



Issue Date: 20 April 2012

Case No.: 2012-FRS-00016

In the Matter of:

MICHAEL WILLIAMS,

Complainant

v.

NATIONAL RAILROAD PASSENGER CORP.,

Respondent.

**DECISION AND ORDER DISMISSING
THE COMPLAINT DUE TO UNTIMELY FILING**

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109, 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. The 9/11 Act was the result of a Conference Report, H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amends the FRSA by modifying the railroad carrier employee whistleblower provision – both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121.

PROCEDURAL HISTORY

The Complainant, Mr. Michael E. Williams, filed a complaint on December 17, 2011, alleging that the Respondent, National Railroad Passenger Corporation ("Amtrak") committed a violation of the FRSA. The Occupational Safety and Health Administration ("OSHA") issued its findings on January 9, 2012. OSHA determined that the complaint had not been filed within 180 days of the alleged retaliatory action and dismissed the complaint as untimely. On January 20, 2012, Mr. Williams appealed the OSHA determination to the Office of Administrative Law Judges ("OALJ").

On **March 15, 2012**, Amtrak filed a Motion to Dismiss the complaint as untimely. Mr. Williams replied to the Motion on March 26, 2012.

STATUTORY PROVISIONS

The FRSA provides that:

A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done—

...

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;

49 U.S.C. §20109(a)(4)

An action under the FRSA must be commenced not later than 180 days after the date on which the alleged violation of the act occurs. 49 U.S.C. § 20109 (d)(2)(ii). A violation occurs “when the discriminatory decision has been both made and communicated to the complainant.” 29 C.F.R. §1979.103(d).

BACKGROUND

This summary of the case is taken from the account in Mr. Williams’ complaint. I accept for purposes of the motion all of the factual allegations in the complaint.

Mr. Williams was employed by Amtrak as a road foreman, a management position. According to the complaint, he suffered an on-the-job injury in November of 2008. He was descending from a locomotive engine when the engineer accidentally dropped a laptop bag, which hit Mr. Williams on the head. He immediately felt a sharp pain in his neck, radiating down his back.

He called his supervisor, Larry Vanover, who told him “well, if you are really injured go ahead and go to the hospital.” He went to a hospital emergency room and while he was there Linwood Harris, another manager, called him and told him not to report the injury “because it would not look good if a manager reports an injury and I [Mr. Williams] would lose my job.”

In a written statement dated February 12, 2012, Mr. Harris confirmed that this conversation took place. He stated that Mr. Vanover called him, told him of Mr. Williams’ injury, and said that it would not look good for Mr. Williams or the division. He “kept reiterating that we didn’t need any injuries especially for a manager.” Mr. Vanover knew that Mr. Harris and Mr. Williams were friends and asked Mr. Harris to talk to Mr. Williams about not reporting the injury. Mr. Harris agreed and made the call to Mr. Williams, who was still in the emergency room. He told Mr. Williams about the conversation that he had had with Mr. Vanover, and Mr. Williams agreed not to report the injury.

The injury has continued to cause Mr. Williams pain. He stated that “[f]or fear of ruining my career, I did not get the medical treatment I needed.” He contacted a representative of Amtrak’s Employee Assistance Program. She sent him an email on May 28, 2009. That email provided the toll free hotline numbers for Amtrak’s Ethics Compliance office and Inspector General and stated that reports could be made to those offices “if an employee believes that they [sic] are being intimidated not to report an injury.”

Mr. Williams began a medical leave of absence on December 11, 2011. On December 12, 2011, he made a complaint to the Amtrak Ethics and Compliance Hotline. The materials that he has submitted with his DOL complaint include emails from the compliance officer to whom the complaint was assigned, but do not indicate whether this internal complaint has been resolved.

DISCUSSION

In his December 17, 2011 complaint to OSHA Mr. Williams stated that since his injury he has been working in a hostile environment because “the company could terminate me anytime because I hired into management and have no union representation.” However, in that complaint the only adverse employment action that he identified was the pressure by Mr. Vanover and Mr. Harris to convince him not to report the injury. The other concern he expressed was that he could be terminated without union representation. The lack of union protection is not an adverse employment action under the Act. It results from his employment status as a manager, and would be the case even if the 2008 accident had never happened.

The adverse action that has been alleged was not, strictly speaking, retaliation for having reported a work-related injury. Rather, it was coercion applied to prevent Mr. Williams from reporting the injury in the first place.

In spite of this distinction, pressure of the kind that both Mr. Williams and Mr. Harris described is improper and I will assume for the purposes of this motion that it constituted adverse employment action under the FRSA.

The injury and the pressure not to report it occurred in November of 2008, more than three years before the complaint was filed, and the 180 day time limit specified in Section 20109 (d)(2)(ii) of the Act expired long before the complaint was filed. However, in certain circumstances untimely filing of a complaint can be excused under the doctrines of equitable tolling or equitable estoppel. A plaintiff or complainant seeking to relax the statute of limitations has the burden of justifying the application of these doctrines. *Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26, at 20 (ALJ) (Feb. 23, 2007).

Equitable tolling of the statute of limitations may apply in three situations: (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981).

Under the doctrine of equitable estoppel, “a late filing may be accepted as timely if an employer has engaged in ‘affirmative misconduct’ to mislead the complainant regarding an operative fact forming the basis for a cause of action, the duration of the filing period, or the necessity for filing.” *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054 (ARB Aug. 31, 2005).

There has been no indication that Mr. Williams made the same statutory claim to another agency within 180 days of the adverse action. Similarly, there is no allegation or evidence that anyone at Amtrak misled him as to his remedies under federal law. After his complaint to the Ethics hotline, a representative of Amtrak contacted him concerning procedures under the company’s internal complaint procedures. This email chain does not discuss legal remedies under FRSA. In any event, his internal complaint was not made until December 2011, so nothing that was done in response to it could have affected his action or inaction during the 180 days after his injury.

There is no allegation of any extraordinary circumstance that prevented Mr. Williams from filing earlier. The only reason that he gives for the delay in seeking medical attention, which might also be construed as applying to pursuing legal remedies, is that he feared for his career. This is understandable, and is a dilemma faced by any employee considering whether to become a whistleblower. In enacting the FRSA Congress had the opportunity to consider this potential reason for delay, and determined on 180 days as the time period within which a report would have to be made.

ORDER

The Complaint is **DISMISSED** due to untimely filing.

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KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc
Newport News, Virginia

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. § 1979.110(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. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(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.

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. § 1979.110. 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. §§ 1979.109(c) and 1979.110(a) and (b).