-day limitations period.

Order

For the foregoing reasons, Respondent Union Pacific's motion for summary decision is GRANTED. Complainant's claim is DENIED, and this case is DISMISSED.

SO ORDERED.

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.

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

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).