



**Issue Date: 26 April 2018**

**CASE NO.: 2018-FRS-00006**

**IN THE MATTER OF:**

**NICHOLAS AYMOND and  
TIMOTHY MARTINO  
Complainants**

**v.**

**NATIONAL RAILROAD PASSENGER CORP. (AMTRAK)  
Respondent**

**ORDER GRANTING RESPONDENT'S MOTION FOR DISPOSITIVE ACTION  
AND DISMISSING COMPLAINT**

This case arises from a complaint filed by Nicholas Aymond and Timothy Martino ("Complainants") against National Railroad Passenger Corp. (Amtrak) ("Respondent") 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. The 9/11 Act was the result of a Conference Report, H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.).

Section 1521 of the 9/11 Act amends the FRSA by modifying the railroad carrier employee whistleblower provision- both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121. The amended Section 20109 prohibits covered employers from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee related to the terms and conditions of his employment for engaging in protected conduct. This conduct includes providing information to covered employers which the employee reasonably believes constitutes violations of federal law, rules, or regulations related to railroad safety or security. Additionally, the amended Section 20109 will follow the AIR 21 procedure for adjudication at the U.S. Department of Labor.

On January 16, 2018, Respondent moved for dismissal of this matter on the grounds that Complainants' claims are barred by the doctrines of *res judicata* and collateral estoppel and based upon Complainants' failure to prove any element of their claim under the FRSA. For the reasons discussed below, Respondent's Motion for Dispositive Action is granted.

## BACKGROUND

In February 2013, after completing a yearly overtime job in Atlanta, Complainants were passengers in an Amtrak vehicle that was involved in a car accident. Complainants were injured in the accident and reported their injuries to Respondent. As a result of reporting their injuries, Complainants allege Respondent outsourced the overtime work to an outside contractor. (Compl. Resp., p. 2; Resp. Mtn., EX-3).

In July 2013, Complainants filed a complaint with OSHA alleging retaliation by Respondent under the FRSA for injuries sustained in the February 2013 accident. After an investigation of Complainants' allegations, OSHA found no reasonable cause to find that Respondent had retaliated against Complainants for engaging in any protected activity. Complainants objected to OSHA's findings and requested a formal hearing before an administrative law judge. The matter was assigned to ALJ Lee Romero who rendered a Decision and Order in the Complainants' favor in September 2015. (Resp. Mtn., p. 2, EX-1-3).

Specifically, ALJ Romero ordered Respondent pay back pay for 2014 and 2015 to Complainants in the amount of \$5,000 each, along with compensatory damages of \$1,000 each. Neither party appealed ALJ Romero's Decision and Order. (Resp. Mtn., pp. 2-3, EX-3).

On June 16, 2017, Complainants filed a second whistleblower complaint alleging Respondent had continued to violate the FRSA by denying overtime in 2017 and 2018 as a result of reporting their work-related injuries in February 2013. (Resp. Mtn., p. 3, EX-4; Compl. Resp., p. 4). On October 2017, OSHA found no reasonable cause to believe or support that a violation of the FRSA occurred and dismissed the complaint. (Resp. Mtn., p. 4, EX-5).

In accordance with the regulations, Complainant timely objected to OSHA's findings and requested a hearing before an administrative law judge. The matter was assigned to the undersigned, and a Notice of Hearing & Pre-Hearing Order was issued on December 8, 2017.

On January 16, 2018, the undersigned received Respondent's Motion for Dispositive Action. On January 23, 2018, I ordered Complainant to submit a response to Respondent's Motion by March 2, 2018. I also allowed Respondent the opportunity to submit a reply no later than March 16, 2018.

Thereafter, the undersigned timely received Complainant's Response to Respondent's Motion for Dispositive Action ("Compl. Resp."). On March 16, 2018, Counsel for Respondent submitted its Reply in Further Support of its Motion for Dispositive Action ("Reply").

On March 28, 2018, Complainant filed a Motion to Strike Respondent's Reply, or Alternatively, Motion for Permission to File Sur-Reply. In particular, Complainant argued Respondent's reply was procedurally impermissible and in violation of the Pre-Hearing Order which does not authorize the filing of reply briefs. Complainant also contended Respondent did not seek or obtain my authorization before filing its reply. Accordingly, I granted Complainant's Motion for Permission to File Sur-Reply. Thereafter, the undersigned's office timely received Complainant's sur-reply ("Sur-Reply") on April 13, 2018.

## ISSUES PRESENTED

Respondent's Motion for Dispositive Action presents the following issues for resolution:

1. Whether Complainants' claims are barred by the doctrines of *res judicata* and collateral estoppel based on ALJ Romero's 2015 Decision and Order
2. Whether Complainants can establish the elements of their FRSA retaliation claim

## LEGAL STANDARDS

### A. Motion to Dismiss

Under 29 C.F.R. § 18.70(c), any party may move for disposition of the pending proceeding when consistent with statute, regulation, or executive order. A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.

### B. Summary Decision Standard

The standard for granting summary judgment or decision is set forth at 29 C.F.R. § 18.72 (2015), which is derived from Federal Rule of Civil Procedure (FRCP) 56. Under Section 18.72, a party may move for summary decision, identifying each claim or defense on which summary decision is sought. An administrative law judge shall grant summary decision if the movant shows that there is no genuine issue of material fact and the movant is entitled to decision as a matter of law. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011). "A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The primary purpose of summary decision is to isolate and promptly dispose of unsupported claims or defenses. *Id.*

If movant 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 facts alleged 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).

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 decision, 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 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. v. Catrett*, 477 U.S. 317, 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.

### **C. Standards Applicable to an FRSA Claim**

The FRSA, under which Complainants brings this claim, generally provides that a rail carrier may not retaliate against an employee for engaging in certain protected activity, including reporting, in good faith, a hazardous safety or security condition. *See* 49 U.S.C. § 20109.

FRSA investigatory proceedings are governed by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”). 49 U.S.C. § 20109(d)(2). AIR 21 prescribes different burdens of proof at different stages of the administrative process. Under AIR 21, a complainant must establish by a preponderance of the evidence that he engaged in a protected activity that was a “contributing factor” motivating the respondent to take an adverse employment action against him. Thereafter, a respondent can only

rebut a complainant's case by showing by clear and convincing evidence that it would have taken the same adverse action regardless of a complainant's protected action. *See Menefee v. Tandem Transportation Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006)); *see also Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007) (Complainant must prove by a preponderance of the evidence that he engaged in protected activity, Respondent knew of the protected activity, Complainant suffered an unfavorable personnel action, and the protected activity was a contributing factor in the unfavorable decision, provided that the Complainant is not entitled to relief if the Respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event).

Consequently, in order to meet their burden of proving a claim under the FRSA, Complainants must prove by a preponderance of the evidence that: (1) they engaged in protected activity, (2) Respondent knew of the protected activity, (3) they suffered an unfavorable personnel action, and (4) such protected activity was a contributing factor in the unfavorable personnel action. *Thompson v. BAA Indianapolis LLC*, ALJ No. 2005-AIR-32 (ALJ Dec. 11, 2007). A "contributing factor" includes "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, at 6 (ARB Feb. 29, 2012).

### **THE CONTENTIONS OF THE PARTIES**

In support of its Motion for Dispositive Action, Respondent relies on the following supporting documentation: (1) the declaration of Orla G. Thompson, Esq.; (2) a copy of the OSHA Notice dated July 15, 2013 and complaint letters dated July 2, 2013; (3) OSHA's October 2013 findings; (4) a copy of ALJ Romero's 2015 Decision and Order; (5) a copy of the OSHA Notice dated July 26, 2017 and complaint letter dated June 16, 2017; (6) OSHA's October 2017 findings; and (7) a copy of Complainants' OALJ complaint dated December 8, 2017. (Resp. Mtn., EX-1-6).

Respondent contends that dismissal in its favor as a matter of law is proper and that Complainant's claim against Respondent should be dismissed. Specifically, in its Memorandum of Law, Respondent contends the following:

1. Complainants' claims are barred by the doctrines of *res judicata* and collateral estoppel based on ALJ Romero's 2015 Decision and Order.
2. Complainants cannot plainly satisfy the elements of their FRSA claim.

(Resp. Mtn. for Summary Decision, pp. 4-7).

In their Response, Complainants contend that Respondent's Motion should be denied as to each of Respondent's grounds in support of its Motion. Specifically, Complainants argue the 2015 Decision and Order did not conclusively determine that they were not entitled to lost overtime opportunities beyond 2015, nor did it find that damages for future lost overtime was

speculative. Rather, Complainants allege they were not awarded future lost overtime beyond 2015 since such damages require speculation that Respondent would subsequently violate the FRSA by outsourcing overtime work in the future. Indeed, any justiciable retaliation claim for lost overtime opportunities for any year beyond 2015 had not yet occurred. As such, Complainants argue that causes of action that accrue after the prior proceeding was filed are not barred by *res judicata* or collateral estoppel. (Compl. Resp., pp. 5-8).

Regarding Respondent's allegation that they cannot establish a *prima facie* case under the FRSA, Complainants allege this argument is meritless and misplaced. In particular, Complainants argue Respondent had not given a reason for why it has continued to outsource the overtime work or explained the retaliatory evidence cited in the 2015 Decision and Order. Further, Complainants contend Respondent's argument that the temporal proximity between the protected activity and outsourcing of overtime work is too remote to support an inference of causation is misplaced for two reasons. First, Complainants allege the adverse action can only occur once a year if Respondent chooses not to send its employees. Second, the cases cited by Respondent in support of its argument are not FRSA retaliation cases and involved different causation standards that are inapplicable to the instant matter. (Compl. Resp., pp. 8-9).

In its reply, Respondent contends Complainants incorrectly presume that their right to sue for lost overtime in 2017 and 2018 had not yet accrued when they pursued their prior FRSA claim and that they can continue to assert claims for lost overtime every few years based on a single protected activity in 2013. Rather, the ALJ adjudicated their damages claim, and the claims presented in the instant matter mirror the claims litigated in the 2015 Decision and Order. Since Respondent's decision to contract the overtime work to third parties was permanent, Complainants cannot assert any new claims for lost overtime. (Reply, pp. 1-5).

Regarding the merits of Complainants' claim, Respondent argues Complainants have not alleged and produced evidence to show their protected activity in 2013 was a contributing factor by Respondent to retaliate against them many years later by depriving them of overtime opportunities. Rather, there is no evidence of any other retaliatory actions closer in time to the original decision to contract out the overtime work, nor is there any evidence that Respondent has offered any overtime to one of its employees. Further, Respondent argues the gap in time between the protected activity in 2013 and the alleged adverse action in 2017 and 2018 is far too prolonged to permit a reasonable inference that it acted with an independent retaliatory intent. (Reply, pp. 5-8).

In their sur-reply, Complainants again contend their claims are not barred by *res judicata* or collateral estoppel based on Respondent's admission that retaliation claims accruing after the commencement of the prior proceeding are not barred. In addition, Complainants argue the instant matter was not actionable in the prior proceeding since the discrete retaliatory acts had not yet occurred. Further, Complainants allege Respondent's decision to outsource the overtime work is discretionary and made on a year-by-year basis, meaning Respondent had not outsourced the overtime work in 2017 and 2018 when it initially outsourced the work in 2014. (Sur-Reply, pp. 1-4).

In addition, Complainants contend Respondent did not discharge its initial summary decision burden by producing record evidence demonstrating the absence of a genuine issue of material fact. Specifically, Complainants argue Respondent's contention that the lapse of time between the reports of injury and decision to outsource the overtime work is not a basis for summary decision. Even if Respondent carried its burden, then Complainants assert the factual setting surrounding the lost overtime opportunities are suggestive of a retaliatory motive and that the question in the instant matter is whether the motive to outsource the work has changed since 2015. (Sur-Reply, pp. 5-7).

## DISCUSSION

### A. Whether the Doctrines of *Res Judicata* and Collateral Estoppel Apply

The main issue presented in Respondent's Motion is whether ALJ Romero's 2015 Decision and Order bars the claims asserted by Complainants in the instant matter. Dismissal under each doctrine will be discussed separately.

#### 1. *Res Judicata*

*Res judicata* bars a "second suit raising claims based on the same set of transactional facts...[I]t applies to the final judgment of an administrative tribunal...[where] the parties have had an adequate opportunity to litigate." See *Matter of Christopher R. Chin, Young*, 2015 WL 5240550 (Bd. C.A. Sept. 4, 2015)(citing *U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422)(applying *res judicata* based on a final judgment in an earlier administrative determination made on claimant's request for relocation benefits, where claimant made the same request in a subsequent action before the FAA).

A party is barred from relitigating a claim under the doctrine of *res judicata* if: (1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *Cardona v. Holder*, 754 F.3d 528, 530 (8th Cir. 2014) (quoting *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990)). However, *res judicata* does not bar claims that did not exist at the time of the prior litigation. *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986).

In its Motion, Respondent argues *res judicata* applies to bar Complainants' current claim since the 2015 Decision and Order denied the request for damages covering lost overtime for any years after 2015. (Resp. Mtn., p. 6). In response, Complainants state they did not have a justiciable retaliation claim for lost overtime opportunities in 2017 and 2018 because such retaliatory adverse actions had not yet occurred in 2015. (Compl. Resp., p. 6).

In determining whether *res judicata* bars Complainants' current claim, neither party disputes the first two elements are met. In fact, Complainants acknowledge the 2015 Decision and Order was rendered by a court of competent jurisdiction and was a final judgment on the merits. (Compl. Resp., pp. 2, 6). The only issue disputed by the parties is whether the same cause of action is involved in both cases. *Cardona v. Holder*, 754 F.3d at 530.

In the first proceeding, Complainants alleged they were denied overtime opportunities as a result of their reports of personal injury due to an automobile accident in 2013. Based on this retaliatory action, Complainants asserted they were entitled to back pay for the lost overtime work in 2014 and 2015 as well as damages for each year of lost overtime until the age of 65. (Resp. Mtn., EX-1). In the instant matter, Complainants' 2017 OSHA complaint alleges Respondent denied them overtime work opportunities in 2017 and 2018 in retaliation for reporting their injuries in 2013 and due to the 2015 Decision and Order. Since ALJ Romero did not award damages for the loss of any overtime after 2015, Complainants allege these damages are new and subject to a new whistleblower complaint. (Resp. Mtn., EX-4). Complainants also allege the denials of overtime work in 2017 and 2018 constitute new adverse actions. (OALJ Comp., pp. 1-3).

Courts have adopted a transactional approach to the identity of claims question drawn from § 24(b) of the Restatement (Second) of Judgments. *Keith v. Aldridge*, 900 F.2d 736 (4th Cir. 1990) (quoting *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981)). Under the Restatement (Second) standard, "the appropriate inquiry is whether the new claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment." *Harnett*, at 1313.

In applying that standard to the instant matter, I find Complainants' current claim arises out of the same transaction that was resolved by the judgment in the prior proceeding. As mentioned above, Complainants allege in the instant matter that they are entitled to damages based on the denial of overtime work opportunities in 2017 and 2018 in retaliation for reporting their injuries in 2013 after ALJ Romero had ruled in the first suit that their protected activity was a contributing factor to their loss of overtime opportunities. These claims presented in the instant matter mirror those claims presented by Complainants in the prior proceeding wherein they alleged they had lost overtime opportunities due to Respondent contracting out this work to third parties. Thus, I find the claims presented in the instant matter arise from the same events from those at issue in the first suit.

While Complainants argue the claims alleged in this matter did not exist at the time of the first suit since the loss of overtime work in 2017 and 2018 had yet not occurred, the only evidence offered by Complainants regarding the period of performance of the overtime work by a third party was a services contract between Respondent and the third party which indicates an initial period performance from 2014 through 2015. A review of that contract indicates that Respondent, at its sole discretion, retains the option to extend the base contract terms for up to five one-year periods. (Sur-Reply, CX-1). In addition, CX-1 also indicates the services contract remained in full force and effect between Respondent and the third party on March 23, 2015. Contrary to Complainants' assertion, the outsourcing of the overtime work to a third party is a continuing act since 2014, and not discrete retaliatory acts that accrued after the prior proceeding.

Therefore, I conclude Complainants' claim damages for lost overtime opportunities in 2017 and 2018 did exist at the time of the first suit. Indeed, Complainants offered no new allegations in their OALJ complainant, nor did they produce any evidence that they had been subject to other adverse actions they can reasonably tie to their original protected activity.

Rather, Complainants' current claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment. *See Harnett*, at 1313. Consequently, *res judicata* applies to the instant matter and bars Complainants' claim against Respondent. Accordingly, summary decision in favor of Respondent is appropriate as a matter of law.

## 2. Collateral Estoppel

Next, Respondent contends collateral estoppel bars Complainants from pursuing damages for lost overtime for any years after 2015. Collateral estoppel bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *Mendoza v. United States*, No. CV 17-5035, 2017 WL 3917148, \*3 (E.D. La. Sept. 7, 2017). Collateral estoppel prevents a party from relitigating an issue if: (1) the same issue has been actually litigated and submitted for adjudication; (2) the issue was necessary to the outcome of the first case; and (3) precluding litigation of the contested second matter does not constitute a basic unfairness to the party sought to be bound by the first determination. *See In the Matter of Syed M.A. Hasan, v. Sargent & Lundy*, 2007 WL 2573634, at \*4 (affirming final ALJ decision that collateral estoppel bars the claim of a complainant who brought a discrimination complaint which raised the same issue as his prior complaint); *see also Dresser v. Ohio Hemprey, Inc.*, No. 98-2425, 2010 WL 3720420, at \*3 (Sept. 13, 2010) (citing administrative decisions are judicial in nature where the elements of collateral estoppel were met and applied).

In regards to the first element of determining whether collateral estoppel applies, the issue of whether Complainants were entitled to damages for future lost overtime opportunities was actually litigated by the parties and submitted to ALJ Romero for adjudication.

In his 2015 Decision and Order, ALJ Romero stated:

The undersigned concedes that a calculation of \$2,500 per year for overtime work is a reasonable figure and supported in the record by substantial evidence. As indicated by case precedent, the need for an exact figure does not provide a valid reason to withhold overtime pay from a complainant who suffered illegal discrimination. I do not agree, however, that Complainants in the instant matter are entitled to an unfettered amount of overtime for every year until they reach the age of 65. While exact certainty in calculations is not required, I find that finality is necessary.

To award Complainants such a virtually indefinite award for hypothetically performing overtime work every year until the age of 65 is unreasonable. To make such an award would assume that Respondent could never contract out its overtime work for valid, non-discriminatory reasons, and it would assume that both Complainant Aymond and Complainant Martino would indeed be employed for Amtrak until the age of 65. Consequently, I award Complainants overtime pay for only the years 2014 and 2015, totaling an award of \$5,000.00 apiece. Making

any further awards would be an abuse of discretion. While the standard requires that any uncertainties in determining the award be assessed against the employer, I find that to award Complainants \$90,000 and \$15,000, respectively, would be speculative beyond what the standard assumes, and it would unnecessarily punish Respondent as disguised punitive damages...

(Resp. Mtn., EX-3 at 67-68).

In the present matter, Complainants allege they are entitled to damages for Respondent's denial of overtime work to them in 2017 and 2018 "as a result of reporting their work related injuries in 2013 and a favorable decision by an Administrative Law Judge in 2015." (Resp. Mtn., EX-5 at 1). The issues presented in these claims mirror the issues that were litigated, adjudicated, and decided in the 2015 Decision and Order and are an attempt by Complainants to reassert the same damage claims that were denied based on the same set of facts. I agree with Respondent that the 2015 Decision and Order bars the claims presented by Complainants in the instant matter. The record evidence clearly reflects ALJ Romero's Decision and Order denied the request for damages covering any lost overtime pay for any years after 2015. (Resp. Mtn., EX-3 at 67-68).

In the prior proceeding, Complainants averred "Respondent eliminated its regular practice of sending ten New Orleans workers to Atlanta to work on a highly prized job that provided significant overtime opportunities in retaliation for the report of work-related injuries." (Resp. Mtn., EX-3 at 41). Contrary to Complainants' assertions, ALJ Romero accounted, considered, and denied Complainants' argument that they were entitled to damages for the lost overtime work for every year until they reach the age of 65. (Resp. Mtn., EX-3 at 67-68). Indeed, in denying damages for overtime pay after years 2014 and 2015, ALJ Romero reasoned "finality is necessary" in only awarding damages for overtime pay for years 2014 and 2015. *Id.* Accordingly, the first element of whether the doctrine of collateral estoppel applies is met.

Next, the second element regarding whether the issue was necessary to the outcome of the first case is met. *See Hasan, supra*. In the prior proceeding, the Decision and Order on the merits denied Complainants' request for damages covering list overtime for any years after 2015. Neither party appealed the Decision and Order, making it a final order in the prior matter. Accordingly, there has been a final judgment, and the determination of whether Complainants were entitled to damages for lost overtime pay after 2015 was a critical and necessary part of the Decision and Order in the earlier action. Therefore, the second element is satisfied.

Finally, I find precluding litigation of the instant matter does not constitute a basic unfairness to Complainants. Indeed, Complainants seek to reassert the prior argument that they are entitled to damages for lost overtime previously considered and denied by ALJ Romero. Moreover, while Complainants argue otherwise, the 2015 Decision and Order did not find that the claim for future damages was premature since the right had not yet accrued. Rather, ALJ Romero found an award of damages until age 65 would be "speculative" based on many unknown factors and "would unnecessarily punish Respondent." (Resp. Mtn., EX-3 at 68). I agree with ALJ Romero. By allowing Complainants an opportunity to reassert their claim for

damages for lost overtime in 2017 and 2018, Respondent, and not Complainants, would be unfairly prejudiced. Therefore, all three elements are satisfied. Accordingly, I find collateral estoppel bars Complainants from pursuing damages for lost overtime for any years after 2015. Accordingly, summary decision in favor of Respondent is also proper in this matter on this basis.

**B. Whether Complainant's alleged protected activity was a contributing factor in his termination**

Alternatively, Respondent also asserts Complainants cannot satisfy the elements of their FRSA claim. In particular, Respondent contends the four-year time gap between the reports of injury and lost overtime opportunities forecloses any claim of unlawful retaliation as a matter of law. (Resp. Mtn., pp. 7-8).

Under the FRSA, a complainant must establish by a preponderance of the evidence that the protected activity was a contributing factor to the retaliatory discrimination, not the sole or even predominant cause. *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-00015 (ARB Mar. 29, 2013); *see also Araujo v. New Jersey Transit Rail*, 708 F.3d 152 (3rd Cir. 2013). As recently stated by the ARB in its decision in *Palmer v. Canadian National Railway*:

A contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision. We want to reemphasize how low the standard is for the employee to meet, how broad and forgiving it is. "Any" factor really means any factor. It need not be "significant, motivating, substantial or predominant"—it just needs to be a factor. The protected activity need only play some role, and even an insignificant or insubstantial role suffices.

*Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-154, slip. op. at 53 (ARB Sept. 30, 2016)(en banc)(internal citations omitted). The contributing factor element "may be established by direct evidence or indirectly by circumstantial evidence." *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12, slip. op. at 11 (ARB Oct. 26, 2012).

The ALJ must consider all the relevant, admissible evidence and make a factual determination, under the preponderance of the evidence standard of proof to determine whether complainant's protected activity played any role whatsoever in the adverse personnel action. *Palmer, supra*, slip. op. at 59-60. If the protected activity did play a role in the adverse action, then the complainant prevails at this step; if not, then the employer prevails at this step. *Id.* However, if there is a factual dispute on this question, the ALJ must then sift through the evidence and make a factual determination. *Id.* This requires the ALJ to articulate clearly what facts he found and the specific evidence in the record that persuaded the ALJ of those facts. *Id.*

In the present matter, Complainants allege their reports of injury in 2013 was a contributing factor to the overtime work denials in 2017 and 2018. (OALJ Compl., pp. 1-3). Other than the 2015 Decision and Order, Complainants have set forth no evidence that shows the

protected activity contributed to the overtime work denial in 2017 and 2018. While the contributing factor standard does not require the employee “conclusively demonstrate the employer’s retaliatory motive,” it does require that the employee prove “intentional retaliation prompted by the employee engaging in protected activity.” *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) (quotation omitted).

Respondent does not dispute that Complainants engaged in protected activity in 2013 or that they suffered an adverse employment action. Instead, Respondent seeks summary decision on the basis that they cannot show that any protected activity was a contributing factor in the overtime work denial.

In reviewing Respondent’s Motion, I find Respondent has met its burden of showing that Complainants have failed to establish any nexus between the protected activity and Respondent’s overtime work denial. I agree with Respondent that the lack of temporal proximity undermines Complainants’ claim. Specifically, I note the four-year gap between Complainants’ protected activity in 2013 and the overtime work denial in 2017 is far too remote to allow a reasonable inference that the protected activity contributed to the loss of overtime opportunities. In reaching this finding, I note other courts have rejected shorter time periods as insufficient to establish a causal connection between the protected activity and the retaliatory discrimination. *See Kipp v. Mo. Highway & Transp. Comm’n*, 280 F.3d 893, 897 (8th Cir. 2002) (holding that “the interval of two months... so dilutes any inference of causation that... the temporal connection could not justify a finding in [the plaintiff’s] favor on the matter of causal link”); *Kuduk v. BNSF Railway Co.*, 980 F. Supp. 2d 1092, 1101 (D. Minn. 2013) (Davis, C.J.) (explaining that “a plaintiff cannot establish a *prima facie* case of retaliation based on temporal proximity alone when the termination occurred two months after the protected conduct”). Further, the Supreme Court has held “that a period of twenty months between protected activity and adverse employment action suggests, by itself, no causality at all.” *See Clark Co. School Dist. v. Breeden*, 532 U.S. 268 (2001).

Moreover, determining whether the Complainants’ 2013 protected activity contributed in any way to Respondent’s decision to use an independent contractor to complete the overtime work in this matter does not require any factual determination. In their response, Complainants attempt to produce sufficient evidence showing the existence of genuine issues of material fact. Specifically, Complainants argue the adverse action can only occur once a year by its very nature.<sup>1</sup> In addition, Complainants also argue Respondent has not presented any explanation of the retaliatory evidence cited in the 2015 Decision and Order or given any different reason as to why it has continued to outsource the overtime work.

Although Complainants allege the lapse in time between the protected activity and adverse action alone does not demonstrate their ability to present witnesses, documents, and other evidence sufficient to carry their burden of proof, Complainants have failed to offer any evidence to demonstrate the existence of a material issue of fact to preclude summary decision. Rather, Complainants appear to rest on the allegations contained in their OALJ complaint. Further, while Complainants are correct in their assertion that temporal proximity is not an

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<sup>1</sup> In response to Respondent’s temporal proximity argument, Complainants also allege the cases cited by Respondent in support of its position are not FRSA retaliation cases and are inapplicable in the instant matter. I disagree.

element of an FRSA retaliation claim, they have failed to submit any evidence to show that the totality of the circumstances must be considered. Instead, Complainants mistakenly suggest Respondent has a retaliatory motive in outsourcing the overtime work each year.

Accordingly, I find Respondent has shown the absence of evidence supporting Complainants' allegation their reports of injury in 2013 was a contributing factor to the overtime work denials in 2017 and 2018. This shifts the burden to Complainants to set forth specific facts under 29 C.F.R. § 18.72. However, Complainants have failed to provide specific facts showing that there is a genuine issue of material fact to be resolved at a hearing. Accordingly, summary decision in favor of Respondent is also proper in this matter on this basis.

### **CONCLUSION**

Respondent has shown no dispute of material fact regarding whether the doctrines of *res judicata* and collateral estoppel bar Complainants' current claim in this matter. Accordingly, I conclude as a matter of law, viewing the evidence in a light most favorable to Complainants, that the doctrines of *res judicata* and collateral estoppel are applicable to the instant matter. Therefore, Respondent is entitled to summary decision pursuant to 29 C.F.R. § 18.72(a).

In addition, Respondent has also shown no dispute of material fact regarding whether Complainants' reports of injury in 2013 was a contributing factor to the overtime work denials in 2017 and 2018. Accordingly, I conclude as a matter of law, viewing the evidence in a light most favorable to Complainants, that Complainants failed to set forth specific facts showing a dispute regarding whether the reports of injury in 2013 was a contributing factor to the overtime work denials in 2017 and 2018. Therefore, Respondent also is entitled to summary decision pursuant to 29 C.F.R. § 18.72(a) on this basis.

### **ORDER**

For the reasons stated above, **IT IS HEREBY ORDERED** that Respondent's Motion for Dispositive Action is **GRANTED**.

**IT IS FURTHER ORDERED** that the claim in the above-captioned matter is **DISMISSED** with prejudice and Complainants' request for a hearing is **WITHDRAWN**.

**SO ORDERED** this 26<sup>th</sup> day of April, 2018, at Covington, Louisiana.

**CLEMENT J. KENNINGTON**  
**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](mailto:Boards-EFSR-Help@dol.gov)

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

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

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

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

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