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Issue Date: 19 August 2011

CASE NO.: 2011-FRS-00005

In the Matter of:

MARK L. JENSEN,
Complainant,

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

ORDER DENYING SUMMARY DECISION AND GRANTING SUMMARY ADJUDICATION OF ISSUE

This whistleblower action arises under the employee protection provisions of the Federal Railroad Safety Act, 49 U.S.C. §20109, as amended. In a complaint filed with the Department's Occupational Health & Safety Administration on June 28, 2010, Complainant alleged that on October 27, 2009, his foreman assigned unsafe work to him, that he reported this the next day at a safety meeting, and that within a few days (on November 6, 2009), the Railroad raised false and pretextual disciplinary charges against him that led to his termination from employment. He asserts that the disciplinary action and termination were in retaliation for his bringing the unsafe work assignment to the Railroad's attention.

Background and Procedural History

On October 25, 2010, the Administrator issued his "Secretary's Findings." He concluded that there was no reasonable cause to believe there had been a violation. The Administrator found that the evidence then of record showed that Complainant's protected activity was not a contributing factor in the Railroad's decision to terminate the employment.

On November 26, 2010, Complainant objected to the "Secretary's Findings" and requested a hearing before an administrative law judge. The matter was transferred to this Office and set for hearing.

On August 2, 2011, the Railroad filed the present motion for summary decision. It argues that: (1) the undisputed facts show that Complainant's alleged protected activity did not contribute to the Railroad's decision to terminate the employment; (2) the claim is foreclosed under the

statute's election of remedies provision because Complainant grieved the termination under the collective bargaining agreement; and (3) Complainant's alleged pattern and practice claim is not legally cognizable in that the statute authorizes no such claims. The Railroad submitted in support of the motion exhibits marked 1 through 23.

On August 15, 2011, Complainant filed a timely opposition, including exhibits marked A through DD. He argues that the Railroad and the Administrator misconstrue the scope of his complaint; that he points to numerous safety complaints he made "throughout his career" as relevant to his claim (not a single complaint about one unsafe assignment); that he is alleging a pattern and practice violation against the Railroad; that the temporal proximity of the protected activity and the Railroad's initiating the disciplinary process suggests that the safety complaint was a contributing factor to the termination; and that the result of the grievance procedure (together with other facts) shows that the reason given for the termination was pretextual – it rebuts any showing that the Railroad would have terminated the employment absent Complainant's protected activity. Complainant argues that his union's pursuit of a grievance on his behalf did not trigger the Act's election of remedies provision. Finally, he argues that the pattern and practice claim is legally sufficient in that it parallels similar actions under Title VII of the Civil Rights Act of 1964.[1]

I will conclude that Complainant has successfully resisted the motion on his central whistleblower theory related to the termination of his employment. He has offered enough to establish a factual dispute about whether his protected activity contributed to the Railroad's adverse disciplinary action. His pursuit of a grievance did not trigger the Act's election of remedies provision. He also filed a charge of age discrimination with the Equal Employment Opportunity Commission, but that didn't trigger the election of remedies provision either.

On the other hand, I will grant summary adjudication of issues (or partial summary decision) to the Railroad on Complainant's pattern and practice claim. As a matter of law, the Federal Railroad Safety Act does not authorize pattern and practice litigation.

Facts[2]

Union Pacific hired Complainant in 1977. Other than during some work furloughs in the 1980's, Complainant has worked for the Railroad continuously since then. At the time the safety issue arose and the termination occurred, Complainant was working as a carman in Council Bluffs,

[1] As neither party objected to the exhibits of the other, I admit all of the proffered exhibits for purposes of this motion. Some of the exhibits have limited application. For example, the Administrator's findings of fact, which are among the exhibits, are not admitted as evidence to substantiate the matters asserted in those findings; rather, the "Secretary's Findings" would be relevant for purposes such as to show the timeliness of the request for a hearing before an administrative law judge (were that an issue).

[2] These facts are undisputed when the evidence is taken in the light most favorable to Complainant, who is the non-moving party. I find these facts for purposes of this motion only.

Iowa. In the year prior to the safety-related incident, the Railroad had imposed discipline against Complainant three times.

On October 27, 2009, Complainant's foreman asked him to do an assignment that Complainant felt was unsafe. Complainant reported the incident at a safety meeting the next day. Although Complainant's foreman was not at the meeting and has no recollection of hearing about the safety complaint, the foreman's manager, Farrell Romriell told him about it the day after the safety meeting (October 29, 2009). C.Ex. J at 34-35.

A few days later, on November 6, 2009, the Railroad notified Complainant that he was charged with violating the rule on "blue signal protection" on November 1, 2009.[3] Mr. Romriell preferred the charges based on reports from the foreman involved in the safety incident. Another employee who was with Complainant at the time of the alleged blue signal violation was also charged.

After following its disciplinary procedures, the Railroad terminated Complainant's employment on December 28, 2009. The co-worker had a lesser history of disciplinary infractions; he was disciplined for the blue signal incident, but not terminated from employment.

Complainant's union, the Brotherhood of Railway Carmen, grieved the Railroad's termination of Complainant's employment. And Complainant himself filed an administrative charge of age discrimination with the U.S. Equal Employment Opportunity Commission.

On October 6, 2010, a Public Law Board of the National Mediation Board decided the union's grievance in favor of the union. It ordered Complainant reinstated with full back wages, benefits, and seniority. As to the charge of age discrimination, it appears that Complainant never filed a civil action.

Discussion

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. §18.40(d); 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 must 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. §18.40(c). A genuine issue exists when, based on

[3] Other disciplinary charges might have been included as well.

the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

I. There Is a Dispute of Fact as to Whether Complainant's Protected Activity Contributed to the Railroad's Decision to Terminate the Employment.

The Federal Rail Safety Act makes unlawful a railroad carrier's discharge of an employee if it is "due, in whole or in part," to the employee's lawful, good faith (1) reporting of a hazardous safety condition, or (2) refusal to work when confronted by a hazardous safety condition that a reasonable person would conclude posed an imminent danger of death or serious injury. 49 U.S.C. §20109(b)(1)(A) and (B), (b)(2).[4] The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. §42121, et seq. 49 U.S. §20109(d).

The burdens established in AIR 21 cases require a complainant to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. See 49 U.S.C. §42121(b)(2)(B). If a complainant meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. 29 C.F.R. § 1979.109(a); see also *Barker v. Ameristar Airways*, Inc., ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc*., ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4. The Secretary's Interim Final regulations are consistent with this regime. *See* 29 C.F.R. §1982.109 (a), (b).

Here, the Railroad argues that: (1) the person who raised the blue signal complaint against Complainant, namely Complainant's foreman, didn't know about Complainant's complaint at the safety meeting; and (2) Complainant's disciplinary record, combined with his violation of the blue signal rule, account for the Railroad's decision to terminate; there is no basis to find that the safety incident contributed to the termination.

The Railroad's argument neglects too much of the record as it stands for purposes of this motion. First, the foreman did know about Complainant's safety-related complaint: the foreman's manager told him of it the next day. Second, even if the foreman who initiated the blue signal discipline didn't know about any protected activity, the manager who actually preferred the disciplinary charge (Mr. Romriell) did know about it. Third, any number of other Railroad officials involved in the termination decision might have known of Complainant's safety complaint; the Railroad has offered nothing to negate this.

[4] On refusals to work, there must also be no reasonable alternative to the refusal available to the employee, and the employee must notify the rail carrier of the hazardous condition and the worker's intent not to perform the work. 49 U.S.C. §20109(b)(2).

Complainant also offers sufficient evidence to establish a dispute about whether the safety incident contributed to the termination decision. The proximity in time between the protected activity and the adverse action is an important factor when determining whether there is a causal link. *See McBurney v. Stew Hansen's Dodge City, Inc.*, 398 F.3d 998, 1003 (8th Cir. 2005). Temporal proximity alone may be insufficient to establish a *prima facie* case. *See* Lindeman & Grossman, EMPLOYMENT DISCRIMINATION LAW, Ch. 14.IV.D.2 at 1031 (4th ed. 2007). But some courts have found it sufficient when the proximity is "'very close.'" *See Clark County Scholl District V. Breeden*, 532 U.S. 268, 273-74 (2001) (citing cases) (20 months too remote in time to show causation).[5] Here, the proximity in time is about as close as possible – just a few days.

And temporal proximity is not the only indicator that the safety incident contributed to the Railroad's disciplinary decision. In addition, the labor grievance arbitration panel overturned the termination, not so much because of a lack of evidence that Complainant violated the blue signal protection rule, but rather because the Railroad applied the rule against Complainant in an arbitrary and capricious way. The Railroad's manager admitted at the arbitration that the blue signal rule needed clarification and that Complainant's conduct had been consistent with the training that the Railroad had given him. The panel also found that other workers had violated the rule and not been similarly disciplined. Arbitrary and unequal application of a disciplinary rule is a core indicator that the disciplinary action was discriminatory. It implies retaliation.

II. Complainant Has Not Triggered the Act's Election of Remedies Provision.

The Federal Railroad Safety Act requires what it terms an "election of remedies" as follows: "An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. § 20109(f). Here, the Railroad argues that Complainant's union's pursuit of a grievance, asserting on Complainant's behalf rights under a collective bargaining agreement, constitutes an election of remedies under the Federal Railroad Safety Act and forecloses the present action. The Railroad also offers evidence that Complainant filed an administrative charge of age discrimination with the Equal Employment Opportunity Commission related to the termination from employment. Neither of these, however, triggers the Act's election of remedies provision.

The Secretary's Interim Final regulations do not address the Act's election of remedies provision. As yet, there are no precedential decisions. The only similar election of remedies language in a federal statute occurs in the National Transit Systems Security Act, 6 U.S.C. § 1142(e), and I am unaware of precedential guidance under that provision either.

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[5] *See also, Keener v. Duke Energy Corp.*, ARB No. 04-091 (ARB. July 31, 2006) (13-month gap too long to infer causation); *Evans v. Washington Public Power Supply Sys.*, ARB No. 96-065 (ARB July 30, 1996) (one year gap too long); *cf. Mandreger v. The Detroit Edison Co.*, 1988-ERA-17 (Sec'y Mar. 30, 1994) (6 months sufficiently close to infer causation); *Crosier v. Portland General Electric Co.*, 1991-ERA-2 (Sec'y Jan. 5, 1994) (3 to 4 months sufficiently close).

There is generally little guidance available on the interpretation of statutory election of remedies provisions; election of remedies is a common law doctrine not generally rooted in statutory text. *See Roam v. Koop*, 116 Cal. Rptr. 539, 542 (Cal. Ct. App. 1974). When such statutes exist, Congress often has been more specific. For example, a grievance procedure for Foreign Service employees provides:

> A grievant may not file a grievance with the Board if the grievant has formally requested, prior to filing a grievance, that the matter or matters which are the basis of the grievance be considered or resolved and relief be provided under another provision of law, regulation, or Executive Order . . . and the matter has been carried to final decision under such provision on its merits or is still under consideration.

22 U.S.C. § 4139(a)(1) (2006). It is in this rather uncharted context that I turn to a discussion of the issues relevant here.

A. The Union's Pursuit of a Grievance Was Not an Election under the Act.

On the union grievance, the Act's language raises three questions. First, the language refers to the person seeking protection under another provision of law as "an employee"; it is silent about cases in which the party seeking an alternate remedy is a union. If a union pursues a grievance on behalf of an employee, does that constitute the employee's election for these purposes? Second, the statute refers to the pursuit of another remedy for the same "unlawful act." Is an alleged breach of a collective bargaining agreement an "unlawful act," or is it a simple breach of contract? Third, the Act provides that employees' rights to remedies under the whistleblower provisions cannot be waived by "agreement" or as a "condition of employment." 29 U.S.C. §20109(h). Can the election of remedies provision apply consistent with that requirement if the collective bargaining agreement offers fewer remedies than the Act? I address these issues in turn.

1. Complainant's Union, Not Complainant, Pursued the Grievance.

When a union pursues a grievance, its decision to do so is an act of the union, not of the employee. The union's action is based on the collective bargaining agreement and the union's overall majoritarian interests. As the Supreme Court has long acknowledged, a "union's exclusive control over the manner and extent to which an individual grievance is presented" raises concerns about its enforcement of federal statutory rights on behalf of individual members. *See, e.g.*, *Alexander v. Gardner-Denver*, 415 U.S. 36, 58 n.19 (1974). This is because the union may subordinate the interests of an individual employee to those of its collective membership. *Id.* "The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less

vigorously, or make different strategic choices, than would the employee." *McDonald v. West Branch*, 466 U.S. 284, 291 (1984).[6]

Congress' relatively recent amendments to the Federal Railroad Safety Act recognize a real distinction between unions and their individual members. A subsection Congress added in 2007 is entitled, "Rights retained by employee." 29 U.S.C. §20109(h) (re-designated from subsection (g) in 2008). That subsection provides that: "The rights and remedies in this section [*i.e.*, the whistleblower provisions] may not be waived by any agreement, policy, form, or condition of employment." *Id.* The thrust is that a union's agreement with an employer to waive some of the individual whistleblower protections in the statute is unenforceable; the statute created rights retained in the individual worker irrespective of any agreement, including a collective bargaining agreement. Implicit in this is that the rights and interests of individual workers and their unions can and do differ at times.[7]

I conclude that, when a union chooses to pursue a grievance on behalf of an employee, it is acting as a union, and that this is distinct from an election of the individual employee to seek a remedy other than under the Federal Railroad Safety Act. As the union, not Complainant, pursued the grievance, Complainant did not trigger the election of remedies provision in the Act.

2. The Grievance Was Not Pursued for "Unlawful Conduct."

The union's contention – and the basis for the award – in the labor arbitration was not that Union Pacific engaged in conduct was unlawful; rather, it was that Union Pacific breached its contractual obligations under the collective bargaining agreement. As the arbitration award

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[6] *Gardner-Denver* and *McDonald* concern the enforceability of mandatory arbitration provisions in collective bargaining agreements when applied to individual workers' Title VII claims. These cases' ambit – and perhaps their continued viability – was greatly diminished in *14 Penn Plaza LLC v. Pyett*, ___ U.S. ___, 129 S.Ct. 1456, 1464, 1472 (2009). As Justice Thomas explained, writing there for a 5-4 majority, the Court has long acknowledged a judicial policy concern about a union's interests differing from those of its individual members. *Id.* at 1464. But, absent direction from Congress in a particular statute, this judicial policy generally cannot overcome the strong policy favoring arbitration in both the Federal Arbitration Act and the federal labor laws. *Id.* Nothing about *Pyett*, however, negates the recognition that the interests of a union do not always coincide with – and sometimes are inconsistent with – its individual members' pursuit of federal statutory rights.

[7] Subsection (h) does not necessary preclude an application of *Pyett* to Federal Rail Safety Act cases. Under *Pyett*, the selection of an arbitral forum, as opposed to a courtroom, is not a waiver of substantive rights. *See Pyett*, 129 S.Ct. at 1469-70. If subsection (h) limits only a waiver of substantive rights, privileges, and remedies, then the selection of an arbitral forum – as opposed to the administrative forum that the Act sets up – might not run afoul of subsection (h). I need not and do not reach this question.

As a general matter of federal labor law, unions have a duty of fair representation to their members. *Marquez v. Screen Actors*, 525 U.S. 33, 44 (1998). A union would be liable, for example, if it decided not to pursue a grievance for reasons such as unlawful discrimination. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Unions are subject to the requirements of Title VII and the Age Discrimination in Employment Act. *See* 42 U.S.C. §2000e-2(c); 29 U.S.C. §623(d). These factors should diminish the conflict of interest between unions and individual members, *see Pyett*, 129 S.Ct. at 1473, but they will not eliminate them.

states, the union alleged a violation of Rule 34 of the collective bargaining agreement between it and the Railroad.[8]

But, "To breach a contract is not unlawful; the breach only begets a remedy in law or in equity." *Benderson Development Co. v. U.S. Postal Service*, 998 F. 2d 959, 962 (Fed. Cir. 1993) (interpreting a statutory provision requiring that the Postal Service only acquire property in a "lawful" manner).[9] As the election of remedies provision is limited to allegations elsewhere of the same "unlawful act," the provision does not apply to contract claims such as the one pursued here. *See Mercier v. Union Pacific*, 2008-FRS-00004, (ALJ June 3, 2009) at 2 (under the Federal Railroad Safety Act, disputes under a collective bargaining agreement are contractual and not based on another provision of law).

3. The Election of Remedies Provision Does Not Apply to Alternate Claims That Provide Lesser Remedies Than Does the Federal Railroad Safety Act.

The amendment codified in subsection (h) precludes application of the election of remedies provision when the alternate recourse was to arbitration under a collective bargaining agreement with lesser remedies than those afforded under the Act.[10] At the arbitration, the union was limited to the remedies that the collective bargaining agreement allowed. Those remedies did not include emotional distress or punitive damages. In contrast, the Federal Railroad Safety Act allows these remedies. *See* 29 U.S.C. §20109(e)(2)(C), (e)(3) (providing compensatory damages plus possible punitive damages not to exceed $250,000).

As an amendment to the statute, subsection (h) must be seen as modifying and clarifying the Act's election of remedies provision (which pre-dated the amendment); the election of remedies provision must be construed consistent with subsection (h).[11] That means that no

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[8] The union did not contend, and the arbitrator did not decide, whether Union Pacific engaged in unlawful conduct by terminating Complainant in retaliation for a safety complaint. The focus of the arbitration was not on Union Pacific's motivation, but rather on whether it had good cause for the termination under the collective bargaining agreement's termination provision.

[9] *See also Shoryer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1043-44 (9th Cir. 2010) (alleged breach of contract insufficient to show "unlawful" conduct for purposes of the California unfair competition statute, Cal. Civ. Code §17200); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1253-54 (10th Cir. 1988) ("Under the RLA, while the courts have no jurisdiction to hear airline employee claims based solely upon the contract, the courts do have jurisdiction over claims based upon federal statutes. . . . Certainly no inconsistency results from permitting both contractual rights and statutory rights to be enforced in their respectively appropriate forums."); *Mosqueda v. Burlington Northern & Santa Fe Ry.*, 981 F. Supp. 1403 (D. Kan. 1997) ("Plaintiff's claim of racial discrimination was brought under the statutory authority of Title VII, not the provisions of the Collective Bargaining Agreement.").

[10] This is correct to the extent that it is the union that is empowered to pursue the grievance, not the employee. *See* discussion above.

[11] Even were subsection (h) not added as an amendment, the election of remedies provision generally would have to be construed in the context of the entire statute. *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates*, 484 U.S. 365, 371 (1988) (construing language in the Bankruptcy Act). As the Supreme Court held in

election of remedies can be required if it is based on an agreement between a union and an employer that would diminish the remedies to which the employee might be entitled under the Act. Any other rule would fail to give effect to subsection (h)'s mandate that no agreement can waive the employee's right to the remedies that the Act provides.

In the present case, the Act's election of remedies provision could apply only if the remedies available under collective bargaining agreement are no less than those under the Act; they must include compensatory damages and permissible punitive damages of at least $250,000. The collective bargaining agreement does not allow for such remedies.[12]

Accordingly, I find that Complainant's union's pursuit of a labor grievance arbitration on his behalf did not trigger the election of remedies provision in the Act.

B. Complainant's Filing of an Administrative Charge of Discrimination with the Equal Employment Opportunity Commission Did Not Trigger the Election of Remedies Provision.

The Act's election of remedies provision's reference to one who "seeks protection" under another provision of law is ambiguous. Without guidance from precedential decisions or an applicable regulation, I turn to general common law considerations, especially in that election of remedies is grounded in the common law.

Generally, at common law, a plaintiff is not required to exercise an election of remedies until there has been an award. *See, e.g., Roam*, 116 Cal. Rptr. at 542 ("a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment"). Yet I do not find this general rule sufficient to address the Act's language.

In particular, the Federal Railroad Safety Act's language applying the election of remedies provision to one who "seeks protection" appears to require a different result. It could suggest that the election is deemed made when a complainant *initiates* a claim under another provision of law; initiating a claim could be seen as seeking a remedy. On the other hand, Congress might have meant only that the *pursuit* of a claim under another provision of law is an election even if the complainant ultimately is unsuccessful on the other claim. That is, "seeking" implies only that; actually obtaining relief is not required to trigger the election of a remedy.

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that case: "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear . . . ." *Id.*

[12] Were it not for these additional remedies, it might be that the present action would be pointless. To the extent that the arbitration resulted in Complainant's being made whole on lost wages, benefits, and seniority rights, there might be nothing left that he could be awarded in this forum. Complainant's potential entitlement to a make-whole remedy in this forum does not entitle him to a double recovery.

Considering these factors, I conclude that a complainant can be held to have sought protection under another provision of law only when, at a minimum, she has initiated an action in a forum that has jurisdiction to afford her relief for the same alleged unlawful conduct.

Complainant here filed a charge of discrimination with the Equal Employment Opportunity Commission in June 2010. R.Ex. 9. The charge alleges a violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.*, and is based on the same termination from employment that is the subject of this Federal Railroad Safety Act claim. R.Ex. 9. At his deposition in the present case, Complainant testified that the Railroad discriminated against him based on age when it terminated the employment. *See* R.Ex. 1 at 31-33.

Complainant's filing of a charge falls short of initiating a claim seeking relief; rather, it is no more than compliance with an administrative *pre-requisite* to the filing of a claim for relief. The Age Discrimination in Employment Act requires that, at least 60 days before filing a lawsuit, a person alleging age discrimination file a charge with the Equal Employment Opportunity Commission. 29 U.S.C. § 626(d) (2006). This requirement creates a window of time during which the Commission may investigate the charge and, in its discretion, choose to initiate litigation in its own right. 29 U.S.C. § 626(a)-(c). Indeed, if the Commission initiates litigation, it terminates the right of the individual employee to pursue the claim on her own behalf. 29 U.S.C. §626(c)(2). Filing a charge of age discrimination with the Commission thus does not initiate an action based on which the employee may be granted relief; that requires the filing of a civil action no fewer than 60 days after the filing of the administrative charge, and it can be done only if the Commission does not initiate suit during the intervening time.

The filing of the administrative charge is merely a preliminary to permit a complainant who chooses to go forward with an age discrimination claim to seek relief from a court that has jurisdiction to grant it. Even then, it is a path that is contingent on the Commission's not initiating its own suit. Compliance with this administrative pre-requisite to suit does not trigger the election of remedies provision.

III. The Federal Railroad Safety Act Does Not Authorize Pattern and Practice Litigation.

Although it does not appear that Complainant alleged in his complaint to the Occupational Health & Safety Administration a "pattern and practice" of whistleblower violations at Union Pacific, he apparently has asserted such a claim as a justification for certain discovery requests, and Respondent Railroad seeks summary decision on any such claim. Without deciding whether Complainant has properly raised (or pleaded) a pattern and practice allegation, I will reject any such claim on the law.

Complainant cites as authority for a pattern and practice claim the Supreme Court's discussion of such actions in a Title VII case, *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (race discrimination). What Complainant neglects is that Congress established "pattern and practice" litigation expressly for Title VII cases and authorized only government officials to pursue it. *See* 42 U.S.C. §2000e-6. Initially, Congress empowered only the Attorney General to

initiate pattern and practice cases. 42 U.S.C. §2000e-6(a). The Attorney General was required to sign the complaint personally and to provide fact pleading in the complaint. *Id.* He was authorized to request a three-judge panel to hear the case. 42 U.S.C. §2000e-6(b). When the Attorney General made such a request, the presiding judge of the Circuit in which the trial court sat was required to convene the three-judge panel, which was to include a circuit judge as well as at least one district judge from the district in which the case was filed. Congress required the panel to hear the case "at the earliest practicable date" and to expedite it "in every way." *Id.* Appeals from the three-judge panel were directly to the Supreme Court. Effective in 1974, Congress transferred authority for pattern and practice litigation under Title VII from the Attorney General to the Equal Employment Opportunity Commission. 42 U.S.C. §2000e-6(c). It was in this context that the Supreme Court recognized pattern and practice litigation and observed that, to make out its case, the government had "to establish . . . that racial discrimination was the company's standard operating procedure, the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336.

The Federal Railroad Safety Act contains no similar provision. It creates only one kind of enforcement action. *See* 49 U.S.C. §20109 (d)(1). That is an action brought by "an employee who alleges discharge, discipline, or other discrimination in violation of [the Act]." *Id.* An "employee means an individual presently or formerly working for . . . a railroad carrier . . . ." 29 C.F.R. §1982.101(d). An "employee" is not a class.

Even under Title VII's express provision for pattern and practice claims, such claims must be brought by the government, not by an aggrieved private individual employee. At least in the early years, pattern and practice claims required review at the highest levels of the government; that's why the Attorney General was required to sign the complaint personally. The special expedited procedures, including three-judge trial courts and appeals of right to the Supreme Court, were extraordinary. The Federal Railroad Safety Act contains no similar provisions.

To the extent that Complainant has alleged a pattern and practice claim, the Railroad is entitled to summary adjudication of that claim.[13]

[13] I do not imply that the evidence at trial necessarily will be completely confined to incidents in which Complainant was personally involved. If the same decision-makers who terminated Complainant's employment repeatedly disciplined other subordinates who engaged in activity protected under the Act, that could be relevant to show that Complainant's safety-related activity occasioned similar retaliation. But, to be relevant for this purpose, it must have some link to the discipline imposed on Complainant (e.g., same managers or same foreman). Evidence of widespread retaliation also could support Complainant's claim for punitive damages: It could show the Railroad's conscious disregard of workers' federal statutory rights. But, again, a few anecdotes are unlikely to show a national practice.

Order

1. The facts going to a causal link between Complainant's protected activity and Union Pacific's adverse employment action are disputed. Complainant has not elected a remedy for the same unlawful act under another provision of law and thus waived a claim under the Federal Railroad Safety Act. Accordingly, Union Pacific's motion for summary decision is DENIED.

2. Complainant's pattern and practice case, to the extent he has raised one, is legally deficient. Union Pacific is GRANTED summary adjudication on this issue.

SO ORDERED.

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STEVEN B. BERLIN
Administrative Law Judge