In the Matter of:

MICHAEL WILLIAMS, **ARB CASE NO. 12-068**

COMPLAINANT, **ALJ CASE NO. 2012-FRS-016**

v. **DATE: December 19, 2013**

NATIONAL RAILROAD PASSENGER CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Michael E. Williams; *pro se*; Florence, South Carolina

***For the Respondent*:**
Robert D. Corl, Esq.; *Amtrak Law Department*; Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Federal Railroad Safety Act of 1982 (FRSA).[1] Complainant Michael Williams alleges that his employer, National Railroad Passenger Corp. (Amtrak), retaliated against him for engaging in FRSA whistleblower protected activity. In a Decision and Order (D. & O.) dated April 20, 2012, the presiding Administrative Law Judge (ALJ) granted Amtrak's motion to dismiss Williams's complaint as untimely. For the reasons discussed below, we affirm.

[1] 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2013), as implemented by federal regulations at 29 C.F.R. Part 1982 (2013) and 29 C.F.R. Part 18, Subpart A (2013).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to issue final agency decisions under the FRSA.[2] We review de novo an ALJ's granting of a motion to dismiss a whistleblower case when the ALJ determines that the complainant's claims are untimely.[3] Though not specifically cited by the ALJ or the parties, we look to 29 C.F.R. § 18.40 to review the ALJ's summary dismissal in that he granted Amtrak's motion to dismiss as a matter of law. Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue a summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts which could support a finding in his favor.[4] The Board reviews a summary decision without weighing the evidence or determining the truth of the matters asserted.[5] The Board "construe[s] complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."[6]

BACKGROUND[7]

In November 2008, Williams allegedly reported an on-duty injury to his supervisor.[8] A co-worker dropped a laptop bag on top of his head and injured Williams's neck and spine. Williams immediately informed his supervisor, who told him to go to the hospital if he was injured. When Williams arrived at the hospital emergency room, his supervisor's manager

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[2] Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1982.110.

[3] *Bala v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-026, slip op. at 3 (ARB Sept. 27, 2013) (the ARB reviews an ALJ's "conclusions of law de novo.").

[4] See 29 C.F.R. § 18.40(c).

[5] *Hasan v. Enercon Svcs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 5 (ARB July 28, 2011).

[6] *Hyman v. KD Res., L.L.C., et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 31, 2010) (citations omitted).

[7] We base the Background Statement on the documentation submitted to the ALJ. Only for purposes of reviewing the motion for summary decision, we view these facts in the light most favorable to Williams, the party responding to the motion for summary decision. *Hasan*, ARB No. 10-061, slip op. at 4. We do not suggest that any of these facts have been decided on the merits.

[8] The background in this paragraph comes from a letter dated December 17, 2011, sent from Williams to OSHA regarding "Discrimination – Injury Reporting."

allegedly called Williams and told him "not to report the injury because it would not look good if a manager reports an injury." This same manager also told Williams that he would lose his job if he reported the injury. Consequently, Williams did not seek medical treatment. He continued working for Amtrak and endured the pain from this work injury. He alleges that he was subjected to a hostile working environment following his injury until his employment ended.

Williams points to two incidents in 2009 as part of his claim of a hostile work environment. Amtrak allegedly placed him on probation (1) on January 27, 2009, for failing to submit to a drug and alcohol test and (2) on March 12, 2009, for allegedly violating the FRA hours of service law.[9]

The next series of alleged retaliatory acts occurred from late 2010 to early 2011. On October 2010, Williams applied for an assistant superintendent position, but Amtrak allegedly rejected him and hired someone with a background of unprofessional conduct.[10] Williams next applied for a road foreman position and was again rejected for a less qualified person. On November 12, 2010, Bill Seltzer, a division manager of another company, CSXT, allegedly badgered, harassed, and intimidated him. Williams reported Seltzer's allegedly unprofessional conduct, but Williams was scrutinized rather than defended and nothing was done about Seltzer's conduct. He unsuccessfully applied for a general road foreman position in November 2010 and January 2011. Williams points to no other specific instance of alleged harassment or retaliation occurring over the next ten (10) months in 2011.

On December 8, 2011, Amtrak Road Foreman Gerald Vincent asked Williams to assist in performing efficiency tests on one of his crews.[11] When the crew failed the efficiency tests, Amtrak Assistant Superintendent Larry Vanover allegedly blamed Williams for not following up with the crew after the test. But Williams said that he "agreed with Mr. [Jim] Freeman" as to the "manager's responsibility to ensure compliance with the crew during efficiency testing." Finally, although Williams was scheduled to start vacation on December 10, 2011, his employer allegedly forced him to attend a meeting in Raleigh, N.C., to discuss the crew's test failure, as well as meetings in Florence and Jacksonville on December 12 and 16, respectively.

In early December 2011, Williams filed his first whistleblower complaint with OSHA against Amtrak.[12] On January 9, 2012, OSHA dismissed Williams's complaint as untimely.

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[9] Complainant's Brief to the Board (Comp. Br.) at 2.

[10] The background in this paragraph comes from the Comp. Br. at 3-5 and Complainant's faxed submission (Comp. Feb. Sub.) to the ALJ at 8, 20 (Feb. 24, 2012).

[11] The background in this paragraph comes from the Comp. Br. at 4, 6, and the Comp. Feb. Sub. at 6, 8, 10, 11, 12.

[12] No clear indication exists in the record as to the date Williams filed his complaint. OSHA's findings identify December 17, 2011, as the date of Williams's complaint, but the record also contains the OSHA Report of Investigation dated December 8, 2011, stating that Williams's complaint had a disposition of "Dismissed – Untimely Filed." Because our decision finds that

Williams objected to OSHA's findings, requested a hearing, and the case was assigned to an ALJ for further proceedings. On February 24, 2012, Williams submitted to the ALJ twenty-eight pages of documentation to support his case. Amtrak then filed a Motion to Dismiss Williams's complaint, attaching OSHA's findings as Exhibit A. On March 26, 2012, as his response to the Motion to Dismiss, Williams submitted a medical form dated December 21, 2011, diagnosing him with post-traumatic stress disorder and depression due to stress at work and a copy of the 9/11 Commission Act of 2007 Whistleblower Provisions.

After considering the parties' submissions, the ALJ dismissed Williams's complaint as untimely. The ALJ took his summary of the case from Williams's complaint and reviewed other materials Williams submitted, including: (1) a written statement dated February 12, 2012, by Linwood Harris; (2) an e-mail from a representative of Amtrak's Employee Assistant Program to Williams; and (3) other e-mails from Amtrak's compliance officer investigating Williams's internal complaint. D. & O. at 2. Williams filed a petition for review on April 26, 2012, with the Board. Both parties filed briefs. Having examined the record in the light most favorable to Williams, we find that (1) Williams's whistleblower claims for incidents occurring before June 1, 2011, are barred as untimely; (2) he failed to demonstrate a basis for equitable tolling, and (3) the incidents in December 2011, fail, as a matter of law, to state a whistleblower claim.

DISCUSSION

The FRSA whistleblower statute prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity.[13] Prohibited "discrimination" includes "intimidating, threatening, restraining, coercing, blacklisting, or disciplining."[14] Proving a whistleblower claim requires a complainant to establish by a preponderance of the evidence that: (1) he engaged in a protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor, in whole or in part, in the unfavorable personnel action.[15] To be timely, a complainant must file an FRSA whistleblower claim within 180 days

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Williams's complaint was late by many months, the exact day of the filing in December is inconsequential.

[13] See 49 U.S.C.A. § 20109(a), (b).

[14] 29 C.F.R. § 1982.102(a).

[15] *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 5-6 (ARB Oct. 26, 2012). *See* 49 U.S.C.A. § 42121(b)(2)(B)(iii).

after an alleged violation.[16] The statutory limitations period begins to run when a "complainant has final, definitive, and unequivocal knowledge of a discrete adverse act . . . ."[17]

The ALJ's Rulings on the Statute of Limitations and Equitable Tolling

The ALJ correctly found that Williams filed too late for the whistleblower violations occurring before June 2011. Williams filed his complaint with OSHA in early December 2011. All of the incidents Williams described were discrete acts that occurred from 2009 through January 2011 that the FRSA whistleblower statute covers (discipline, failure to promote, and intimidation). The FRSA whistleblower statute required that Williams file within 180 days of each of these discrete acts, making the filing deadline the end of July 2011. Therefore, Williams's December 2011 complaint was months late and barred.

We also agree with the ALJ that equitable estoppel does not save Williams's claims for the alleged violations occurring before June 2011. In determining whether we should toll a statute of limitations for whistleblower claims, the Board has recognized four principal and nonexclusive "situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights."[18] Williams did not provide any information supporting any of the grounds for equitable tolling. We agree with the ALJ that Williams's claim of being discouraged from reporting an injury does not mean he was prevented from filing a whistleblower claim. Consequently, we find as untimely any claim based on the Amtrak's allegedly harassing conduct occurring before June 2011.

Hostile Work Environment and December 2011 claims

The ALJ did not expressly discuss the legal significance of Williams's reference to work incidents occurring in December 2011. More fully described earlier, Williams asserted that Amtrak criticized him after his crew failed an efficiency test on December 8, 2011, and he was required to attend meetings during his scheduled vacation.[19] Because of Williams's pro se

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[16] 42 U.S.C.A. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d).

[17] *Cante v. New York City Dep't of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 10 (ARB July 31, 2009).

[18] *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012) (citations omitted).

[19] The OSHA findings state that Williams "alleged Respondent disciplined him and denied him promotions between November 2008 and April 2011 in reprisal for his having informed his supervisor in November 2008 of his being injured while on the job." OSHA Findings dated January 9, 2012, at 1. After reviewing the record, we find no reference to any specific lost promotional

status, we consider whether he saw these incidents as (1) a continuation of the alleged "hostile environment" existing from 2009 through early 2011 and/or (2) independent bases for asserting a whistleblower claim. We find, as a matter of law, that the December 2011 incidents fail to constitute part of a hostile work environment claim or an independent basis for whistleblower claims.

The Board has recognized "hostile work environment" claims as a basis for asserting unlawful whistleblower discrimination.[20] A hostile work environment occurs where "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . .'"[21] To determine whether there is a hostile work environment, a court must look at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[22] "Discourtesy or rudeness should not be confused with harassment; nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing, actionable."[23] The abusive conduct must occur because of the protected activity and it must be sufficiently severe and/or pervasive so as to alter the conditions of employment, from the perspective of a reasonable person.[24] A complaint alleging a hostile work environment is not time-barred if all the acts encompassing the claim are part of the same practice and at least one act comes within the 180-day filing period.[25] As general guidance, we rely on the Court's reasoning in *Morgan* that a series of alleged events comprises the same hostile environment when "the pre- and post-limitations period incidents

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opportunities after January 2011. In responding to a motion to dismiss, Williams was required to provide specific facts of his claim. Regardless, given that Williams did not file his complaint until December 2011, discrete acts of allegedly discriminatory refusals to promote fall outside the 180-day statute of limitations for filing FRSA whistleblower claims.

[20] *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 1997-ERA-014 et al., slip op. at 11 (ARB Nov. 13, 2002) (citations omitted).

[21] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

[22] *Harris*, 510 U.S. at 23. *See also Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-001, slip op. at 10 (ARB Apr. 30, 2004) (quotations omitted).

[23] *Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 2001-ERA-019, slip op. at 8 (ARB Feb. 26, 2004) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

[24] 29 C.F.R. § 18.40(c); *Lewis v. United States Envtl. Prot. Agency*, ARB No. 04-117, ALJ Nos. 2003-CAA-005, -006, slip op. at 5 (ARB June 30, 2008) (citations omitted).

[25] *Schlagel*, ARB No. 02-092, slip op. at 10 (citing *Morgan*, 536 U.S. at 117). *See also Gilliam v. South Carolina Dep't of Juvenile Justice*, 474 F.3d 134, 140 (4th Cir. 2007) (citation omitted).

involve the same type of employment actions, occur[] relatively frequently, and [a]re perpetrated by the same managers."[26]

In this case, we find that the December 2011 incidents do not form part of any preceding hostile work environment claim. The alleged criticisms and meetings occurring during Williams's scheduled vacation materially differ from his unsuccessful pursuit of promotional opportunities in early 2011 and a ten-month gap separates the events.[27] Similarly, we also find that the timing and nature of the previous incidents of alleged retaliation in 2009 and 2010 (probation for failing to submit to a drug and alcohol test and violating hours of service laws) make them a different series of events from the December 2011 incidents.

Lastly, we find that the December 2011 incidents fail to provide a legally sufficient basis for a FRSA whistleblower claim. Williams asserts generally that he was criticized after his crew failed an efficiency test. He does not describe the incident as a reprimand. Williams never says that the test was improper or that the failure did not occur. Williams also agreed that it was the "manager's responsibility to ensure compliance with the crew during efficiency testing."[28] Williams's own admissions demonstrate that Amtrak performed a proper test and expected Williams to appear at meetings in response to the failure. On balance, we find that the general criticism and required meetings do not rise to the level of "discriminatory" conduct needed to form the basis of a FRSA whistleblower complaint, such as discipline, reprimanding, intimidating, threatening, restraining, coercing, or blacklisting. In addition, we also find that Williams failed as a matter of law to present sufficient circumstantial evidence of a causal link between his only protected activity in November 2008[29] and the December 2011 incidents to raise a genuine issue of material fact on the issue of causation.

In sum, all of Williams's claims fail as a matter of law for several reasons. As to his claims based on incidents occurring before June 2011, they are untimely and he failed to provide

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[26] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120 (2002) (citation to court below omitted).

[27] We note that discrete acts may form part of a hostile work environment claim "[w]here the discrete act is sufficiently related to a hostile work environment claim so that it may be fairly considered part of the same claim . . . . The pivotal question is whether the timely discrete acts are sufficiently related to the hostile work environment claim." *Chambless v. Louisiana-Pacific Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007).

[28] Comp. Feb. Sub. at 11.

[29] The other protected activity Williams has asserted occurred on December 21, 2011, when he reported his diagnosis of PTSD and depression due to work stress. Since this protected activity occurred after all of the adverse action alleged in this case, it could not have contributed to any adverse action against Williams.

a basis for equitable tolling. As to his claims based on the incidents occurring in December 2011, he failed to state a legally sufficient basis to support a whistleblower claim.

CONCLUSION

We **AFFIRM** the ALJ's Decision and Order and **DISMISS** the complaint.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge