

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 18 April 2019**

CASE NO.: 2018-NTS-3

In the Matter of:

JEFFREY BAILEY,  
Complainant

v.

FIRST TRANSIT, INC. and METROPOLITAN COUNCIL,  
Respondents

**And**

CASE NO.: 2018-NTS-4

In the Matter of:

MARLON E. CARTER,  
Complainant

v.

FIRST TRANSIT, INC., and METROPOLITAN COUNCIL,  
Respondents

**ORDER OF DISMISSAL**

This matter arises under the employee protection provisions of the National Transit Systems Security Act of 2007, 6 U.S.C. § 1142, (“NTSSA” or the “Act”) and the implementing Regulations at 29 C.F.R. Part 1982. Complainants, Jeffrey Bailey and Marlon E. Carter, (“Complainants”) filed complaints with the Secretary of Labor, through the Occupational Safety and Health Administration (OSHA), alleging they were terminated by their employer in retaliation under the NTSSA on March 3, 2017. Following investigation, on March 8, 2018, OSHA found that respondents, First Transit/Metropolitan Council,<sup>1</sup> (“Respondents”) did not

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<sup>1</sup> In its Initial Disclosure submitted December 6, 2018, Respondent First Transit acknowledged that it is a separate legal entity from Metropolitan Council. As they are apparently separate entities, the caption in the instant matter was also amended to reflect both parties as respondents. In its March 8, 2018, findings however, OSHA referred to Respondents as one entity.

violate the NTSSA and dismissed the complaint. On March 30, 2018, Complainants objected to OSHA's findings and requested a hearing before the Office of Administrative Law Judges (OALJ). Complainants are not represented by counsel.

On April 17, 2019, Complainants notified the undersigned that they exercised their rights to file a complaint in this matter in U.S. District Court (federal court), and utilize the "NTSSA kick-out" provision<sup>2</sup>. Thus, in accordance with 29 C.F.R. § 1982.114(a) and (b) and 6 U.S.C. §1142(c)(7), Complainant's have filed their complaints in federal court. For the reasons that follow, this matter is dismissed with prejudice.

While Complainants did not provide copy of their Complaint filed in federal court to the undersigned, they did attach a docketing notice of electronic filing from the U.S. District Court of Minnesota indicating "Bailey et. al v. Metropolitan Council et. al, Case Number: 0:19-cv-01024-DWF-TNL," with Jeffrey L. Bailey and Marlon Carter identified as the filers, entered on April 12, 2019. With electronic filing notice from the U.S. District Court of Minnesota, I am satisfied that Complainants have indeed excised their right to "kick-out" this matter to federal court, pursuant to 29 C.F.R. § 1982.114(b). *See also* 6 U.S.C. §1142(c).

Generally, 29 C.F.R. § 1982.114 permits a complainant to bring an action at law or in equity for *de novo review* in the appropriate district court for the United States with jurisdiction, if there is no final order of the Secretary, 210 days have passed since the filing of the complaint and there has been no delay due to the bad faith of the complainant.

The requirements of 29 C.F.R. § 1982.114 have been satisfied here. Specifically, a hearing has not yet taken place and consequently there has been no final order of the Secretary; more than 210 days have passed since the complaint was filed on March 3, 2017; and there is no evidence of delay due to bad faith of Complainants.

As Messrs. Bailey and Carter have filed their complaint in federal district court and for the reasons stated above, their complaint in the above captioned matter is **DISMISSED WITH PREJUDICE**.

## **ORDER**

**IT IS ORDERED** that the complaint filed by complainants, Jeffrey Bailey and Marlon Carter, is **DISMISSED WITH PREJUDICE** to its reinstatement since the action has been filed in federal district court.

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<sup>2</sup> On the same date, counsel for Respondents also notified the undersigned's law clerk that Complainants filed a complaint in this matter in District Court.

It is further **ORDERED** that all pending motions and hearing deadlines are **MOOT**.

**NATALIE A. APPETTA**  
Administrative Law Judge