U.S. Department of Labor Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 30 May 2012

CASE NO.: 2011-FRS-00025

In the Matter of:

RICK UTGAARD,
Complainant,

v.

BNSF RAILWAY,
Respondent.

Appearances: Rick A. Utgaard
in propria persona

Andrea Hyatt, Esq.,
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER DENYING RECONSIDERATION ON SUMMARY DECISION AND DISMISSING CLAIM

On January 9, 2012, I granted partial summary decision to Respondent in this whistleblower action under the Federal Railroad Safety Act. 49 U.S.C. § 20109. Representing himself, on January 26, 2012, Complainant filed a document that I construed as a motion for reconsideration. In subsequently filed papers, Respondent opposed reconsideration and argued that, even if I were to consider Complainant's additional arguments, the result on summary decision would remain unchanged, and that Respondent is entitled to a favorable decision on the merits as a matter of law.

I will deny the motion for reconsideration. Even were I to consider Complainant's additional submissions, they do not change the outcome. As there are no other issues pending, I will dismiss the complaint in its entirety.

Procedural History

Complainant initially filed a complaint with the Occupational Safety and Health Administration telephonically on April 29, 2011. He alleged that Respondent retaliated against him on account of his reporting incidents in which his supervisor failed to document hours of service properly. Complainant apparently did not specify an alleged adverse action; at least the OSHA officer who reduced the telephonic complaint to writing did not specify an alleged retaliatory act.

After a limited investigation, OSHA identified the alleged retaliatory act as Respondent's placing Complainant on an involuntary medical leave on September 20, 2010. The OSHA Administrator then analyzed the complaint and denied it as untimely. The Act requires that claims be filed within 180 days after the retaliatory act, and the Administrator found that Complainant filed the complaint 221 days after he was placed on the involuntary medical leave.

Complainant requested a hearing. In the request, for the first time he alleged a different act of retaliation: that Respondent had initiated disciplinary proceedings against him while he was on the medical leave, and that Respondent (in collusion with Complainant's union) coerced him into signing a waiver in which he admitted to a rules violation and agreed to a 30-day disciplinary suspension.

In early August 2011, Complainant wrote to the Chief Administrative Law Judge and included a third alleged retaliatory act: that Respondent failed to reimburse him for certain expenses incurred in February 2011. There is no indication that Complainant served on Respondent the August 2011 letter that stated the new allegation.

On November 16, 2011, Respondent moved for summary decision; its motion addressed only the medical leave and the disciplinary suspension. I issued an order to Complainant to show cause, requiring him to file an opposition. I explained the procedural and legal standards governing summary decision, urged Complainant to get legal representation, advised him that a failure to oppose the motion substantively could result in an adverse decision on the merits without a trial, and set a December 5, 2011 deadline for the opposition.

Complainant filed a timely opposition.[1] He responded on the two adverse actions Respondent addressed in the opening papers, reiterated the third allegation (denial of expense reimbursements), and added three entirely new alleged retaliatory acts.[2] As Complainant apparently had failed to notify Respondent of his third theory (the one based on unreimbursed expenses), Respondent could not have addressed that allegation in its motion. Nor could it have addressed the three new allegations that surfaced for the first time in Complainant's opposition papers.

[1] The opposition was technically deficient in that Complainant didn't sign his declaration under penalty of perjury. I notified Complainant of the deficiency, and he corrected it.

[2] The three new allegations were that: (1) Respondent denied him pay for 13 minutes of work on September 9, 2010 (which, under the applicable collective bargaining agreement and the particular circumstances might have entitled him to pay for 2 hours and 40 minutes); (2) engaged in ongoing intimidation; and (3) did "several [unspecified] items" that Complainant only reported to the Administrator after the Administrator had dismissed the complaint.

Our rules generally do not permit replies, and Respondent did not file one.

Before I could rule on the motion, Complainant submitted two additional (now untimely) filings in opposition. On January 4, 2012, nearly a month after the deadline, he filed another brief and declaration (5 pages). On the next day, he submitted more exhibits plus an 18-page "Motion for Evidentiary Hearing."

I struck these filings as late. I also addressed Complainant's filing of opposing papers by drib and drab in successive installations and explained that this cannot be permitted; if it were, the briefing on motions would never end, and the motions never would be decided.[3] Nonetheless, in the alternative, I did consider Complainant's additional materials when I decided on summary decision, and I held that nothing in them changed the result. Order Granting Partial Summary Decision (Jan. 9, 2012) at 3 n. 3.

On January 9, 2012, I granted partial summary decision as to the two alleged acts of retaliation addressed in the motion (involuntary medical leave and 30-day suspension). I held that the claim related to the medical leave was time-barred. On the disciplinary suspension, I held that Complainant failed to make a *prima facie* showing that a decision-maker knew at the time of decision that Complainant had engaged in protected activity.

But I did not dismiss the claim in its entirety. Under our rules, a litigant is entitled to amend his complaint once as a matter of right if the amendment precedes Respondent's answer; thereafter permission of the administrative law judge is required and may be predicated on "such conditions as are necessary to avoid prejudicing the public interest and rights of the parties." 29 C.F.R. §18.5(e).

I took Complainant's addition of his second theory (the disciplinary suspension), which he raised when he requested a hearing, as his amendment of right. As to the third through sixth newly alleged adverse actions, I allowed Complainant 21 days to amend his complaint, subject to certain conditions aimed at maximizing the efficiency of the process.

In particular, I required that in any amended pleading, Complainant specify enough facts to give Respondent and me notice of what his theory of retaliation was.[4] I also required him to give the date of the adverse action as well as the date he first complained to anyone at the Department of Labor so that it would be possible to determine that the claim was timely filed. Finally, I required him to allege enough to show that the added claim related to the one he filed at OSHA; otherwise, he'd have to pursue the new theory at OSHA first, before he could bring it here. Without Complainant's meeting these conditions, it was too likely that there would be prejudice to Respondent and a waste of public resources through a succession of either time-barred or otherwise facially deficient claims.

[3] As I wrote in the Order: "Our rules – as with the rules of any court – contemplate a limited exchange of briefs so that the record on any motion may be closed and the motion decided in a fair and reasonably expeditious manner. If parties are allowed to submit materials by drib and drab *ad nauseum*, no motion could be decided without excessive delay."

[4] For example, unspecified acts of "intimidation" or unspecified "several items" that he'd mentioned to OSHA would not be sufficient.

On January 26, 2012, Complainant filed two documents that, in an order issued on January 31, 2012, I construed as a motion for reconsideration on partial summary decision and an amended complaint with three of the four additional alleged adverse actions to which Complainant had earlier referred.[5]

The amended pleadings failed to meet the requirements I had set. One of the alleged adverse actions, as a matter of law, did not relate to the complaint that Complainant had filed with OSHA; Complainant therefore needed to pursue that theory at OSHA before it could be heard here.[6]

On the other two theories, Claimant failed to allege when the adverse action occurred and when he first complained to the Department of Labor about it. There was nothing in the amended complaint from which it could be inferred that the claims were timely filed.[7] As Complainant failed to comply with the order allowing the amendment, I struck the amended complaint.

Set into this context, I turn to Complainant's motion to reconsider the order on summary decision. On this motion, Complainant advanced three arguments. Two of them go to timeliness: First, he argued that he filed the complaint timely because, although Respondent had placed him was on an involuntary leave and wasn't paying him, he didn't realize this was adverse because he assumed Respondent would pay him back wages for the lost time; essentially he assumed that he was on a paid vacation until the medical issues could be resolved. Second, he argued that the untimely filing should be excused because he was having health problems, caused in part by his dispute with Respondent.

Complainant's remaining argument is addressed to the decision-maker's having knowledge that he'd engaged in protected activity. The protected activity was a complaint to the Federal Railroad Administration. Complainant argued that he cited multiple incidents in the Federal Railroad Administration complaint; that he was the only witness to one of them; and that on at least one of the others, the other witnesses would not have complained because to do so would have implicated themselves. He was thus "the only common denominator," and the manager

[5] Complainant did not include in the amended pleading his vague theory that Respondent did "several [unspecified] items" that he'd reported to OSHA after OSHA had decided the case against him.

[6] The new theory was harassment. Complainant's OSHA complaint was of a specific act of retaliatory treatment (the unpaid, involuntary medical leave). Harassment claims are legally distinct and unrelated to treatment claims and must proceed through the process independently. *See Cottrill v. MFA, Inc.*, 443 F.3d 629, 634-35 (8th Cir. 2006); *Chacko v. Patuxent Institute*, 429 F.3d 505, 511 (4th Cir. 2005). Complainant also failed to allege the relevant dates as required in the order allowing him to amend.

[7] Every indication was that both claims were untimely. One concerned non-payment of overtime. The payment would have had to become due while Complainant was actively working for Respondent. But Complainant hasn't worked for Respondent since September 2010, and apparently did not raise this theory until December 2011, which is well-beyond the 180-day filing requirement. The other claim was for non-payment (or late payment) of employee expenses. Again, the expenses would have to have been incurred while Complainant was actively working for Respondent. As Complainant hadn't been actively working for Respondent for about fifteen months when he raised this issue with the Department of Labor, this claim too appeared to be untimely.

who took the adverse decisions against him could have deduced that Complainant was the person who had complained.[8]

Respondent opposes reconsideration. It argues that Complainant has failed to show an adequate basis to reopen the questions on summary decision but only seeks a "second bite at the apple." In the alternative, it argues that Complainant offered no evidence or argument that leads to a different result on the motion for summary decision. As Respondent has the better argument on both counts, I will deny the motion.

Discussion

I. Complainant Is Not Entitled To Reconsideration.

Motions for reconsideration are not aimed at providing a "second bite at the apple," allowing complainants to present facts or arguments that they chose not to present in the first instance. *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3rd Cir. 1995) (forum *non conveniens*). "Whatever other circumstances may justify reconsideration, mere presentation of arguments or evidence *seriatim* does not." *Id.* "Reargument 'should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided.'" *Id.* (citation omitted).

> It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless.

Frietsch v. Refco. Inc., 56 F.3d 825, 828 (7th Cir. 1995) (Posner, C.J.).

Complainant does not address the legal basis under which he could be entitled to reconsideration. Our rules make no explicit provision for it. When our rules are silent, we look to the Federal Rules of Civil Procedure. 29 C.F.R. § 18.1(a). Relief from an order generally is addressed under Rule 60(b), Fed.R.Civ.P. The Rule lists reasons based on which a trial court may grant such relief. The portions conceivably relevant on this record are contained in the following subparts:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(e);
>
> * * *
>
> (6) any other reason that justifies relief.

[8] Complainant also argued that he'd previously raised informal concerns about the improper reporting of hours of service and other safety issues, and that this same manager had retaliated against him. This goes to the manager's retaliatory animus or possible pattern of behavior, not to his knowledge of Complainant's filing the particular Federal Railroad Administration complaint that is the alleged protected activity in this case.

As I consider these factors, I am sensitive to the fact that Complainant represents himself. Although some liberality must be allowed to accord a *pro se* litigant

> "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." Affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system.

Peck v. Safe Air Int'l, Inc., ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 19 (ARB January 30, 2004), *citing Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983) (other internal citations omitted). Thus, the adjudicator must strike a proper balance between accommodation and evenhanded administration. *Peck, supra*, at 19.

No mistake, inadvertence, surprise, or excusable neglect. For these purposes "parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel." *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1101 (9th Cir. 2006). Here, Complainant knew what was required on motions for summary decision. I advised him in the Order to Show Cause what summary decision was, its purpose and effect, its legal underpinnings, and that in his opposition:

> Complainant must present "specific facts" to show that there is a genuine dispute. He may present the facts in the form of affidavits, declarations, deposition transcripts, discovery responses, properly identified and authenticated documents, and other similar evidence. Mere allegations and speculation are not enough.
>
> Complainant may also dispute the legal arguments that BNSF advances in its brief. Complainant may do this in the form of an opposing brief filed on or before December 5, 2011. In the brief, Complainant should support his legal arguments with citations to appropriate sources of law, such as statutes, regulations, and case decisions. He may argue based on reason, experience, policy considerations, and the like.

Order to Show Cause, Nov. 17, 2011 at 2.

Complainant was also aware of the filing deadline. I advised him that his failure to file an opposition by December 5, 2011 could result in a decision against him without a trial. *Id.*

Complainant's timely filed, extensive opposition to summary decision shows deliberation and thought. The typed brief is 17 pages long. Complainant submitted with it a loose-leaf binder containing 15 tabbed exhibits. The brief discusses the exhibits and argues that Complainant is entitled to a hearing. Although it does not expressly refer to the doctrine of equitable estoppel or equitable tolling, it advances relevant arguments on these theories to rebut Respondent's

argument that the claim is time-barred.[9] Complainant raises numerous other arguments, citing the exhibits.

When Complainant filed additional papers a month late, I struck them as untimely, but in the alternative considered them and found that they did not affect the result on summary decision. This essentially gave Complainant a second bite at the apple.

Complainant offers no excuse for not submitting, either with his opposition papers or at worst with his late-filed additional papers, the evidence or argument he now advances in this motion for reconsideration. This is not a second bite at the apple; it is a third. As Complainant's opposition to summary decision reflects his knowing, deliberate selection of evidence and arguments, Complainant is accountable for his choices and offers no excuse to bring him within Rule 60(b)(1).

No newly discovered evidence. Under Rule 60(b)(2), "A defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court." *Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992) (collecting cases). A party's "failure to file documents in an original motion or opposition does not turn the late filed documents into 'newly discovered evidence.'" *School District No. 1J v. ACandS, Inc*., 5 F.3d 1255, 1263 (9th Cir. 1993).[10]

Indeed, Complainant concedes that the evidence he submitted on the motion for reconsideration is not new. He states in his motion that the attached exhibits do not contain new documents, but only re-organized and re-numbered copies of exhibits he previously submitted. Even if some of the facts he alleges were newly advanced, there would be nothing to indicate that they are *newly discovered*.

For example, Complainant alleges that he did not realize until November 30, 2010 that he would not be paid for his medical leave. Even so, by his own admission he did know this by November 30, 2010, which is more than a year before he filed his opposition to summary decision; it is not newly discovered information. Similarly, there are no newly discovered facts in Complainant's argument that his manager could have figured out that he was the one who reported the alleged violations. According to Complainant, the incidents all involved him directly (which means he knew of them) and took place no later than September 2010, some fifteen months before he filed his opposition to summary decision. Again, nothing is newly discovered.

No other grounds. Finally, the relief under Rule 60(b)(6), F.R.Civ.P., which is for "any other reason" that justifies relief "requires a finding of 'extraordinary circumstances.'" *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985) (citing *McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985)); *Twentieth Century-Fox Film Corp. v. Dunnahoo*,

[9] Complainant argues that his manager misled him into not pursuing his rights and that his late filing should be excused because he was experiencing anxiety, depression, and memory loss, for which he was seeing a psychiatrist. "Complainant Utgaard's Motion for a Trial" at 10.

[10] Even evidence that reasonably *could have been discovered* is insufficient. *Hopkins v. Andaya*, 958 F.2d 881, 887 n. 5 (9th Cir. 1992).

637 F.2d 1338, 1341 (9th Cir. 1981). Here, Complainant offers nothing extraordinary that would allow relief under Rule 60(b)(6); simply being unrepresented is not an extraordinary circumstance. *See Peck v. Safe Air Int'l, Inc., supra.*[11]

The other grounds for relief under Rule 60(b), F.R.Civ.P., are not even arguably applicable, and Complainant offers nothing to the contrary.[12]

Conclusion. Throughout the course of this litigation, I have accommodated Complainant because he is unrepresented. I have construed his filings liberally to identify his new and successively raised allegations of diverse adverse actions and allowed him to pursue them if he simply would plead minimally adequate facts. I have read his arguments liberally to fit them within our rules of practice and procedure and within established legal and equitable doctrines. On the motion for summary decision, Complainant never advanced an express argument based on equitable tolling or estoppel; I had to construe his arguments to bring them within those doctrines. Just that alone was arguably close to the line beyond which I would exceed my role as an even-handed adjudicator. Indeed, I had to read Complainant's filing liberally to construe this very motion as one for reconsideration; he nowhere expressly states that's what it is. But to consider facts and argument that Complainant filed timely, amplified by those he filed a month late, issue an order on summary decision, and then allow him to file still later a third set of evidence and arguments that were available to him all along goes beyond the bounds of even-handed adjudication. *See Peck v. Safe Air Int'l, Inc., supra.*[13]

I thus find that Complainant is not entitled to reconsideration of the January 9, 2012 order granting partial summary decision.

II. Even on Reconsideration, Complainant Is Not Entitled to Relief from the Order on Summary Decision.

Even were I to reach the merits of Complainant's arguments on reconsideration, he offers nothing that will change the result.

A. Complainant Knew of the Adverse Action More than 180 Days before Filing His OSHA Complaint.

On the motion for summary decision and in all the subsequent filings, there has been no dispute that the alleged adverse action of placing Complainant on an involuntary medical leave occurred on September 20, 2010, and that the time between that action and Complainant's filing his

[11] When I decided the motion for summary decision, I considered and rejected Complainant's contention that his late filing should be excused for health reasons. For the same reasons, I reject his repetition of this argument on reconsideration.

[12] Other grounds, not relevant here, include, for example, fraud, misrepresentation, or misconduct by an opposing party; the judgment is void; the judgment has been satisfied, released, or discharged; or it is based on an earlier judgment that has been reversed or vacated.

[13] After I construed Complainant's present filing as a motion for reconsideration and ordered Respondent to file an opposition, I allowed Complainant a reply. He filed two, one on March 5, 2012, and a second on March 22, 2012, both with the same title: "Claimant Response to Respondent's Motion for No Reconsideration." I considered both.

OSHA complaint was 221 days, which puts it outside the 180-day limitations period. Complainant argued on summary decision that the late filing must be excused because he initially assumed that, when Respondent brought him back into service following the medical leave, it would pay him all the wages he would have earned had he been working, and that he only learned that he was "getting the shaft" on October 22, 2010.

I did not reach the legal sufficiency of Complainant's argument because it was factually inadequate: even if accepted as the relevant date, October 22, 2010 is 189 days before Complainant filed his OSHA complaint on April 29, 2011; it still falls outside the 180-day limitations period.

Complainant's argument having failed, he now would advance different and inconsistent facts. He says he didn't realize the action was adverse until he spoke to his union representative on November 30, 2010, and learned that he would not be getting any back wages when he was returned to service following the medical leave. While asserting this, however, he candidly admits in his reply brief that he "felt he was getting the shaft *the day he was taken out of service*."[14] It was only "after he had time to think about it, he felt he was on a paid vacation at least until November, when Claimant was told by [his union representative] that he wouldn't be getting any back pay." *Id.*

I reject Complainant's argument for two reasons. First, a party seeking equitable relief cannot base his request on a shifting set of factual allegations. At some portion of the relevant time, Complainant might have mistakenly assumed that Respondent eventually would pay him for the time he was on the unpaid medical leave, but regardless, he admitted that he knew the action was adverse from the first day he was put on a leave and that this was reconfirmed when he again realized that he was "getting the shaft" by October 22, 2010. There is no reason to relieve Complainant of those admissions.

Second, that a party made an unbased and inaccurate assumption is not a basis for equitable tolling. As I stated on summary decision, equitable tolling generally may be available in whistleblower cases under three circumstances: "when the defendant has actively misled the plaintiff regarding the cause of action;[15] when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4, *citing School Dist. of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Williams v United Airlines, Inc.*, ARB No. 08-063 at 2 (Sept. 21, 2009) (*citing* same).

[14] "Claimant's Response, etc.," filed March 22, 2012, at 8, ¶10 (emphasis added).

[15] Where the employer has actively misled the employee, the doctrine is more correctly equitable estoppel, not equitable tolling. *See Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4. This includes, for example, "'where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.'" *Id.* at 5. In some Circuits, this element of the employer's misleading the plaintiff is generally required for equitable tolling at least in employment discrimination cases. *See Williamson v. Indiana University*, 345 F.3d 459, 463 (7th Cir. 1003); *Amini v. Oberlin College*, 259 F.3d 493, 498 (6th Cir. 2001); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999); *see also Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750, 752-53 (D.C. Cir. 1998).

Here, Complainant offers no facts and no argument to suggest that Respondent misled him into believing that it would pay him back wages for the time he was on a medical leave. On the contrary, he immediately thought the leave was an adverse action and only later made an unwarranted assumption that it amounted to a paid vacation. What Complainant actually knew, without making assumptions, is that Respondent cut off his pay. Together with his filing the complaint with the Federal Railroad Administration three months earlier, that was enough to put him on notice of a possible whistleblower claim. Equitable tolling is not available to a party who *knew or should have known* during the limitations period of a claim that was possible. *See Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1173 (9th Cir. 2003). At the least, Complainant should have known of a possible claim because he had been given no indication that he'd receive back wages and, rather than indulging in speculation about it, should have promptly asked either Respondent or his union representative.[16] Complainant's additional argument for equitable tolling therefore fails.

B. Complainant Has Not Raised a Genuine Dispute about Whether Decision-Maker Fritz Had Knowledge of Complainant's Protected Activity.

I granted Respondent summary decision on Complainant's second theory (disciplinary suspension) because Complainant failed to raise a genuine issue as to whether the manager who imposed the suspension knew at that time of Complainant's protected activity. The activity was a complaint to the Federal Railroad Administration that Complainant's manager Jared Fritz was not properly reporting his hours of service. Fritz admits that he knew a complaint was made because a Federal Railroad Administration inspector told him. But he denies knowing who made the complaint until Complainant filed this whistleblower action.

On reconsideration, Complainant asserts that his Federal Railroad Administration complaint raised three separate incidents in which Fritz allegedly did not accurately report his hours of service; that Complainant was the only worker to have worked on all three of the occasions; and that it therefore it wouldn't have taken a "rocket scientist" for Fritz to have figured out who made the complaint. Standing alone, this does not conclusively establish that the manager had knowledge of the protected activity at the time he suspended Complainant. But, it might be enough to raise a triable issue were it not for a crucial and decisive deficiency.

In particular, Complainant offers nothing to show that Fritz knew or even thought that Complainant was the only worker to have worked all three of the relevant jobs. In a second declaration, Fritz denies any such knowledge and states that he wouldn't have inferred from what he knew that Complainant filed the complaint with the Federal Railroad Administration.[17]

Fritz states in the declaration that he didn't spend much time thinking about who might have filed the complaint, but he "assumed that whoever contacted the FRA would have been someone with first-hand knowledge of how many hours I was at each worksite and what tasks I performed." *Id.* ¶6. He describes each of the three relevant jobs in some detail. He states that he

[16] Once Complainant learned on November 22, 2010 that his assumption about back pay was erroneous, he still had plenty of time to file the complaint timely before the March 19, 2011 limitations deadline. He simply didn't do it.

[17] See "Second Declaration of Jerad Fritz," filed February 24, 2012.

didn't see Complainant at two of the jobs, and on the third, Complainant left before the work was complete and while Fritz was still working. Fritz concludes in this sworn statement:

> I did not consider it likely that a person who wasn't present while I was at the worksite, and therefore wouldn't know how many hours I worked or what tasks I performed, would report to the FRA that I had not properly reported my Hours of Service. For that reason, I never suspected that Mr. Utgaard was the individual who contacted the FRA.

Id. ¶9.[18]

Complainant's evidence does not bring Fritz' testimony into genuine dispute. Complainant has placed on the record his complaint to the Federal Railroad Administration, dated May 4, 2010. C.Ex. 1a. In it, Complainant accuses Fritz and supervisor John Hubbard of three specific examples of not filling out required hours of service reports.[19] Complainant alleges that the most recent of these occurred on May 2, 2010, just two days before he wrote the complaint. The other two were some eighteen months earlier on October 10 and 22, 2008.

As Complainant describes the three incidents, nothing shows that Fritz interacted with Complainant on more than one of them, the work done of October 10, 2008. Even on that occasion, Complainant alleged only that he met Fritz "mid-day" and apparently Fritz must have been wiring a signal light, although Complainant never went to the worksite to see what Fritz was actually doing. *Id.* This is entirely consistent with Fritz' declaration testimony that, although he knew Complainant worked that day, Complainant left before the work was done, Fritz stayed and continued working, and thus Complainant wouldn't have known how many hours Fritz worked.

As to the other incidents, Complainant's description of the events of October 22, 2008 shows that he was aware that Fritz and Hubbard were together in a "bungalow" and that, in Complainant's opinion, one of them must have done some wiring. Nothing about this shows that Fritz, in the bungalow, knew Complainant was outside working; Complainant did not report any interaction between them.

On the May 2, 2010 incident, Complainant states that he loaded generators onto vehicles in Mandan, North Dakota, and was waiting for instructions when his hours of service for the day elapsed, and he went to a motel. At that time, only five of 50 generators that needed to be set up had been completed. The next morning, about 45 of the 50 were done. From this, Complainant concluded that Fritz and Hubbard must have worked on setting up the approximately 40 generators that were completed overnight. Again, nothing suggests any interaction between Complainant and Fritz or anything else from which Fritz would have known that Complainant

[18] Fritz states in his declaration that the Federal Railroad Administration investigation concluded that he had properly documented his hours of service. *Id.* ¶10.

[19] As Complainant alleged in the FRA complaint: "I am sure there are other [examples], but those are for someone else to report." C.Ex. 1a at 1.

was working; indeed, everything indicates that, if Fritz worked on the project, he worked overnight, while Complainant was at a motel. [20]

I therefore need not resolve any disputed facts or make any credibility determinations to reconcile the parties' declarations. It is entirely consistent with the entire record, and I accept for purposes of this motion, that Complainant did work on all three jobs; that Fritz knew of Complainant's working on only of one of the three jobs; and that, even on the one job, Complainant wouldn't have known how many hours Fritz worked because he was gone before Fritz completed his work, thus dispelling any suggestion that it was Complainant who filed the complaint. I conclude from this that the circumstantial evidence provides no basis to infer that Fritz must have known it was Complainant who filed the complaint with the Federal Railroad Administration.

Conclusion and Order

Complainant has failed to show that he is entitled to reconsideration of the January 9, 2012 order granting partial summary decision. In the alternative, even were I to reach the substance of Complainant's arguments, I would not grant relief on this record. Complainant has failed to offer evidence sufficient to excuse his late filing of his first claim (involuntary medical leave), and has failed to bring into genuine dispute Fritz' declaration testimony that, at the time he imposed a disciplinary suspension on Complainant, he did not know that it was Complainant who had filed the Federal Railroad Administration complaint. As I have stricken Complainant's amended pleading and have granted summary decision on all other issues, Complainant's claim is DENIED in its entirety, and this matter is DISMISSED.

The January 9, 2012 order granting partial summary decision is appended for completeness and incorporated by reference.

SO ORDERED.

A

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

[20] In one of his briefs, Complainant argues about the October 10 and 22, 2008 incidents. *See* "Complainant Utgaard's Order to Resubmit Case," filed Jan. 26, 2012, at 8. He asserts, as Fritz does not dispute, that he was the only person present with Fritz on October 10, 2008. As to October 22, 2008, Complainant argues that three people would have known about Fritz' hours and that Complainant is one of them. But he doesn't describe the circumstances or allege any facts from which it could be inferred that Fritz knew who worked that day. Complainant also argues in this section of his brief about events on October 23, 2008; April 3, 2010; and July 6, 2008. None of these was a subject of the complaint to the Federal Railroad Administration.

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

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).

SEE ADDENDUM TO FOLLOW

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 09 January 2012

CASE NO.: 2011-FRS-00025

In the Matter of:

RICK UTGAARD,
Complainant,

v.

BNSF RAILWAY,
Respondent.

ORDER GRANTING PARTIAL SUMMARY DECISION AND VACATING HEARING DATE

Introduction and Procedural History

This matter arises under the employee protection provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20109. It is set for hearing on March 19, 2012 in Billings, Montana. Its relevant procedural history is as follows:

On April 29, 2011, Complainant telephoned the Occupational Safety and Health Administration on his own behalf and stated a complaint. R.App. at 95.[1] According to OSHA records, the Administrator reduced Complainant's telephonic complaint to writing ("Discrimination Case Activity Worksheet") and summarized Complainant's allegation as follows: "Complainant alleges he was discriminated against because he turned in his manager, Jerad Fritz, for not documenting his hours of service." *Id.* The "Discrimination Case Activity Worksheet" does not specify a particular alleged retaliatory adverse action; it states only that Complainant alleged that the discriminatory act occurred on "December 15, 2011." But that's not possible, as the date Complainant called in the complaint was nearly eight months *before* December 15, 2011. I take OSHA's note to mean that Complainant alleged that the retaliatory act occurred on December 15, *2010*, not December 15, *2011*.[2]

---

[1] "R.App." refers to Respondent's appendix to its motion for summary decision. "C.Ex." refers to Complainant's exhibits. "C.Decl" refers to Complainant's combined declaration and brief. Neither party filed evidentiary objections to the other's exhibits. Accordingly, I admit for the purposes of this motion all of the exhibits that either party submitted on or before the December 5, 2011 filing deadline. (*See* discussion below rejecting later-filed materials).

[2] The "Discrimination Case Activity Worksheet" contains a signature box that reads: "I certify that the complaint was filed with me on (date):" followed by space for a signature, title, and date. The record shows that the Occupational Safety & Health Administration officer who completed the form indicated a title of "Compliance Officer" and indicated a filing date of April 29, 2011. But instead of the Compliance Officer's signature, the form

Following what the Administrator described as a "limited investigation," on June 9, 2011, he issued "Secretary's Findings." The Findings recite that, during the investigation, the Administrator determined that Complainant was asserting as the retaliatory adverse action that Respondent BNSF Railway had "removed [him] from service on September 20, 2010." As Complainant did not file a complaint until April 29, 2011, and this was more than 180 days after the alleged unlawful act on September 20, 2010, the Administrator denied the claim as untimely filed.

In a fax sent on July 13, 2011, Complainant requested a hearing before an administrative law judge. He objected to the Administrator's determination and raised two arguments. First, he contended that, "Though I was taken out of service on 9/20/2010 it wasn't until after 10/22/2010 that I realized I was getting the shaft." He alleged additional facts in support of this argument; I discuss those below. Second, Complainant alleged (apparently for the first time) another discriminatory act: that while he was off work on a medical leave, his manager initiated disciplinary action against him; that Complainant requested a postponement of Respondent's investigation of the disciplinary incident until he could return to work; and that his Union representative advised him that "if [he] didn't sign a waiver and it went to investigation, that [he] could get fired." *See* Request for Hearing (undated); C.Decl. at 1. (The waiver is akin to a plea bargain, in which the worker agrees that he violated a work rule, and the Company imposes lesser discipline.) The result was a 30-day disciplinary suspension. Complainant didn't state when this occurred, but he argued that it was fewer than 180 days before he filed his complaint with the Administrator.

In a later letter to the Chief Administrative Law Judge (received on August 9, 2011), he added a third alleged violation. As he wrote: "In February of 2011, I was denied expenses that I was owed and that is well within the 180 days. It sounds like they might finally be paying the phone bill, but I haven't seen any of the money yet." There is no indication that Complainant served Respondent with a copy of the cover letter or with his request for a hearing.

On November 16, 2011, Respondent moved for summary decision. I issued an order to show cause, requiring Complainant to file an opposition. I recited the general principles for summary decision and notified Complainant that, if he didn't file an opposition on or before December 5, 2011, I might decide the claim against him without the need for a trial. I reminded him that he had a right to retain counsel at his own expense, that in some instances Respondent might be required to pay his legal expenses (if Complainant prevailed), and that that he might consider retaining counsel even if only to prepare and file an opposition to the motion, if not for the entire case.

---

contains the following: "(b)(7)c." As Complainant does not dispute the identification or authenticity of the document, I accept that it is what it appears to be: the Occupational Safety & Health Administration Compliance Officer's memorialization of Complainant's telephonic complaint, filed April 29, 2011. (The regulations permit the filing of oral complaints, state that they "will be reduced to writing by OSHA," and provide that they are effective on the date of the telephone call. 29 C.F.R. §1982.103 (b), (d).

Continuing to represent himself, Complainant filed a timely and detailed opposition. It includes a 16-page document in which Complainant intersperses averred facts and argument (apparently a combined declaration and brief "C. Decl.") as well as numerous exhibits.[3]

Respondent's motion addresses two of the adverse actions that Complainant has alleged: the "removal from service" (which was a compelled, safety-related medical leave) and the 30-day suspension. Respondent argues that the compelled medical leave is time-barred and fails on the merits because Complainant cannot show that any deciding official knew of Complainant's protected activity. As to the disciplinary action, Respondent argues that: (1) Complainant failed

[3] The combined declaration and brief was not signed under penalty of perjury and therefore was not technically sufficient. In a telephone conference on December 22, 2011, I alerted Complainant that he needed to sign, file, and serve a verification. He filed the verification on January 5, 2012. His late-filing of the verification was proper, as I had requested and allowed it.

But Complainant also submitted untimely materials that I strike and will not consider. Our procedural rules provide that "a party opposing the motion [for summary decision] may not rest upon the mere allegations or denials of such pleading [as the complaint. The party] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). Opposing answer briefs are due within 10 days of service of the motion or "such other period as the administrative law judge may fix," and may include affidavits or other evidence the party wishes to submit. *Id.* § 18.6(b). "Unless the administrative law judge provides otherwise, no reply to an answer, response to a reply, or any further responsive document shall be filed." *Id.*

Here, I set a filing deadline for Complainant's opposition of December 5, 2011, which was longer than the period that that rules generally allow. (Respondent served the motion by mail on November 14, 2011. Without an order of the administrative law judge, the opposition would have been due on November 29, 2011. *See* 29 C.F.R. §§ 18.4(c), 18.6(b).) The opposition filings should have included all of Complainant's arguments, affidavits, and any other exhibits he wished to submit. *See* 29 C.F.R. §18.6(b).

Instead, after filing his extensive opposition, Complainant continued to submit additional materials to this Office. On January 4, 2012, nearly a month after the filing deadline, Complainant submitted his "Complainant Utgaard's Order to Show Cause," which is another combined brief and declaration (5 pages). On the following day, he submitted a letter stating that he was submitting "enough evidence to allow [his] case to go to trial." He enclosed an "Exposure Record Request," dated March 5, 1998, and bearing an exhibit tag (14a); an email dated September 1, 2011 and bearing an exhibit tag (4d) (2 pages); a copy of his initial request for a hearing before an administrative law judge; a copy of a letter that Complainant wrote to this Office on November 1, 2011, seeking a continuance of an earlier trial setting; copies of twelve separate certificates of service related to prior filings; and "Complainant Utgaard's Motion for Evidentiary Hearing" (18 pages).

I strike these additional filings for two reasons. First, I expressly ordered that Complainant submit any opposition to the motion on or before December 5, 2011. He actually did file an opposition at that time. He did not request an extension of time to submit additional materials. He never requested leave to file the materials late. He offered no explanation for the delay. And most of the materials are not relevant to the motion and none appears to have been newly discovered after Complainant filed his timely opposition.

Second, our rules – as with the rules of any court – contemplate a limited exchange of briefs so that the record on any motion may be closed and the motion decided in a fair and reasonably expeditious manner. If parties are allowed to submit materials by drib and drab *ad nauseum*, no motion could be decided without excessive delay. That's why our rules exclude even reply briefs, absent leave of the administrative law judge. And these additional (late) submissions were not replies: Respondent didn't respond to Complainant's opposition, and thus there was nothing further to which Complainant could be replying.

Finally, I find nothing in Complainant's added filings that changes the result. Complainant addresses certain newly alleged violations at considerable length. I am giving him an opportunity to amend his complaint to add those. They can be fully litigated if Complainant files the amendment. Complainant offers nothing to disturb the findings in the text on the two issues that the present ruling decides.

to exhaust administrative remedies because he didn't file a complaint with the Occupational Safety & Health Administration, (2) that Complainant offers no facts to tie the disciplinary action to his protected activity; and (3) Respondent would have disciplined Complainant even absent his protected activity.

In his opposition, Complainant generally offers a point-by-point refutation. He also tenders more new allegations. He states that Respondent has been denying him overtime. C.Br. at 9. He also alleges that Respondent has been subjecting him to "intimidation" that has been "ongoing ever since Mr. Miller took over as Supervisor in Glendive." *Id.* Finally, he states that after the Administrator denied his claim, he tried to add "several items to his case but was told [apparently by OSHA] that his case was closed." *Id.*

Pleadings and Scope of This Action

The implementing regulations provide that complaints should be filed with Occupational Safety & Health Administration. 29 C.F.R. § 1982.103(c). The formal requirements are loose and limited:

> No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

29 C.F.R. § 1982.103(b).

Once a complaint is filed, the Administrator must notify the respondent. *Id.* § 1982.104(a). A respondent may – but is not required to – answer within 20 days of receipt of notice. *Id.* § 1982.104(b). Initially, the Administrator must conduct a limited investigation to determine if the complaint on its face, together with supplemental interviews, alleges "the existence of facts and evidence" to make out a *prima facie* case; if it does not, the complaint is dismissed without more. 29 C.F.R. § 1982.104(e). (That is what happened in the present case.) If there is a *prima facie* showing, the Administrator investigates the merits, reaches a determination, and issues written findings and a preliminary order. *Id.* §1982.105(a). Any party desiring review of the findings or order must file a timely written request for hearing, stating whether the objections are to the findings or to the order. *Id.* §1982.106(a). The case is then referred to this Office for *de novo* adjudication. *Id.* §1982.107(b).

Unless the implementing regulations specify otherwise, proceedings before this Office are conducted under our generally applicable rules of procedure and evidence found at part 18 of title 29 of the Code of Federal Regulations. 29 C.F.R. §1982.107(a). Those rules provide that a "complaint" is "any document initiating an adjudicatory proceeding," regardless of how the document is designated. 29 C.F.R. §18.2(d). Pleadings, including complaints, may be amended as follows:

> If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary

> to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint.

Id. § 18.5(e).

In the present case, Complainant has continued to raise an ongoing series of new alleged adverse actions, all said to be in retaliation for his initial complaint that his manager "performed covered service without documenting it." *See* Determination Letter from Federal Railroad Administration (July 9, 2010), C.Ex. 4b. Complainant's initial complaint was that he was involuntarily placed on a medical leave. In his request for a hearing, he added an allegation related to a disciplinary suspension. The record is silent as to whether Respondent filed an answer to the complaint before Complainant raised this second claim. I therefore construe the allegation of the retaliatory suspension as Complainant's amendment to his complaint as a matter of right. *See* 29 C.F.R. §18.5(e). Respondent has addressed both of these allegations in this motion for summary decision, and I will decide the motion on both claims.

What remains, however, are Complainant's most recent allegations that Respondent (1) didn't reimburse Complainant (or took too long to reimburse him) for approximately $140 in cell phone charges (*see* C.Ex. 7); (2) denied him pay for 13 minutes of work on September 19, 2010[4] (*see* C.Ex. 6); (3) engaged in ongoing intimidation "since Mr. Miller took over as Supervisor in Glendive"; and (4) did "several [unspecified] items" that Complainant reported to the Administrator only after the Administrator had dismissed his complaint. It appears that Complainant raised these four new allegations for the first time in his opposition to this motion.

Respondent's motion does not address these newest allegations, as the briefing on the motion appears to be Respondent's first notice of them. I will allow Complainant an opportunity to amend his complaint to plead the new allegations if he can meet certain specified requirements.

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.*

[4] It appears that, under the applicable collective bargaining agreement, Respondent must pay a worker called to perform work outside his normal work hours (and not continuous with other work) for a minimum of two hours and forty minutes. C.Ex. 6f.

Catrett, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.[5]

I. Complainant's Allegation of a Retaliatory Compelled Medical Leave Is Time-Barred.

An employee who alleges a violation of the Act must commence an action "by filing a complaint with the Secretary of Labor" within 180 days after the date on which the alleged violation occurred. 49 U.S.C. §20109(d)(1), (d)(2)(A)(ii); 29 C.F.R. §1982.103(d). Here, Complainant failed to file his complaint timely.

There is no dispute that Respondent removed Complainant from service on September 20, 2010 and placed him on a medical leave. R.App. 42, 147. The Company's stated reason was that it needed to determine whether Complainant was medically able to work safely. The issue arose after Complainant reported back pain when driving Company vehicles as well as fatigue, possibly from sleep apnea. Complainant contends that the Company's placing him on an involuntary medical leave was in retaliation for the protected activity in which he engaged when he wrote a complaint to the Federal Railroad Administration on May 4, 2010. *See* C.Ex. 4a, 4b. The interval from September 20, 2010, when Complainant was placed on the medical leave, to the date Complainant filed his complaint with OSHA, April 29, 2011, is 221 days.[6] Complainant's filing fell outside the applicable 180-day limitations period.

Consistent with Supreme Court holdings in Title VII cases,[7] the Secretary provided in the implementing regulations for equitable tolling of the limitations period in Federal Railroad Safety Act claims. *See* 29 C.F.R. § 1982.103(d). As the regulation states: "The time for filing a complaint may be tolled for reasons warranted by applicable case law." *Id.*

Generally, equitable tolling may be available in whistleblower cases under three circumstances: "when the defendant has actively misled the plaintiff regarding the cause of action;[8] when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4, *citing School Dist. of City of Allentown*

[5] The facts in this Discussion section 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.

[6] I take official notice of the calendar.

[7] *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

[8] Where the employer has actively misled the employee, the doctrine is more correctly equitable estoppel, not equitable tolling. *See Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4. This includes, for example, "'where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.'" *Id.* at 5. In some Circuits, this element of the employer's misleading the plaintiff is generally required for equitable tolling at least in employment discrimination cases. *See Williamson v. Indiana University*, 345 F.3d 459, 463 (7th Cir. 1003); *Amini v. Oberlin College*, 259 F.3d 493, 498 (6th Cir. 2001); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999); *see also Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750, 752-53 (D.C. Cir. 1998).

v. Marshall, 657 F.2d 16 (3rd Cir. 1981); *Williams v United Airlines, Inc.*, ARB No. 08-063 at 2 (Sept. 21, 2009) (*citing* same).[9]

In his opposition to summary decision, Complainant does not assert that equitable tolling rescues him from the limitations period. He does offer two arguments, however, that I construe as requests for equitable tolling. First, he argues that he didn't immediately realize that being removed from service and put on a medical leave were adverse actions because he thought he'd be able to return to work and would be paid back wages for the time off. C.Decl. at 9; Request for hearing ("I honestly thought I would be right back to work with back pay"). He states that he only realized the action was adverse when it was combined with other hostile activities: denying him overtime, not waiting for a disciplinary action until he returned to work, and "other things." *Id.*[10] Second, he argues that, once he realized that the action was adverse, he "started having anxiety attacks, memory loss and depression." *Id.*

Even assuming that Complainant's first argument is legally sufficient,[11] it fails on the facts. In his letter to the Chief Administrative Law Judge in which Complainant objected to OSHA's denial of his claim and requested a hearing, Complainant specified the date on which he realized that the action was adverse. As he wrote:

Though I was taken out of service on 09/20/2010 it wasn't until after 10/22/2010 that I realized I was getting the shaft. It was on this date that I faxed the [medical] information requested by [Field Manager] Brett Ouellette [about my ability to work safely] only to find out that wasn't good enough. After I faxed the information to him, I never heard from him, so I called him back. He then [wanted more].[12]

[9] Although *Williams* appears to have arisen in the Ninth Circuit (as did the present case), the Board relied on the Third Circuit authority in *Marshall* for its holding.

[10] Respondent notes that Complainant admitted at his deposition that he "found it hard to believe that a person could be taken [off work] because they have sleep apnea." R.App. at 47. This, however, fails to negate that he thought he'd be restored to service without loss of pay, thus rendering the forced temporary medical leave, in his view, not adverse at the time it occurred.

But Complainant does miss the mark when he conflates an argument that he didn't realize until a later date that the action was adverse and a wholly different argument: that Respondent's conduct did not adversely affect him emotionally until a later date. Complainant admits that the medical leave was unpaid and that he went on unemployment compensation. C.Decl. at 7. He thus knew immediately that Respondent's action was adverse in the sense that Respondent stopped paying him. It might not have affected him emotionally until later, but the statutory limitations period runs from his being put on notice that his pay status was being discontinued, not from when he later reacted emotionally. As even the latter of these dates is outside the limitations period, I need not belabor the issue.

[11] *But see Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1173 (9th Cir. 2000) (rejecting equitable tolling when plaintiff knew or should have known during the limitations period of the existence of a *possible* claims).

[12] Complainant clarified at his deposition that his claim was not based on an assertion that the Company acted adversely to him by delaying his return to work; rather, his claim was limited to the Company's placing him on the medical leave in the first place. R.App. at 62. His theory is more that it was not until he concluded that the Company was delaying his return to work that he realized the medical leave was adverse.

Accepting *arguendo* Complainant's contentions, the 180-day limitations period was tolled until October 22, 2010. But this remains unavailing, as the date on which Complainant filed his complaint was 189 days later, still beyond the limitations period.

On the present record, Complainant's second argument – that the retaliation caused him anxiety attacks, memory loss, and depression – fails as well. Arguably, these facts go to the second of the three alternative bases for equitable tolling: occasions on which a plaintiff "in some extraordinary way" has been prevented from filing the claim. *See Williams, supra.* Complainant's argument fails, however, because he has not shown a mental incapacity sufficient to warrant equitable tolling. *See Wilkie v. Department of Health and Human Services*, 638 F.3d 944 (8th Cir. 2011) (expert testimony that plaintiff seemed "pretty stressed and depressed" held insufficient basis for equitable tolling).

As the *Wilkie* Court stated:

> We have held that "a plaintiff seeking tolling on the ground of mental incapacity must come forward with evidence that a mental condition prevented him from understanding and managing his affairs generally and from complying with the deadline he seeks to toll." "Courts that have allowed equitable tolling based on mental illness have done so only in exceptional circumstances, such as where the complainant is institutionalized or adjudged mentally incompetent." We have observed "that the standard for tolling due to mental illness is a high one."

Id. at 950 (citations omitted). *See also, Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010) (in a habeas case, "the burden of demonstrating the appropriateness of equitable tolling for mental illness lies with the plaintiff; in order to carry this burden, she must offer a "particularized description of how her condition . . . severely impair[ed] her ability to comply with the filing deadline, despite her diligent efforts to do so" – citations omitted); *Cox v. Sears, Roebuck & Co.*, 1994 WL 143019 (M.D. Fla. 3/31/1994) (stress and depression insufficient); *Kerver v. Exxon Products Research Co.*, 40 FEP 1567, 1568-69 (S.D. Tex. 1986) (same when plaintiff continued to handle his own affairs and did not consider himself mentally ill or incompetent); *cf. Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (when employer's repeated sexual abuse, rape, and assault of plaintiff left her severely impaired and unable to function in many respects, led to repeated suicide attempts, and left her unable to read, open mail, or function in society, and "completely psychiatrically disabled during the relevant limitation period," equitable tolling excused a late-filed Title VII charge).

Here, Complainant offers some medical records from family practitioner Bruce R. Swarny, MD. The records show that Dr. Swarny saw Complainant for complaints of depression, anxiety, and memory on three occasions from December 24, 2010 through March 24, 2011. Initially, Dr. Swarny diagnosed a Depressive Episode and Generalized Anxiety Disorder, then changed the diagnosis to "Anxiety State Unspecified." The industry standard for diagnosis of mental disorders, the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., Text Revision) (DSM-IV-TR), does not recognize a diagnosis of "Anxiety State Unspecified." But in any event, what Dr. Swarny notes as his objective observations of Complainant throughout the treatment period are that, although his mood was initially depressed and later anxious, he had

good attention; good judgment; clear, spontaneous, normal speech; was fully oriented; and was well-groomed.

Complainant doesn't suggest that he was institutionalized or adjudged mentally incompetent at any relevant time – or at all. Nor has he offered a "particularized description" of how his subjective feelings of anxiety, depression, and memory loss prevented him from making a phone call to OSHA or otherwise filing his complaint for more than 180 days. If anything, Dr. Swarny's records imply that Complainant had the attention, judgment, and ability to communicate that would allow him to file his complaint timely. Complainant has offered nothing like the facts of *Stoll*, where the plaintiff showed that she was "completely psychiatrically disabled" and could not function in society or even open or read the mail at any relevant time.

I do not doubt that Complainant found the alleged events distressing. For purposes of summary decision, I must – and do – view the evidence in the light most favorable to Complainant and assume that Complainant was anxious, depressed, and sustained some memory loss. But his showing falls far short of the "extraordinary" circumstances that would prevent his filing the complaint timely.

Accordingly, Complainant's claim based on his removal from service and being placed on a medical leave is denied as time-barred.

II. Complainant Has Failed to Establish a Prima Facie Case Based on the Disciplinary Suspension.

Complainant's second alleged violation of the Act centers on Respondent's pursuing disciplinary action against Complainant while he was on the medical leave, resulting in a 30-day suspension. Respondent argues that it is entitled to a favorable decision on this claim for three reasons. First, Complainant failed to exhaust administrative remedies because he did not file the complaint with the Occupational Safety & Health Administration. Second, Complainant offers no evidence either that the decision-makers had knowledge of his protected activity or that his engaging in protected activity was a factor that contributed to the Company's decision to pursue disciplinary action. Third, Respondent argues that, based on the undisputed facts, it would have taken the same disciplinary action even if Complainant had not engaged in protected activity. I reject the first argument. As the second argument has merit, I need not reach the third.

A. Complainant May Pursue Added Claims Here Without Returning to OSHA So Long As the Added Claims Reasonably Relate to Those He Earlier Raised at OSHA.

The general procedural regime for complaints, investigations, initial findings and preliminary orders, and litigation state that a complainant "should" be filed with OSHA,[13] which then investigates and issues Secretary's findings,[14] from which any party desiring review may object

[13] 29 C.F.R. § 1982.103(c). Use of the word "should," rather than "must," implies that there are exceptions in proper cases.

[14] 29 C.F.R. §§ 1982.104, 1982.105.

and file a request for hearing with the Chief Administrative Law Judge.[15] Respondent argues that this regulatory regime creates a jurisdictional prerequisite that a complainant "exhaust administrative remedies" at OSHA before pursuing the matter into litigation before an administrative law judge. Had Complainant not initiated his claim at OSHA in the first instance, the argument might have had merit, but under the circumstances presented here, it does not.

First, Respondent misplaces its reliance on federal trial court decisions that hold a plaintiff's failure to exhaust remedies before the appropriate administrative agency deprives the district court of jurisdiction; that is, administrative exhaustion is a jurisdictional prerequisite for federal court action.[16] What Respondent neglects is that an administrative law judge conducting a *de novo* hearing before the Department of Labor Office of Administrative Law Judges is merely executing one phase of the administrative procedure that Congress and the Department of Labor have established; it is a part of the administrative process. This Office is an administrative agency, not a court; Complainant is in the process of availing himself of the very administrative remedy that Respondent argues he has failed to exhaust.

Second, Complainant did file a complaint with OSHA. He called and spoke to an OSHA official on the telephone. When reducing the complaint to writing, the OSHA official didn't note what discriminatory act Complainant alleged. OSHA was empowered to interview Complainant as part of a limited or a full investigation and ask him for all facts underlying his claim. An OSHA investigator was in a position to elicit from Complainant specific allegations. Indeed, implicit in the regulatory scheme of allowing free-form, loose complaints – including oral complaints in a telephone conversation – is that OSHA will follow up with interviews in a limited investigation.

But under the applicable regulation, it is not for an administrative law judge to review the adequacy of an OSHA investigation. Administrative law judges may not remand to OSHA "for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits." 29 C.F.R. § 1982.109(c). Typically, the way in which an administrative law

---

[15] 29 C.F.R. § 1982.106.

[16] Respondent cites two federal district court decisions for this proposition. *Zhu v. Federal Housing Finance Board*, 389 F.Supp.2d 1253, 1271-72 (D. Kan. 2005); *Bozeman v. Per-Se Technologies, Inc.*, 456 F.Supp.2d 1282, 1357 (N.D. Ga. 2006).

Respondent also misplaces its reliance on *Jain v. Empower IT, Inc.*, ARB No. 08-077 (Oct. 30, 2009). That case was a labor condition application case arising under the Immigration and Nationality Act. The implementing regulations for that Act provide that, "No hearing or appeal pursuant to this subpart shall be available where the Administrator determines that an investigation on a complaint is not warranted." 20 C.F.R. § 655.806(a)(2). The regulations allow an administrative law judge to review the Administrator's decision only in two instances: "First, where the Administrator determines, after investigation, that there is no basis for finding that an employer committed violations, and second, where the Administrator determines, after investigation, that the employer has violated the INA. *Jain* at 9, (citing 20 C.F.R. § 655.820(b)(1), (2)). Nothing in the Federal Railroad Safety Act cabins an administrative law judge's authority to review OSHA's findings in the same manner; nothing provides that, if OSHA makes a preliminary finding that a complainant has failed to make out a *prima facie* case necessitating a full investigation, there is no appeal. The regulatory scheme is entirely to the opposite, with the administrative law judge assigned to address issues even when OSHA did not. *See* 29 C.F.R. §1982.109(c), and discussion in the text below.

judge would address the additional issues on the merits would be through an amendment to the complaint to add those issues. That is what I will allow here.[17]

Finally, it could well be that Complainant in fact did raise these additional allegations with OSHA. Complainant telephoned OSHA after it dismissed his claim and stated additional allegations. Nothing on the record specifies what those allegations were. Complainant states only that OSHA declined to consider them, as it had already dismissed the case that it opened after the initial complaint.

Again, OSHA arguably should have done more. If it didn't want to reopen the case that it had dismissed, it should have opened a new file with the additional allegations. The regulations require no more than a phone call to file a complaint; that's what Complainant did. When OSHA declined to consider the new allegations, it effectively dismissed them, allowing Complainant to include them in any request for review before an administrative law judge.[18]

In all, I conclude that Complainant may amend his complaint in this forum to include additional allegations of unlawful retaliatory acts so long as they reasonably relate to the allegations he raised in his complaint to OSHA.

B. Complainant Failed to Offer Evidence that the Company Official Pursuing Disciplinary Action Against Him Knew of His Protected Activity.

As it applies here, the Federal Railroad Safety Act makes unlawful a railroad carrier's suspension of an employee if it is "due, in whole or in part," to the employee's lawful, good faith act done . . . to file a complaint . . . applicable to railroad safety or security." 49 U.S.C. § 20109(a)(3). 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. *See* 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

[17] Courts hearing employment discrimination claims routinely allow plaintiffs to add allegations beyond those raised before the administrative agency (Equal Employment Opportunity Commission) so long as they are "reasonably related" and, for example, involve additional incidents of discrimination carried out in the same manner as those in the administrative charge. *See Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 177 (2d Cir. 2005); *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003). The result would differ, for example, if the plaintiff brought a hostile work environment charge and attempted in a later court proceeding to add an incident of disparate treatment or vice versa. *See Cottrill v. MFA, Inc.*, 443 F.3d 629, 634-35 (8th Cir. 2006); *Chacko V. Patuxent Institute*, 429 F.3d 505, 511 (4th Cir. 2005). Similarly, the result could differ if the plaintiff pointed to different decision-makers. *See Chacko, supra*; *Vasquez v. County of Los Angeles*, 349 F.3d 634, 645 (9th Cir. 2003).

[18] Complainant might be raising a third argument, but it is one that I reject. He states: "Mr. Fritz actively misled the plaintiff by using his union rep., Mr. Wyckoff to either mislead or not represent the plaintiff to the extent that he was entitled to." C.Decl. at 10. Complainant argues at length about his dissatisfaction with his union's representation. *Id.* at 11-16. But he says nothing to describe or identify what the misrepresentation was or show that it delayed his filing the complaint. Nor does he offer any evidence to support his conclusion that his union representative was somehow the Company's agent or dupe. This is insufficient to raise a genuine issue going to equitable estoppel.

he 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 No. 05-058 (Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (Jan. 31, 2008), slip op. at 4.

Respondent contends that no one involved in the decision to discipline Complainant was aware at any relevant time that it was Complainant who had complained to the Federal Railroad Administration. As Complainant's manager and the decision-maker on the suspension, Jarad Fritz stated in a declaration that he was aware that someone had filed a complaint with the Federal Railroad Administration because an inspector from that agency told him, but neither the inspector nor anyone else identified who had filed the complaint. R.App. at 139. Mr. Fritz didn't suspect it was Complainant and only learned that it was him "after May 2011," when Occupational Safety & Health Administration served a copy of the OSHA complaint on Respondent. *Id.*

Complainant does not address this argument directly.[19] He does, however, state: "Not only did Mr. Utgaard openly talk about his sleep apnea but he also talked about turning Mr. Fritz into the [Federal Railroad Administration] for Hours of Service." C.Decl. at 3.

This statement, however, is insufficient to bring Mr. Fritz' declaration into dispute. It amounts to nothing more than speculation about what Mr. Fritz might have heard. *See Muino v. Florida Power & Light*, ARB No. 06-092 at 8-9 (Apr. 2, 2008) (affirming summary decision: speculation insufficient to create a genuine issue of material fact to show that the decision-maker had knowledge of the protected activity). Complainant does not dispute that Mr. Fritz was the decision-maker; he offers nothing to suggest that any other manager was involved. The implication is that Complainant's protected activity couldn't have contributed to Mr. Fritz' decision to impose discipline because Mr. Fritz didn't know that Complainant was the person who had engaged in the protected activity.

As Complainant is unable to show that Respondent's decision-maker had knowledge of Complainant's protected activity, his claim based on the disciplinary suspension fails as a matter of law.

---

[19] There are suggestions in Complainant's papers that he needs more time for discovery. If he is asserting this argument, I reject it. The case was docketed on July 13, 2011, nearly six months ago. On August 3, 2011, I set it for a trial on December 15, 2011, with a discovery cut off date in late November 2011. That put the parties on notice that they needed to get their discovery done.

A complainant is obliged to prove that the deciding officials knew of his protected activity. Complainant is charged with knowledge of this requirement. He should have been developing his proof on it since the case was referred here in July 2011, with an eye to concluding the development by the initial discovery cut-off date more than four months later in late November 2011. He also is charged with understanding the discovery tools available to him. (Respondent had engaged in interrogatory, deposition, and requests for production, which also alerted Complainant to these tools.) Complainant did request numerous document demands through subpoenas, but none of these is aimed at showing that any Company deciding official had knowledge that it was Complainant who filed the Federal Railroad Administration complaint. Complainant never states what additional discovery he needs or why he hasn't had an opportunity to complete it. This is not an adequate showing to deny a motion for summary decision as premature when the case is this close to the March 19, 2012 trial date.

Order

Respondent's motion for summary decision on Complainant's currently pending allegations (forced medical leave and 30-day suspension) is GRANTED.

Within 21 days, Complainant may file an amendment to his complaint to add allegations of other adverse actions he claims to be in retaliation for his protected activity on May 4, 2010; provided, however, that any such amendment must include a definite statement of the facts alleged (*i.e.*, not just vague references to "several items" or to "ongoing intimidation"); a statement of the date on or about each alleged adverse action occurred; and a statement of the date that he first raised this alleged adverse action in a complaint (or any kind of report or statement) to any agency of the U.S. Department of Labor (including an identification of which agency – such as Occupational Safety & Health Administration or the Office of Administrative Law Judges).

It must be possible to ascertain from the facts Complainant pleads whether the new claim is reasonably related to those Complainant previously raised with the Occupational Safety & Health Administration. If the claim is not reasonably related to those the Complainant previously raised with OSHA, he should file a new complaint with OSHA, rather than amend here.

If Complainant contends that, although he did not include the particular newly pleaded adverse action in his initial OSHA complaint on April 29, 2011, the later-filed complaint relates back in time to the initial OSHA complaint, he will state that as a contention and plead all facts necessary to support it.

Complainant is advised that, if he chooses to amend his complaint, he should include all claims he believes in good faith, after reasonable investigation, that reasonably relate to those he previously raised with OSHA. I am unlikely to allow any further amendment beyond this one absent a showing of events arising *after* Complainant files this next amendment. Other than such potential newly arising claims, Complainant's pleading must be complete at this time.

Complainant is again advised that there are technical legal demands applicable to any amended complaint he might file under this Order. Complainant may retain an attorney or a non-attorney representative at his own expense to represent him, either for preparation of an amended complainant or for any other purpose related to this matter.[20]

If Complainant does not have on file in this Office an amended complaint conforming to the requirements above (or an order extending time) within 21 days of the date this Order issues, I will dismiss Complainant's case in its entirety. If Complainant files a timely amended complaint, Respondent will file an answer within 21 days of the filing of the amended complaint.

[20] As I stated in a previous Order, in certain cases in which the complainant is the prevailing party, the respondent may be required to pay the complainant's reasonable attorney's fees.

In view of there being no currently pending allegations, and considering that, if Complainant raises new allegations in an amended complaint, time for discovery will be necessary, the trial setting for March 19, 2012 in Billings, Montana is VACATED.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge