**U.S. Department of Labor**

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**Issue Date: 30 May 2012**

**CASE NO: 2012-FRS-00008**

***In the Matter of:***

CURTIS MARTINEK,
*Complainant,*

*v.*

BNSF RAILWAY COMPANY,
*Respondent.*

**ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. (Aug. 3, 2007) and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). A hearing has been requested by Complainant Curtis Martinek on the determination made by the U.S. Department of Labor.

On April 12, 2012, Respondent filed and served a motion for summary decision. Complainant's opposition thereto was due no later than April 27, 2012; however, in light of Complainant's pro se status I extended the time for response to May 11, 2012. Mr. Martinek has not filed any response to the motion. Although his lack of response will not be treated as a concession that Respondent's motion should be granted, it does mean that Mr. Martinek has failed to dispute any of the facts argued by Respondent and I therefore will assume that they are true.

*Undisputed Facts*

Complainant Curtis Martinek was notified that he was terminated from his employment, effective immediately, with Respondent BNSF Railway Company on December 2, 2010. The reason given for his termination was a failure to comply with instructions regarding extension of his medical leave. [Exhibit 1A to Respondent's motion for summary decision.] Complainant was not employed again by Respondent after this notice of termination. [Exhibit 3 to motion for summary decision.]

Complainant was again notified that he was terminated from employment, effective immediately, on January 6, 2011, for failure to report for duty at the designated time. [Exhibit 1B to motion for summary decision.]

Complainant was again notified that he was terminated from employment, effective immediately, on February 28, 2011, for failure to report a personal injury and misrepresentation. [Exhibit 1C to motion for summary decision.]

On June 23, 2011, Complainant filed a complaint under the FRSA with the Occupational Safety and Health Administration, alleging that his three terminations were in retaliation for having reported personal injury. [Exhibit 2 to motion for summary decision.]

*Discussion*

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact exists that must be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962).

Under FRSA and its implementing regulations, a complaint must be filed with OSHA not later than 180 days after the alleged violation of the FRSA occurs. 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d). The 180-day limitation is not jurisdictional, however, and may be subject to equitable tolling. *Ibid.*

Here, the first notice of termination was issued to Complainant on December 2, 2010, and he filed his OSHA complaint on June 23, 2011, which was 204 days after his employment was terminated. Clearly, his action is time-barred as to that termination.

The second and third notices of termination were issued within the 180-day limitations period and, at first glance, appear timely. However, Respondent persuasively argues that the second and third decisions to terminate employment do not start separate 180-day periods. The December 2, 2010 letter was “final and unequivocal notice” of termination, starting the 180-day clock. See, e.g., *Rollins v. American Airlines, Inc.,* ARB No. 04-140, ALJ No. 2004-AIR-9, slip op. pp. 2-3 (ARB Apr. 3, 2007); *Swenk v. Exelon Generation Co.,* ARB No. 04-028, ALJ No. 2003-ERA-030, slip op. p. 3 (ARB April 28, 2005). He was no longer employed by Respondent after that date, and was never reinstated. As a result, there was no employment relationship

between Complainant and Respondent that could have been severed after December 2, 2010. Accordingly, Complainant was required to file his OSHA complaint no later than 180 days after December 2, 2010. He did not, and his failure to do so makes his complaint untimely.

As mentioned above, the 180-day limit is not jurisdictional, and may be extended by equitable tolling principles. Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown,* 657 F.2d 16, 20 (3rd Cir. 1981)(citing *Smith v. American President Lines, Ltd.,* 571 F.2d 102, 109 (2nd Cir. 1978)). *See also Harvey v. Home Depot U.S.A., supra.* Courts have held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.,* 1987 ERA 53 (Sec y, Sept. 29, 1989). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. *See Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 151 (1984). In this case, as Complainant has not responded in any way to Respondent's motion, there is no evidence that would support the application of equitable tolling. Accordingly, he is not entitled to relief from the 180-day filing requirement.

## ORDER

Based on the foregoing, IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED; and
2. This matter is DISMISSED with prejudice.

**SO ORDERED.**

**A**

**PAUL C. JOHNSON, JR.**
Associate Chief 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 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).