

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUSSELL BEST,
Plaintiff,
v.
BNSF RAILWAY COMPANY, a
Delaware corporation,
Defendant.

NO. CV-06-172-RHW

**ORDER DENYING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

Before the Court is Defendant’s Motion for Summary Judgment (Ct. Rec. 201). The motion was heard without oral argument.

BACKGROUND

Plaintiff was a long-term employee of Defendant BNSF Railway Company. He filed the above-captioned action in June 2006, asserting claims under the Federal Employer’s Liability Act. He is seeking compensation for hearing loss sustained while being employed by Defendant.

Defendant moves for summary judgment asserting that Plaintiff’s claims are barred as a matter of law due to Plaintiff’s failure to timely file his claims and by the doctrine of laches, and Plaintiff’s claim for negligent assignment of work tasks is precluded by the seniority provisions in the collective bargaining agreement between Defendant BNSF and Plaintiff’s union. Defendant also asks the Court to make a determination that, as a matter of law, Plaintiff has a pre-existing hearing loss condition and that Plaintiff’s damages, if any, should be reduced or

1 apportioned based upon damages caused by the pre-existing hearing loss.

2 DISCUSSION

3 A. Standard of Review

4 Summary judgment is appropriate if the “pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show
6 that there is no genuine issue as to any material fact and that the moving party is
7 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). There is no
8 genuine issue for trial unless there is sufficient evidence favoring the non-moving
9 party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby,*
10 *Inc.*, 477 U.S. 242, 250 (1986). The party moving for summary judgment bears the
11 initial burden of identifying those portions of the pleadings, discovery, and
12 affidavits that demonstrate the absence of a genuine issue of fact for trial. *Celotex*
13 *Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial
14 burden, the non-moving party must go beyond the pleadings and “set forth specific
15 facts showing that there is a genuine issue for trial.” *Id.* at 325; *Anderson*, 477
16 U.S. at 248.

17 In addition to showing that there are no questions of material fact, the
18 moving party must also show that it is entitled to judgment as a matter of law.
19 *Smith v. Univ. of Washington Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000).
20 The moving party is entitled to judgment as a matter of law when the non-moving
21 party fails to make a sufficient showing on an essential element of a claim on
22 which the non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323.

23 When considering a motion for summary judgment, a court may neither
24 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
25 is to be believed, and all justifiable inferences are to be drawn in his favor.”
26 *Anderson*, 477 U.S. at 255. When the evidence yields conflicting inferences,
27 summary judgment is improper, and the action must proceed to trial. *Munger v.*
28 *City of Glasgow Police Dep't*, 227 F.3d 1082, 1087(9th Cir. 2000).

1 **B. Defendant's Arguments**

2 Plaintiff filed his complaint on September 9, 2006. Plaintiff is bringing his
3 claims under the Federal Employers' Liability Act (FELA).¹ FELA provides for a
4 3-year statute of limitations.² See 45 U.S.C. § 56.

5 Defendant argues that Plaintiff's claims are barred due to his failure to
6 commence this action within the applicable statute of limitations period. Plaintiff
7 asserts that he was unaware that he had an injury until 2004 when his physician
8 advised him that his hearing loss was not normal for someone his age. Before
9 then, he was ignorant of a work-related hearing loss claim.

10 In 1949, the Supreme Court held that FELA covered occupational diseases.
11 *Urie v. Thompson*, 337 U.S. 163, 182 (1949). In that case, the plaintiff had worked
12 for the railroad for almost thirty years and had been exposed to silica dust. *Id.* at
13 165-66. He suffered from silicosis, a pulmonary disease that left him disabled and
14 unable to work. *Id.* The question before the Court was whether FELA included
15 injuries in the nature of occupational disease and also addressed the implications of
16 FELA's statute of limitations. There, the Supreme Court observed:

17 It follows that no specific date of contact with the substance can
18 be charged with being the date of injury, inasmuch as the injurious
19 consequences of the exposure are the product of a period of time
20 rather than a point of time; consequently the afflicted employee can be
21 held to be 'injured' only when the accumulated effects of the
22 deleterious substance manifest themselves.

23 *Id.* at 171.

24 ¹Every common carrier by railroad while engaging in commerce . . . shall be
25 liable in damages to any person suffering injury while he is employed by such
26 carrier in such commerce . . . for such injury or death resulting in whole or in part
27 from the negligence of any of the officers, agents, or employees of such carrier, or
28 by reason of any defect or insufficiency, due to its negligence, in its cars, engines,
appliances, machinery, track, roadbed, works, boats, wharves or other equipment.
45 U.S.C. § 51.

²No action shall be maintained under this chapter unless commenced within
three years from the day the cause of action accrued. 45 U.S.C. § 56.

1 In *United States v. Kubrick*, the Supreme Court addressed the statute of
2 limitations of a Federal Tort Claims Act claim. 444 U.S. 111, 120 (1979). In that
3 case, the Court held that a claim accrues when a plaintiff should reasonably have
4 been aware of the critical facts of injury and causation. *Id.* at 122. Notably,
5 however, the Court stated that once a plaintiff is in possession of the critical facts
6 of both injury and the governing cause of that injury, the action accrues even
7 though he may be unaware that a legal wrong has occurred. *Id.* at 122-23.

8 The Court finds that questions of fact exist regarding when Plaintiff knew or
9 should have known the extent and cause of his hearing loss. As such, the answer
10 must be determined by the jury. *See O'Connor v. Boeing North Am.*, 311 F.3d
11 1139, 1150 (9th Cir. 2002) (finding summary judgment not appropriate for statute
12 of limitations defense for CERLA claims where questions of fact existed regarding
13 whether plaintiffs knew or should have known that contamination caused their
14 disease). Similarly, these questions of fact preclude the Court from ruling on the
15 doctrine of laches defense and whether Plaintiff has a pre-existing condition.

16 Finally, the Court declines to grant summary judgment on Plaintiff's
17 negligent work assignment claim. Defendant attempts to narrowly define
18 Plaintiff's FELA claim. However, courts have consistently recognized the broad
19 reach of FELA. "[A]lthough railroad companies do not insure against accidents
20 and the plaintiff in FELA cases still bears the burden of proving negligence, courts
21 have held that only 'slight' or 'minimal' evidence is needed to raise a jury question
22 of negligence under FELA." *Mendoza v. Southern Pac. Transp. Co.*, 733 F.2d
23 631, 632 (9th Cir. 1984) (internal citations omitted). Liability may be found where
24 "employer negligence played any part, even the slightest, in producing the
25 injury . . ." *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993)
26 (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)). Plaintiff's
27 claims under FELA are broader than an ADA-accommodation type claim as
28 presented by Defendant in their motion.

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Summary Judgment (Ct. Rec. 201) is
3 **DENIED.**

4 2. Defendant's Motion for Permission to File Over-Length Brief (Ct. Rec.
5 204) is **GRANTED.**

6 3. The parties' Stipulation to Extend Deadline to Respond to Defendant's
7 Motion for Summary Judgment (Ct. Rec. 207) is **GRANTED.**

8 4. The parties' Second Stipulation to Extend Deadline to Respond to
9 Defendant's Motion for Summary Judgment (Ct. Rec. 216) is **GRANTED.**

10 5. Plaintiff's Motion for Permission to File Over-Length Brief (Ct. Rec.
11 218) is **GRANTED.**

12 6. The parties' Stipulation to Extend Deadline to Reply to Plaintiff's
13 Response (Ct. Rec. 223) is **GRANTED.**

14 7. Defendant's Motion for Permission to File Over-Length Brief (Ct. Rec.
15 232) is **GRANTED.**

16 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
17 Order and to provide copies to counsel.

18 **DATED** this 15th day of April, 2008.

19 *S/ Robert H. Whaley*

20 ROBERT H. WHALEY
21 Chief United States District Court

22 Q:\CIVIL\2006\Best\deny.sj.wpd
23
24
25
26
27
28