



**In the Matter of:**

**MICHAEL S. JENKINS,**

**ARB CASE NO. 13-029**

**COMPLAINANT,**

**ALJ CASE NO. 2012-FRS-073**

**v.**

**DATE: May 15, 2014**

**CSX TRANSPORTATION, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Michelle M. Benjamin, Esq.; Winchester, Tennessee**

*For the Respondent:*

**Joseph C. Devine, Esq.; Baker & Hostetler, LLP; Columbus, Ohio**

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

### **DECISION AND ORDER OF REMAND**

Michael S. Jenkins filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, CSX Transportation, Inc. (CSXT), terminated his employment on December 6, 2011, in violation of the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).<sup>1</sup>

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<sup>1</sup> 49 U.S.C.A. § 20109 (Thomson/West 2012). *See also* 29 C.F.R. Part 1982 (2013).

Jenkins filed his initial complaint of unlawful retaliation with OSHA on July 18, 2012. OSHA dismissed Jenkins's claim as untimely filed. Jenkins then requested a hearing before the Office of Administrative Law Judges (OALJ). On Respondent CSXT's motion for summary decision seeking dismissal of Jenkins's complaint, the Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) on December 20, 2012, granting CSXT's motion and dismissing Jenkins's complaint as untimely filed. Jenkins filed a petition requesting the Administrative Review Board (ARB or the Board) to review the D. & O. For the following reasons, we reverse the ALJ's ruling and remand this matter to the ALJ for further proceedings consistent with this Decision and Order of Remand.

## BACKGROUND

By letter dated December 6, 2011, Respondent CSXT notified Complainant Jenkins that his employment with CSXT was terminated, "effective immediately," for violating CSXT operating rules.<sup>2</sup> At this time, Jenkins had worked for CSXT as a conductor for approximately six years.<sup>3</sup> Jenkins contends that CSXT terminated his employment in retaliation for raising operating safety violations.<sup>4</sup>

In early January 2012, Jenkins's union representatives filed a formal grievance on his behalf with CSXT appealing his employment termination.<sup>5</sup> Jenkins's local union chairmen, Craig Spangler and Reuben Newsome, then requested a meeting with Pete Burris,<sup>6</sup> CSXT Division Manager, in an effort to secure Jenkins's reinstatement.<sup>7</sup> Burris initially told Spangler and Newsome to meet with Crane Jones, CSXT's Assistant Division Manager, who Burris advised could make the decision regarding reinstatement. Upon discussing Jenkins's reinstatement with Jones, he recommended an "action plan" that Jenkins should follow, and scheduled a meeting with Jenkins for February.<sup>8</sup>

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<sup>2</sup> ALJ Order Granting Respondent's Motion for Summary Decision (D. & O.), slip op at 1; Affidavit of Zachery Jones, at para 2; Respondent's Exhibit (RX) B.

<sup>3</sup> Jenkins Affidavit, ¶ 1.

<sup>4</sup> *Id.* at ¶ 2-11.

<sup>5</sup> D. & O. at 1; Jones Affidavit, ¶ 3.

<sup>6</sup> Respondent spells the CSXT Division Manager's surname "Burrus," while Complainant spells it "Burris." We will use Complainant's spelling since we quote extensively from Complainant's affidavits.

<sup>7</sup> Newsome Affidavit, ¶ 2; Spangler Affidavit, ¶ 1; Jenkins Affidavit, ¶ 12.

<sup>8</sup> Newsome Affidavit, ¶¶ 3, 4.

The February meeting with Jones was postponed to March, although when Jenkins showed up for the March meeting, Jones was not available to meet.<sup>9</sup> Spangler and Newsome again requested a meeting with Burris to discuss Jenkins's reinstatement.<sup>10</sup> When they met with Burris in April, Burris advised Spangler and Newsome that they should meet with CSXT trainmasters Marcelo Estrada and Doug Harris. Burris informed them that if Estrada and Harris agreed that Jenkins was ready to return to work, Burris would schedule a meeting to reinstate Jenkins.<sup>11</sup> Newsome, in turn, informed Jenkins of their discussion with Burris, and of Burris's representation that he would schedule a meeting for Jenkins to return to work if the two trainmasters approved.<sup>12</sup>

In May 2012, Estrada and Harris met with Jenkins. They informed him that they were agreeable to his returning to work, and that they would schedule a meeting for him with Burris for his return.<sup>13</sup> Following Jenkins's meeting with Estrada and Harris, Newsome and Spangler spoke to Estrada, who confirmed that the two trainmasters were agreeable to returning Jenkins to work, and that they would contact Burris to set up a meeting regarding his reinstatement.<sup>14</sup>

Near the end of May, Newsome and Spangler both contacted Estrada, who advised them that the trainmasters had not yet heard back from Burris regarding the promised meeting.<sup>15</sup>

Sometime in the first part of June, no meeting with Burris having yet been scheduled, Newsome spoke directly with Burris, who told Newsome that if Estrada and Harris were ready to put Jenkins back to work, that he would be agreeable to his reinstatement. Newsome, in turn, advised Jenkins of his conversation with Burris.<sup>16</sup>

The rest of June and the month of July, despite repeated attempts to set up a meeting with Burris, no date was scheduled until early August, when a meeting with Burris was finally set for August 9th.<sup>17</sup> In the meantime, on July 18, 2012, having concluded that CSXT management

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<sup>9</sup> Newsome Affidavit, ¶ 5.

<sup>10</sup> Spangler Affidavit, ¶¶ 3, 4.

<sup>11</sup> Newsome Affidavit, ¶ 7; Spangler Affidavit, ¶ 4.

<sup>12</sup> Jenkins Affidavit, ¶ 16.

<sup>13</sup> Jenkins Affidavit ¶¶ 17, 21; Newsome Affidavit ¶ 8; Spangler Affidavit, ¶ 5.

<sup>14</sup> Newsome Affidavit, ¶ 9; Spangler Affidavit, ¶¶ 6, 7.

<sup>15</sup> Newsome Affidavit, ¶ 10; Spangler Affidavit, ¶ 8; Jenkins Affidavit, ¶ 22.

<sup>16</sup> Newsome Affidavit, ¶ 10.

<sup>17</sup> Spangler Affidavit ¶¶ 9-13; Newsome Affidavit ¶ 11; Jenkins Affidavit, ¶ 23.

would not, in fact, allow him to return to work,<sup>18</sup> Jenkins filed his FRSA complaint pro se with OSHA alleging that his termination was in retaliation for contacting the Federal Railroad Administration (FRA) concerning safety violations.<sup>19</sup>

At the August 9, 2012 meeting, Burris for the first time indicated that Jenkins would not be reinstated, and that Jenkins would have to proceed to arbitration.<sup>20</sup>

Burris led Jenkins, as well as Newsome and Spangler, to believe that because of the CXST trainmasters' willingness to accept Jenkins back to work, that Burris would reinstate Jenkins to his former employment.<sup>21</sup>

### PROCEEDINGS BELOW

After an investigation, OSHA determined that Jenkins's complaint was untimely, having been filed approximately 225 days after Jenkins's termination, and dismissed the claim. Jenkins filed objections to OSHA's ruling and requested a hearing before a Department of Labor ALJ. Prior to hearing before the ALJ, CSXT filed a motion for summary decision, seeking dismissal on the grounds that Jenkins's complaint was time barred because it was not filed within 180 days of Jenkins's termination. The ALJ granted CSXT's motion and dismissed Jenkins's complaint. Jenkins timely appealed the ALJ's Decision and Order to the Administrative Review Board.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) authority to issue final agency decisions under the FRSA.<sup>22</sup> The ARB reviews de novo an ALJ's granting of a motion to dismiss a whistleblower case when the ALJ determines that the complaint is untimely.<sup>23</sup> Accordingly, the Board is guided in its consideration by 29 C.F.R. § 18.40, governing an ALJ's granting of summary decision as a matter of law.<sup>24</sup> Pursuant to 29

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<sup>18</sup> OSHA Determination Letter (July 30, 2012), RX A.

<sup>19</sup> App. I, Complaint; Report of Investigation (ROI) (July 30, 2012).

<sup>20</sup> Spangler Affidavit, ¶ 13; Newsome Affidavit, ¶ 13.

<sup>21</sup> Spangler Affidavit, ¶ 15; Newsome Affidavit, ¶ 13; Jenkins Affidavit, ¶ 20.

<sup>22</sup> Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012).

<sup>23</sup> *Bala v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-026, slip op. at 4 (ARB Sept. 27, 2013).

<sup>24</sup> *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 2 (ARB Dec. 19, 2013)

C.F.R. § 18.40(d), the moving party is entitled to summary decision on its behalf “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 that could support a finding in his favor.<sup>25</sup> The Board reviews a summary decision without weighing the evidence or determining the truth of the matters asserted.<sup>26</sup> 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.”<sup>27</sup>

## DISCUSSION

Before the ALJ, Jenkins argued that his failure to timely file his complaint should be excused on equitable estoppel grounds. He submitted three affidavits in support of his position. Relying upon the three bases for estoppel identified in *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981),<sup>28</sup> the ALJ found that Jenkins’s submission lacked necessary evidence to support equitable modification of the FRS 180-day filing period:

First, there is no evidence in the record that Respondent actively misled Complainant respecting the cause of action. Nor is there any evidence that the Complainant has in some extraordinary way been prevented from asserting his rights. Furthermore, there is no evidence that Complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.<sup>[29]</sup>

Further, the ALJ found that equitable estoppel was not appropriate because, while there was evidence that the parties began to discuss reinstatement, there was “no evidence in the record that Respondent induced Complainant to defer filing an FRS complaint during the

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<sup>25</sup> See 29 C.F.R. § 18.40(c).

<sup>26</sup> *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 5 (ARB July 28, 2011).

<sup>27</sup> *Hyman v. KD Res., L.L.C.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 31, 2010) (citations omitted).

<sup>28</sup> “[W]hen (1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.” *Allentown*, 657 F.2d at 20.

<sup>29</sup> D. & O. at 3.

pendency of these discussions.”<sup>30</sup> Accordingly, the ALJ dismissed Jenkins’s complaint as untimely filed.

Jenkins argues on appeal that Division Manager Pete Burris led Jenkins to believe that he would reinstate Jenkins if trainmasters Marcelo Estrada and Doug Harris agreed that Jenkins was ready to return to work.<sup>31</sup> He notes that Estrada and Harris subsequently did agree to his return to work and indicated they would schedule a meeting with Burris for his reinstatement to employment.<sup>32</sup> The affidavits Jenkins submitted indicate that representations were made to both Jenkins and Jenkins’s union chairmen that Burris would reinstate Jenkins in light of the trainmasters’ approval. Indeed, the ALJ cited this as an undisputed fact: “Complainant and the union representatives recall that Harris and Estrada eventually agreed to the reinstatement. Moreover, they recalled that in a prior meeting Burris agreed that Complainant would be reinstated if Harris and Estrada recommended it to him.”<sup>33</sup> Thus, Jenkins believed that he was going to be returned to work. He argues that by encouraging this belief, CSXT lulled him into a false sense of security and induced him to rely upon representations that caused him to refrain from exercising his rights to file a timely FRSA claim.<sup>34</sup> He asserts that his reliance upon CSXT representations was reasonable since “they advised him in May 2012 that they [Estrada and Harris] were in agreement that he was ready to return to work and a meeting would be scheduled for reinstatement.”<sup>35</sup>

In response to Jenkins, Respondent argues that the ALJ was correct in ruling that the FRSA 180-day limitations period barred Jenkins’s complaint.<sup>36</sup> CSXT asserts that it never agreed to reinstate Jenkins and never induced Jenkins to do anything.<sup>37</sup> Thus, Respondent argues that equitable estoppel does not apply, and the ALJ’s D. & O. should be affirmed.<sup>38</sup>

Employees alleging employer retaliation in violation of the FRSA must file their complaints with OSHA within 180 days after the alleged violation occurred.<sup>39</sup> It is undisputed

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<sup>30</sup> *Id.* at 4.

<sup>31</sup> Comp. Br. at 2-3.

<sup>32</sup> *Id.* at 4.

<sup>33</sup> D. & O. at 2.

<sup>34</sup> Comp. Br. at 8.

<sup>35</sup> *Id.* at 8.

<sup>36</sup> Resp. Br. at 19-20.

<sup>37</sup> *Id.* at 18.

<sup>38</sup> *Id.* at 20.

<sup>39</sup> 42 U.S.C.A. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d).

that Jenkins did not file his complaint until July 18, 2012, which was 225 days after CSXT terminated his employment on December 6, 2011. In addressing the question of the timeliness of Jenkins's complaint, the ALJ correctly recognized that the 180-day limitations period the FRSA imposes is not jurisdictional and is thus subject to equitable modification. The ALJ also accurately explained the distinction between equitable tolling and equitable estoppel: "Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights."<sup>40</sup> However, while the ALJ correctly recognized that Jenkins raised equitable estoppel as a defense to Respondent's motion, we find error in the ALJ's application of the principles of equitable estoppel to the facts alleged in this case, which we must view in the light most favorable to Jenkins, the nonmoving party.

In addition to the three equitable estoppel principles identified in *School District of Allentown*, the Board has recognized that equitable estoppel will also apply to toll the running of a statute of limitations in situations "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights."<sup>41</sup> Under this test it is immaterial whether the employer engaged in intentional misconduct.<sup>42</sup> The equitable principle justifies tolling because one party "lull[ed] another into a false security, and into a position he would not take only because of such conduct."<sup>43</sup> For estoppel to apply in this context, "the issue is whether the [employer]'s conduct, innocent or not, reasonably induced the [employee] not to file suit within the limitations period."<sup>44</sup> "It is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice."<sup>45</sup>

A number of federal circuit courts have recognized this fourth principle of equitable estoppel. For example, in *Coke v. General Adjustment Bureau*, 640 F.2d 584, 595 (5th Cir.

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<sup>40</sup> D. & O. at 3 (quoting *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991)).

<sup>41</sup> *Hyman*, ARB No. 09-076, slip op. at 7 (quoting *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978)); *Coke v. Gen. Adjustment Bureau, Inc.*, 640 F.2d 584, 589 (5th Cir. 1981) (en banc)). See also, *Turin v. Amtrust Fin. Servs., Inc.*, ARB No. 11-062, ALJ No. 2010-SOX-018 (ARB Mar. 29, 2013); *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012); *Saporito v. Florida Power & Light Co.*, ARB Nos. 09-009, 09-010; ALJ No. 2008-ERA-014 (ARB Feb. 28, 2011).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 8 (quoting *Humble Oil v. The Fidelity & Casualty Co. of N.Y.*, 402 F.2d 893, 897-98 (4th Cir. 1968)).

<sup>44</sup> *Id.* at 7 (quoting *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 865-66 (5th Cir. 1993)).

<sup>45</sup> *Id.*

1981) (en banc), the Fifth Circuit invoked equitable estoppel to toll the running of the limitations period where the employee, in reliance upon repeated assurances by his employer of its intention to reinstate him to his former position, failed to file an ADEA claim with the Secretary of Labor within the prescribed time period. Coke, 55 years of age, was demoted from his position as general manager of General Adjustment Bureau's (GAB) Dallas office and replaced by an employee who was under 40. Coke submitted affidavits asserting that shortly after his demotion, he advised Biegert, an official of one of GAB's biggest clients, of his demotion. Biegert contacted GAB on Coke's behalf and GAB assured Biegert that it would reinstate Coke as manager. That same month, when Coke was not returned to his managerial position, he contacted Biegert again. Biegert again contacted GAB and was once again assured that Coke would be reinstated. Biegert was assured several more times that Coke would be reinstated, and on each occasion Biegert passed these assurances along to Coke. Coke believed at the time he would be reinstated and failed to file the notice of intent to sue within the requisite 180-day filing period. The Fifth Circuit held that it was reasonable for Coke to have relied upon the proffered evidence of GAB's representations and assurances of reinstatement, thereby justifying Coke's failure to timely file notice of his ADEA claim. The court concluded that Coke's proffered evidence raised genuine issues of fact on the issue of equitable estoppel which precluded summary judgment.<sup>46</sup>

Similarly, in *Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363 (D.C. Cir. 1998), the D.C. Circuit held that Currier provided sufficient evidence to invoke equitable estoppel to defeat a summary judgment motion when he submitted an affidavit asserting that he delayed filing an EEOC complaint based upon statements made by his supervisor that could be understood to mean that Currier would be successful in his post-termination efforts to be reinstated. The D.C. Circuit explained: “[W]e think, however, that an employer’s affirmatively misleading statements that a grievance will be resolved *in the employee’s favor* can establish an equitable estoppel. Under those circumstances, an employee understandably would be reluctant to file a complaint with the EEOC for fear he would jeopardize his chances to gain relief voluntarily.”<sup>47</sup>

In this case, Jenkins presented sufficient evidence to create a genuine issue as to whether equitable estoppel should toll the FRSA filing deadline. To support his argument that he was reasonably lulled into foregoing a timely filing to vindicate his rights, Jenkins relies on three uncontested affidavits: Jenkins’s own affidavit, which was corroborated by affidavits from two of his union chairmen, Spangler and Newsome, all of whom personally engaged in discussions with Burris and/or other CSXT management officials about Jenkins’s reinstatement. These affidavits indicate that Burris, an official at CSXT in a position to reinstate Jenkins, led Jenkins, Newsome, and Spangler to reasonably believe that Jenkins would be returned to his former employment if trainmasters Marcelo Estrada and Doug Harris agreed. Jenkins stated in his affidavit, which was corroborated by Spangler and Newsome, that Estrada and Harris (CSXT

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<sup>46</sup> *Coke*, 640 F.2d at 595.

<sup>47</sup> *Currier*, 159 F.3d at 1368 (citations omitted); *see also Frazier v. Delco Elecs. Corp.*, 263 F.3d 663, 667 (7th Cir. 2001) (“The creation of a misleading impression that causes a plaintiff to delay suing is a conventional basis of equitable estoppel.”).



told him that he “was okay to come back and they would tell Burris to schedule a meeting to bring [him] back to work.”<sup>48</sup> As Jenkins stated in his affidavit, based upon the assurances he received from the trainmasters at a meeting in May 2012, where they agreed to his return to work, he “really believed that CSXT was going to reinstate [him] to the conductor position because of the statements and expressed intentions of the CSXT trainmasters and division manager [Burris].”<sup>49</sup> Spangler’s affidavit corroborates Jenkins, stating that in May, Estrada and Harris told Spangler “that they were okay with Mr. Jenkins returning to work and would set up a meeting with Mr. Burris.”<sup>50</sup> Similarly corroborating Jenkins, Newsome states in his affidavit that before the May 2012 meeting, Burris told him and Spangler to set up a meeting for Jenkins with Estrada and Harris, stating that if they believed “Mr. Jenkins was ready, he would schedule a meeting to return Mr. Jenkins to work.”<sup>51</sup> Furthermore, Newsome states, after the May 2012 meeting, Estrada told him “that the two trainmasters had agreed that Mr. Jenkins was ready to come back to work and that he would contact Mr. Burris to set up a meeting regarding his reinstatement.”<sup>52</sup> Since Burris said he would schedule a meeting to return Jenkins to work if these two men agreed, and they did agree, we find that Jenkins’s reliance on these assurances of his imminent reinstatement was reasonable, thereby justifying his failure to timely file his complaint. Jenkins’s proffered evidence establishes a basis for applying equitable estoppel to toll the running of the FRSA 180-day limitations period, and raises genuine issues of material fact on the issue of equitable estoppel that precludes summary judgment.

Citing U.S. Supreme Court precedent, CSXT argues that discussions to resolve Jenkins’s grievance may not be used as evidence to toll the filing period: “the pendency of a grievance, or some other method of collateral review on an employment decision, does not toll the running of the limitations periods.”<sup>53</sup> If Jenkins were merely invoking the existence of his pending grievance to toll the statute of limitations, we might agree with CSXT. Grievance proceedings are little different from settlement negotiations in this respect, which we distinguished in *Hyman* from the current situation. As we there noted, the Board has held that settlement negotiations alone will not toll the running of the statute of limitations. *Hyman*, ARB No. 09-076, slip op. at 8 (citing *Beckmann v. Alyeska Pipeline Servs. Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997) (settlement negotiations in the absence of any showing that the employer misled or otherwise prevented the employee from filing a complaint held insufficient to toll running of limitations period)). Unlike the situation in *Beckmann*, the showing in this case is to the effect, as in *Hyman*, that one party ‘lull[ed] another into a false security, and into a position he would not take only because of such conduct.’ *Humble Oil v. The Fidelity & Casualty Co. of*

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<sup>48</sup> Jenkins Affidavit, ¶ 17.

<sup>49</sup> Jenkins Affidavit, ¶ 20, 21.

<sup>50</sup> Spangler Affidavit, ¶ 6.

<sup>51</sup> Newsome Affidavit, ¶ 7.

<sup>52</sup> *Id* at ¶ 9.

<sup>53</sup> Resp. Br. at 9 (quoting *Delaware St. Coll. v. Ricks*, 449 U.S. 250, 261 (1980)).

*N.Y.*, 402 F.2d 893, 897-98 (4th Cir. 1968). No showing of actual fraud is required. “It is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice.” *Id.*

In holding that Jenkins’s showing in response to CSXT’s motion meets the minimal requirements necessary to invoke equitable estoppel as a basis for tolling the running of the period for filing his complaint, we limit our ruling to reversing the ALJ’s order granting CSXT’s motion for summary decision. We consider dismissal at the summary decision stage inappropriate in this case to resolve the timeliness issue “given the fact intensive nature of the considerations that must be resolved where equitable tolling or equitable estoppel is invoked.”<sup>54</sup> We reiterate what we said in *Hyman*, “that whether equitable modification should be applied to toll the running of a statute of limitations is a fact intensive determination requiring close examination of the facts and equities.”<sup>55</sup> Such determinations almost always involve the credibility of witnesses.<sup>56</sup> Therefore, limiting our ruling to the context in which the timeliness of Jenkins’s complaint was raised and decided below, we reverse the D. & O. and remand this case to the ALJ, leaving open for further consideration the issue of the timeliness of Jenkins’s complaint upon remand and the consideration of a more fully-developed evidentiary record.

## CONCLUSION

In response to CSXT’s motion for summary decision, Jenkins provided sufficient evidence to invoke equitable estoppel as a defense to the summary disposition of his complaint for having failed to file his complaint within the FRSA 180-day limitations period. Accordingly, the ALJ’s D. & O. is **REVERSED** as not in accordance with applicable law. This case is **REMANDED** for further consideration consistent with this Decision and Remand Order.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

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<sup>54</sup> *Hyman*, ARB No. 09-076, slip op. at 9.

<sup>55</sup> *Id.* (citations omitted).

<sup>56</sup> As the Tenth Circuit has noted, “the issue of equitable tolling and estoppel cannot [] be resolved on the basis of the affidavits,” because of the difficulty of determining credibility therefrom. *Wilkerson v. Siegfried Ins. Agency, Inc.*, 621 F.2d 1042, 1045 (10th Cir. 1980).

### **Judge Corchado dissenting:**

While I totally appreciate the majority's reasoning for remanding because of disputed issues of material fact, I respectfully dissent and briefly explain. Even viewing the evidence favorably for Jenkins, I do not believe that he provided enough justification for equitable modification of the statute of limitations, a remedy to be used sparingly.<sup>57</sup> Jenkins bears the burden of justifying the application of equitable tolling principles.<sup>58</sup> I agree that Jenkins proffered some evidence that, if believed, would support a short-lived hope of being reinstated. However, the facts are undisputed that he pursued reinstatement for months to no avail. Jenkins's and Spangler's affidavits make clear to me that, by May 29th (or earlier), Jenkins was still waiting around for a word from the apparent final decision-maker (Burris), who ultimately refused in August 2012 to reinstate Jenkins. The deadline for filing a whistleblower complaint was early June 2009. Meanwhile, waiting to his peril, Jenkins chose not to file his complaint in early June 2012. Instead and inexplicably, Jenkins filed his complaint weeks later on July 18, 2012. Nothing in the record shows that anything changed between May 29 and July 18, 2012; he was still waiting for an answer from Burris. There is no evidence in the record showing that Jenkins specifically asked for a response before June 2012 or that he asked the employer to refrain from asserting the statute of limitations defense.<sup>59</sup> There was certainly no evidence that anyone promised to reinstate Jenkins with backpay, meaning that he had no reason to delay filing a claim for damages pertaining to backpay.<sup>60</sup> In the end, I do not believe that Jenkins presented legally sufficient evidence to support an equitable relief from the statute of limitations.

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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<sup>57</sup> See, e.g., *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001, slip op. at 5 (ARB Nov. 17, 2010) (two-judge panel).

<sup>58</sup> *Friedman v. Columbia Univ.*, ARB No. 12-089, ALJ No. 2012-ERA-008, slip op. at 6 (ARB Nov. 25, 2013).

<sup>59</sup> Contrast *Turin*, ARB No. 11-062 (where the parties executed a "standstill" agreement).

<sup>60</sup> Contrast *Hyman*, ARB No. 09-076, slip op. at 3 n.3 (where Hyman submitted evidence that the employer allegedly agreed he was "wrongfully discharged" and allegedly agreed to compensate him \$138,000 as the amount he "would have earned for 2008 if [he] had not been wrongfully dismissed.").