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Office of Administrative Law Judges
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Issue Date: 19 October 2020

Case No.: **2020-FRS-00007**
OSHA No: 5-2780-19-073

In the Matter of:

ANDRE CIESLICKI,
Complainant,

v.

**SOO LINE RAILROAD COMPANY,
D/B/A CANADIAN PACIFIC,**
Respondent.

Appearances:

Andre Cieslicki,
Pro Se

Tracey Holmes Donesky, Esq.
Greta Bauer Reyes, Esq.
Stinson LLP
For Respondent

Before: Larry S. Merck
Administrative Law Judge

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter arises under the Federal Railroad Safety Act (FRSA), 49 U.S.C. §20109, as amended by the 9/11 Commission Act of 2007. Section 20109 protects employees of railroad carriers from discrimination based on their prior protected activity pertaining to railroad safety or security.

On August 29, 2019, Andre Cieslicki ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that his employer, Soo Line Railroad Company d/b/a Canadian Pacific ("Respondent" or "CP") terminated him in violation of the anti-retaliation provision of the FRSA. In his OSHA statement, Complainant alleged that, due to Respondent's retaliation against him, he "was never reinstated, never contacted, nor

offered any non-safety critical work,” and he “was not afforded a single company benefit to even pay for commencing necessary return to work processes.” (CX D at 2.)¹

On October 10, 2019, OSHA issued a decision dismissing the complaint on the grounds that Complainant did not timely file the complaint. (CX D at 4.) On October 24, 2019, Complainant requested a hearing pursuant to 29 C.F.R. § 1982.105. This case was assigned to me for adjudication on November 26, 2019.

On January 16, 2020, Respondent filed a *Motion to Dismiss* (“RMD”), asserting that the complaint should be dismissed due to an untimely filing. On February 4, 2020, I issued an *Order to Show Cause Why the Case Should Not be Dismissed for Failure to Timely File a Complaint*. On March 2, 2020, Complainant filed a *Response to the Motion to Dismiss* (“CRMD”).²

BACKGROUND

Complainant was an employee of Respondent until April 24, 2015, when he was terminated after failing to protect service³ when called for duty in violation of the General Code of Operating Rules 1.13: *Reporting and Complying with Instructions*, as well as 1.15: *Duty – Reporting and Absence*. (CX E.)

Complainant filed an initial complaint with OSHA concerning this termination on October 7, 2015.⁴ On March 8, 2018, subsequent to OSHA’s dismissal of the complaint, Complainant requested a hearing before the Office of Administrative Law Judges (“OALJ”). On June 5, 2019, this Court also dismissed the Complaint, granting Respondent’s *Motion to Dismiss* based on a finding that Complainant failed to state a claim upon which relief could be granted.⁵ Complainant appealed this Court’s decision to the Administrative Review Board (“the Board”). Upon review, the Board disagreed.⁶ This Court is awaiting the return of the records from the Board. Once the files are received, this Court will notify the parties and will comply with the decision of the Board.

¹ The parties submitted several exhibits in connection with Respondent’s *Motion to Dismiss*. Respondent submitted Exhibits A, B, and C, which are labeled as such. Complainant’s exhibits are labeled as “Exhibit D, Exhibit E, Exhibit F, Exhibit G, Exhibit H, Exhibit J, and Exhibit K,” with no “Exhibit A, B, C, or I” and with a reference to Respondent’s “Exhibit B”. (Complainant’s *Response to Motion to Dismiss* “CRMD” at 1-2.) Complainant’s Exhibits are designated “CX” and Respondent’s Exhibits are designated “RX.”

² On March 2, 2020, Complainant also filed a Request for Summary Judgment (“CRSJ”). Respondent filed an Opposition Memorandum to Complainant’s Request to Summary Judgment (“ROSJ”) on March 17, 2020. In this Order, I will only address Respondent’s *Motion to Dismiss*.

³ See *Helgeson v. Soo Line R.R. Co.*, ALJ No. 2016-FRS-00084 (ALJ April 25, 2019)(which states that “[r]espondent’s ‘GM Notice #8 Train and Engine Employee Guideline effective January 2014 (“Policy” or “Attendance Policy”),’ provides, ‘Minimum Availability: T&E employees who are absent for any reason (including but not limited to sick layoffs, unpaid personal leave day, missed calls and late reporting) on two or more available work days in the calendar month will be subject to review for attendance failure(s). ...No shows and refusals to protect service will be handled as separate and more serious offenses under the U.S. Discipline Policy 5612.” (emphasis in original)).

⁴ OSHA No. 5-2780-16-002; RX A at 4-6.

⁵ See *Cieslicki v. Soo Line R.R. Co.*, ALJ No. 2018-FRS00039 (ALJ June 5, 2019).

⁶ See *Cieslicki v. Soo Line R.R. Co.*, ARB No. 2019-0065, ALJ No. 2018-FRS00039 (ARB June 4, 2020).

On October 21, 2015, Respondent sent a letter to Complainant, notifying him of reinstatement of employment with a return-to-work date of November 4, 2015. (CX F.) Pursuant to Respondent's return-to-work policy and process for employees, Complainant underwent a medical examination on November 12, 2015, which revealed that Complainant was not medically qualified to perform the duties of an engineer. (CX G.) On March 21, 2016, Respondent sent a letter notifying Complainant that the Health Services review of the reinstatement examination still lacked certain medical documents requested prior to the notification. (*Id.*) Pending continued review of the requested medical information, Respondent agreed to accommodate Complainant with a leave of absence. (*Id.*)

On May 4, 2016, Complainant, a member of the Army Reserves, received consecutive deployment orders for active duty for a period from May 21, 2016 to September 27, 2018. (CX H.) On October 24, 2017, while on active duty overseas, Complainant emailed his union, the Brotherhood of Locomotive Engineers and Trainmen ("BLE"), General Chair ("Semenek") regarding an upcoming Public Law Board ("PLB") hearing convened by the union.⁷ He stated in the email that "[t]o this day, over two and half years later, [he] still [is] not on any kind of employment status with CP Rail in ANY sense of the word," and that "[m]y pay has not been re-started, my benefits have not been re-instated." (CX J.)

According to Complainant, beginning in March 2019, approximately five months after his active duty deployment ended, he contacted Employee Services and was informed that he was not listed as a current employee on medical or military leave of absence and his termination in April 2015 was the last employment status listed.⁸ Complainant filed this complaint on August 29, 2019.

RESPONDENT'S MOTION TO DISMISS

Respondent stated in its *Motion to Dismiss* that, regardless of the merits of Complainant's second FRSA claim, this claim should be dismissed because it was not timely filed pursuant to 49 U.S.C. § 20109(d)(2)(A)(ii); and 29 C.F.R. § 1982.103(d). Respondent argued that Complainant's FRSA complaint was not filed within the applicable statute of limitations period of 180 days after the alleged violation occurred or after Complainant had unequivocal knowledge of the alleged adverse act.

Respondent referred to the email from Complainant to Semenek, dated October 24, 2017, as evidence that Complainant had knowledge of the alleged adverse employment acts as early as October 2017. (CX J.) Accordingly, Respondent argues that the 180-day statutory period began to run at least as early as that date, and any FRSA complaint would have been timely only if filed within 180 days of October 24, 2017, or before April 23, 2018. (RMD at 4.) Respondent noted

⁷ Complainant's union filed a claim before the Public Law Board on Complainant's behalf, seeking pay for all time lost and for the removal from his employment record of any discipline assessed due to his termination in April 2015. The claim was denied. (CX K at 2.)

⁸ Complainant asserts that these telephonic "subsequent, *termination* disclosures by CP's Employee Services representatives in the Mar2019, Jul2019, and Aug2019" support his allegation that he first learned of his termination less than 157 days before he filed this Complaint. (CRMD at 2 and 3 (emphasis in the original.))

that Complainant filed his complaint on August 29, 2019, over 490 days after he expressed his knowledge of his employment status in his October 2017 email.

Because Complainant's claim was not filed within the 180 period required by the statute of limitations, Respondent argues that the claim was not timely filed and should therefore be dismissed pursuant to 29 C.F.R. § 18.70(c).

COMPLAINANT'S RESPONSE TO MOTION TO DISMISS

According to Complainant, Respondent's *Motion to Dismiss* should be denied for the following reasons: 1) Respondent had acknowledged that the Complainant was a current employee up to January 26, 2018; 2) Complainant timely filed his complaint in August 2019, less than 180 days from Mar 2019, when he first learned of the adverse employment action; 3) this Court affirmed that Complainant's initial complaint was timely filed, therefore, if Respondent asserts that the initial termination from April 2015 still stands, then the most recent complaint is likewise timely filed.⁹ (CRMD at 3.)

First, Complainant asserted that, "Respondent has argued at least twice, once 11APR2016 to OSHA directly and once 26JAN2018 at the Public Law Board No. 7666, that 'Mr. Cieslicki remains a current employee.'" (*Id.* and CX K at 2.) Complainant explained that the PLB's January 26, 2018 findings show that, "Respondent most assuredly affirm[ed] that 'Mr. Cieslicki remains a current employee...'" as this is "reflected in the PLB's determination (in part) that '[t]he claimant in this case was initially discharged, but then his discharge was reduced to a seven-month suspension.'" (CX K at 2.)

Complainant noted that the telephonic "[n]otifications by CP Rail's Employee Services branch on 21March, 25July, and 29August of 2019, contradict Respondent's arguments" that Complainant was a current employee. (CRMD at 2.) Additionally, Complainant argued that "with the subsequent, termination disclosures by CP's Employee Services representatives in Mar2019, Jul2019, and Aug2019, the timeliness of [his] complaint stands (~157 days)." (CRMD at 3.)

Finally, Complainant argued that "[f]or my initial dismissal in April 2015, I filed a demonstrably timely complaint." (CRMD at 3.) He further asserted that "[i]f Respondent claims that [the] dismissal was never overturned with a reinstatement and leave of absence, then the timeliness of [his] complaint still stands." (*Id.*)

LEGAL STANDARDS

Motion to Dismiss

Twenty-nine C.F.R. § 18.70(c) provides, in pertinent part, that "[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as...

⁹ Complainant also raised an alleged violation of the Uniformed Services Employment and Re-employment Rights Act, which is outside the scope of this Court's authority. (CRMD at 3.)

untimeliness.” On a motion to dismiss, I must accept Complainant’s factual allegations as true and draw all reasonable inferences in his favor when ruling on this motion.¹⁰

Standards Applicable to FRSA Claims

The FRSA protects employees of railroad carriers engaged in interstate or foreign commerce by prohibiting their employers from retaliating against them for “the employee’s lawful, good faith act done . . . to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security . . .” 49 U.S.C. §20109(a).

To prevail in an FRSA claim, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity under the Act, (2) he suffered an adverse personnel action of discharge, demotion, suspension, reprimand, or any other discriminatory action, and (3) the protected activity was a contributing factor in the decision to take the adverse action against Complainant.¹¹ Even if the complainant establishes that an activity protected under the Act was a contributing factor in an adverse personnel action, “the employer may avoid liability if it can prove ‘by clear and convincing evidence’ that it ‘would have taken the same unfavorable personnel action in the absence of that [protected] behavior.’”¹²

However, in order to reach the merits of a FRSA claim, a complainant must first file the claim in a timely manner. In accordance with 49 U.S.C. §20109(d)(2)(A)(ii), the initial claim must be filed not later than 180 days after the date on which the alleged violation occurred or upon the date of unequivocal notification to the employee of an adverse action. In whistleblower cases, statutes of limitation run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision.¹³ The limitations period begins “on the date that the employee is given ‘final, definitive, and unequivocal’ knowledge of a discrete adverse act.”¹⁴

DISCUSSION

For a Complainant to bring a claim under the FRSA, he must file his initial complaint “not later than 180 days after the date on which the alleged violation . . . occurs.” 49 U.S.C.

¹⁰ *Gallas v. The Medical Center of Aurora*, ARB Nos. 15-076, 16-012, ALJ Nos. 2015-ACA-5, 2015-SOX-13 slip op. at 2 (ARB Apr. 28, 2017)(citing *Tyndall v. U.S. EPA*, ARB 96-195, ALJ Nos. 1993-CAA-00006; 1995-CAA-005, (ARB June 14, 1996)).

¹¹ *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR028, slip op. at 11 (Nov. 30 2006); *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-002 (Sec’y Feb. 1, 1995), slip op. at 8-9; *Dodd v. Polysar Latex*, 1988-SWD-4 (Sec’y Sept. 22, 1994).

¹² *Harp v. Charter Comm.*, 558 F.3d 722, 723 (7th Cir. 2009) (quoting *Allen v. Administrative Review Board*, 514 F.3d 468, 475–76 (5th Cir.2008)).

¹³ See e.g., *Rollins v. Am. Airlines*, ARB No. 04-140, slip op. at 2-3 (ARB Apr. 3, 2007); See, e.g., *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054, slip op. at 3 (ARB Aug. 31, 2005).

¹⁴ *Williams v. Nat’l R.R. Passenger Corp.*, ARB No. 12-068, 2012-FRS-00016, slip op. at 5 (ARB Dec. 19, 2013)(affirming motion to dismiss on time-barred grounds where employee filed FRSA claim three years after alleged retaliatory acts took place).

§20109(d)(2)(A)(ii). The statute of limitations in a whistleblower case begins to run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision such as a termination.¹⁵ “Final” and “definitive” notice has been interpreted to mean communication that leaves no further chance for action, discussion, or change. (*Id.*) “Unequivocal” notice refers to communication that is not ambiguous or misleading.¹⁶ The time for filing a complaint begins when the employee knew or should have known of the adverse action.¹⁷ In determining when the statute of limitations begins to run, an employee is assumed to have a “reasonably prudent regard for his rights.” (*Id.*)

In response to Respondent’s *Motion to Dismiss*, Complainant argued that the limitations period began to run on March 21, 2019, when he learned he was not listed as a current employee from the CP Rail Employment Services representative.¹⁸(CRMD at 2.) He insisted that Respondent’s statements regarding his employment status, in documents dated April 11, 2016, which included, “Mr. Cieslicki Remains a Current Employee,” are contradicted by the information he received about his employment status in March 2019. (*Id.*) He also referred the PLB findings dated January 26, 2018, in which the PLB stated “[b]y letter dated October 21, 2015, the Carrier notified the Claimant that he was being returned to service, with his dismissal converted to a suspension that ended October 21, 2015,” and that the “Claimant in this case was initially discharged, but then his discharge was reduced to a seven-month suspension.” (CX K at 2-3.) Complainant argued that these statements of fact by the PLB were, in effect, adopted by Respondent as a correct assertion that, *inter alia*, Complainant was a “current employee” at the time that the findings of the PLB were issued to the parties. (CRMD at 2, CX K at 2-3.) He further reasoned that the PLB’s statement of facts regarding his reinstatement on October 21, 2015 was likewise adopted by Respondent as affirmative statements, and effectively overturned the April 2015 termination. (CRMD at 2.)

Complainant provided no evidence that “Respondent most assuredly affirm[ed]” in January 26, 2018 that Complainant “remains a current employee.” (CRMD at 2.) These statements were made by the PLB as part of their findings, and there is no evidence that Respondent affirmed this statement when the determination was issued in January 2018. Therefore, Complainant’s assertion regarding Respondent’s affirmation of his current employment in January 2018 is not persuasive.

Additionally, Complainant asserted that this complaint is timely filed because this Court found his initial complaint timely filed on October 7, 2015, less than 180 days from his knowledge of the alleged retaliatory employment practices based on the April 24, 2015 termination. (CRMD at 3.) However, timeliness does not apply across complaints that are filed separately. This is a different claim, based on an alleged retaliatory termination that occurred sometime after January 26, 2018, and not a claim based on an earlier complaint. The timeliness

¹⁵ *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003).

¹⁶ *Larry v. The Detroit Edison Co.*, No. 86-ERA-32, slip op. at 14 (Sec’y June 28, 1991).

¹⁷ *Riden v. Tennessee Valley Auth.*, No. 89-ERA-49, slip op. at 2 (Sec’y July 18, 1990).

¹⁸ According to Complainant, the limitations period did not start, as Respondent argues, on October 24, 2017, when the Complainant asserted in the email that he was not currently employed by Respondent.

of the filing for *Cieslicki v. Soo Line R.R. Co.* is not relevant for purposes of determining the timeliness of this filing.¹⁹

While he stated that this Court found that the complaint concerning his termination on April 25, 2015 was timely filed,²⁰ Complainant's reasoning that "[i]f Respondent claims that dismissal was never overturned with a reinstatement and leave of absence, then the timeliness of my complaint still stands" does not survive scrutiny. (CRMD at 3.) Respondent did not make this argument in support of its motion to dismiss, nor does Respondent deny in any of its motions that the reinstatement and subsequent leave of absence occurred at the end of 2015 up to at least April 7, 2016.

Finally, Complainant asserted that he first learned that he was terminated a second time when he contacted, via telephone, an Employee Services representative to inquire about his employment status in March 2019. (CRMD at 2.) He argued that this second termination "would have taken place after January 26, 2018," but he did not provide a specific date. Also, Complainant did not provide any written documents regarding this alleged adverse employment act, nor did he provide specific details about any communications from Respondent that gave notice of his termination. Instead, he merely referenced three instances that he telephoned the Employee Services representative to inquire about his employment status: March 21, 2019; July 25, 2019; and August 29, 2019.

Respondent sent Complainant letter notifications of both his termination in April 25, 2015 and of his reinstatement on October 21, 2015. Respondent also sent notifications regarding the ongoing request for medical documentation and leave of absence offered to accommodate Complainant while Respondent's Health Services continued to assess Complainant's medical qualifications. (CX E, CX F, CX G.) However, Complainant did not produce any letter notifying him after January 26, 2018 that he was terminated again, even while overseas, on active duty, during which time he was still receiving his mail. (CX D.) Therefore, Complainant offered no evidence to support the conclusion that the alleged adverse employment act occurred after the October 24, 2017 email was sent to Semenek.

CONCLUSION

Reviewing the evidence in the light most favorable to the non-moving party (Complainant) I find that Complainant has failed to establish that he timely filed this complaint within 180 days after the date on which the alleged violation occurred or upon the date of unequivocal notification to the employee of an adverse action, pursuant to 49 U.S.C. §20109(d)(2)(A)(ii). Complainant's email from October 24, 2017, stating, *inter alia*, that he was not "on any kind of employment status with CP Rail in any sense of the word," supports Respondent's assertion that Complainant had knowledge of the alleged adverse employment acts, at least as early as October 24, 2017. (CX J.) Complainant waited until August 29, 2019 to

¹⁹ *Cieslicki v. Soo Line R.R. Co.*, ALJ No. 2018-FRS-00039 (ALJ June 5, 2019).

²⁰ It was OSHA's decision on the first complaint dated January 25, 2018 that included the finding that the complaint was timely filed, not this Court. (RX B at 1.)

file this complaint, well after the 180 day period of limitations had expired. Accordingly, I find that Respondent's *Motion to Dismiss* should be granted.²¹

²¹ Additionally, the remaining issue of Complainant's Request for Summary Judgment is rendered **MOOT** and will not be further addressed.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that Respondent's *Motion to Dismiss* based on timeliness is **GRANTED** and the complaint is **DISMISSED**.

LARRY S. MERCK
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).