



Issue Date: 28 October 2004

Case No.: 2004-AIR-37

In the Matter of:

JOHN A. ROBINSON, JR.,
Complainant

v.

NORTHWEST AIRLINES, INC.,
Respondent.

DECISION AND ORDER OF DISMISSAL

Background

This matter involves a complaint under the Whistleblower Protection Provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21)¹ brought by John A. Robinson, Jr. (Claimant) against Northwest Airlines, Inc. (Employer).

On or about 3 March 2004, Claimant filed a complaint alleging Employer threatened to eliminate his flight pass privileges. The Occupational Safety and Health Administration (OSHA) conducted an investigation. On 14 July 2004, OSHA dismissed the complaint. The notice of the decision was delivered to Claimant's Florida address on 17 Jul 04. On 1 September 2004, Claimant, through his representative, sent a letter to OALJ asking that the case be returned to OSHA for more investigation. The court treated the letter as a functional objection to the investigation findings and motion to remand. It issued an order for the parties to show cause why Claimant's motion to remand should not be granted. Employer filed a response opposing the motion to remand, moving to dismiss and seeking attorney fees. The agency (through the solicitor) filed a response opposing the motion to remand.

¹ 49 U.S.C. § 42121 (2000)

On 28 Sep 04, the court denied the motion to remand and ordered the claimant to show cause why Employer's motions to dismiss and for attorney's fees should not be granted. The order summarized the procedural setting and Claimant's options, cautioned claimant as to the possible consequences of failing to respond, and set 22 Oct 04 as the deadline for filing a response. Claimant filed a response on 20 Oct 04.

Positions of the Parties

In its brief, Employer argues that Claimant's case should be dismissed because he did not properly request a hearing. First, it maintains that Claimant's 1 September letter was not filed within the 30 days required for by the regulations. Second, even in the event that Claimant's letter was filed within the 30 days, it only requested the case be returned to the Atlanta OSHA and was not a request for a hearing. Therefore no timely request has been filed. In the alternative, even if the letter was filed within 30 days and a hearing request, Employer argues that the letter was not filed by an authorized representative. Therefore no timely hearing request has been filed by Claimant. Finally, Employer argues that Claimant's failure to properly serve a copy of the request for hearing upon it invalidates the request.

In his response, Claimant does not address any of the issues raised in Employers motion. Rather, he focuses on OSHA's failure to investigate his case, eschews any formal hearing and asks again for the case to be remanded.

"I am not asking this court to rule in my favor as to the merits of my complaint. I am simply asking this court to remand the complaint back to OSHA for an investigation that was never conducted." [emphasis in original].²

Discussion

Motion for Dismissal

The administrative file in the case and documents submitted by the parties establish the pertinent facts.

Claimant's original complaint provided a Florida address and his attorney's fax number. It was filed with the Seattle OSHA office.³

² The court has already ruled on that issue in its previous order, finding no provision in law or regulation allowing the court to remand the case. Nothing in Claimant's response changes that ruling. The case cited by Claimant holds only that an ALJ's order remanding a case to OSHA was not subject to interlocutory appeal, not that it was correct. [*Ford v. Northwest Airlines, Inc.*](#), ARB No. 03-014, ALJ No. 2002-AIR-21 (ARB Jan. 24, 2003)

³ Employer Brief Exhibit 3

One month later, Claimant sent the Seattle OSHA office a letter giving Captain John Friday permission to file a complaint and discuss the case on his behalf. Claimant did not state that contact should be through Captain Friday, nor did he provide any contact information for Captain Friday. Claimant also requested documents be sent to him and provided the same Florida address.⁴

The decision and findings letter issued by OSHA in this case is addressed to Claimant at his Florida address with a copy to Employer. The letter is dated 14 Jul 04 and was delivered to Claimant's Florida address on 17 Jul 04.⁵

Captain Friday's letter to OALJ on behalf of Claimant requests the case be returned to OSHA and is dated 1 Sep 04. In it, Captain Friday indicates he "just received [the notice of OSHA's decision]...after it was forwarded to [him] from Florida." It also indicates Claimant was in Alaska, the Florida address was just a "back up," and Captain Friday was the primary point of contact. Substantively, the letter does not raise any specific objection or request a formal hearing. It simply asks that the complaint be "properly investigated" and states that OSHA officials in Atlanta suggested returning the case to them.⁶

Improper Representative & Failure to Serve Employer

Employer argues that since Captain Friday was not specifically authorized to file any Section 106 objections and hearing requests for Claimant, the 1 Sep 04 letter was without effect and no hearing request was ever filed. However, the regulations provide that an initial complaint may be filed by "any person on the employee's behalf."⁷ Employer cites no statute or rule specifically requiring formal notice of representation. Nor does employer cite any provision distinguishing filing an initial complaint from filing a request for hearing in terms of representation. The way in which Claimant designated Captain Friday as his representative may have caused confusion as to how he could be served in the case. It did not prevent Captain Friday from being able to act on Claimant's behalf. Moreover, there is no evidence that Employer suffered any prejudice due to Captain Friday's representation.

Similarly, while Claimant may have failed to properly serve the 1 Sep 04 letter on all parties in the matter, Employer cites no significant prejudice that resulted from that failure. Obviously, Employer is now on notice and appears to have been able to respond accordingly.

⁴ Claimant Brief Exhibit 1

⁵ ALJ Exhibit 1

⁶ ALJ Exhibit 2

⁷ 29 C.F.R. § 1979.103 (2004)

Neither the fact that the 1 Sep 04 letter was filed by Captain Friday, nor the fact that it was not served by Captain Friday on employer are sufficient grounds to dismiss this case.

Failure to Request a Hearing⁸

The 1 Sep 04 letter filed by Claimant (through Captain Friday) took issue with OSHA's position that Claimant had not cooperated in its investigation. It argued that Claimant had attempted to cooperate with OSHA through its Seattle office, but that office refused to work with Claimant. The letter stated Atlanta OSHA officials advised Claimant to ask the court to send the case to them and asked the court to do so. The letter never requested a hearing or any sort of formal review by this court. The court ruled that it was specifically prohibited from remanding the case by Section 1979.109.

In his response to the court's denial of his remand motion and show cause order, Claimant specifically declined any formal review or action by the court other than remand. "I am not asking this court to rule in my favor on the merits....I am simply asking this court to remand...."⁹

Courts are to construe papers filed by pro se litigants "liberally in deference to their lack of training in the law" and with a degree of adjudicative latitude.¹⁰ There is a limit to such indulgence, and judges are not expected to immunize pro se litigants from the dangers of proceeding without trained counsel.¹¹ Moreover, Claimant is not a neophyte in legal matters. The record reflects Claimant's extensive experience with prior whistleblower and EEO actions, union grievances and even a federal defamation lawsuit.¹²

In this case, Claimant did not simply miss a technical nuance; he failed to respond in any meaningful way to Employer's motion. He steadfastly maintains that all he wants is to have the court return the case to OSHA, even in the face of its ruling that it cannot do so. Consequently, Claimant has never requested a hearing within the meaning of Section 1979.109. That failure is a sufficient basis to dismiss the case.

⁸ There is no significant issue of any fact material to this specific question. 29 C.F.R. §18.40(d) (2004)

⁹ Claimant Brief p.7

¹⁰ *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), citing *Hughes v. Rowe*, 449 U.S. 5 (1980).

¹¹ *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000) citing *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983)

¹² The court notes that it did not consider the merits of those actions. It did not consider the allegations in the sections of Employer's brief recounting what it termed Claimant's "bizarre behavior" nor the section describing his and Captain Friday's "litigious propensities." It did consider the other documents providing evidence of other cases, but only for their tendency to show Claimant has experience in and understands the judicial process.

Timeliness

Assuming, *arguendo*, that the 1 Sep 04 letter was a request for a hearing it was required to be filed within 30 days of receiving the findings and preliminary order. The date of the postmark is considered to be the date of filing....¹³

There is no specific evidence of a postmark date of the 1 September letter. However for the purposes of this summary disposition motion, the court will presume, in favor of Claimant, that the letter was postmarked the same date of the letter, 1 Sep 04. That means that the request was untimely, unless Claimant “received” the OSHA order after 1 Aug 01. The term “received” is not more fully defined by the regulation implementing the procedures under the Act.¹⁴ However, the regulations require that OSHA send its decisions to claimant by certified mail.¹⁵ Moreover, it would make no sense to require actual delivery, since such a definition would allow a claimant to avoid service and hold open his ability to demand a hearing indefinitely. Consequently, delivery occurred and the 30 day period began to run when the decision was delivered to Claimant’s address.

Thus, the central issue is whether the Florida address to which the decision was delivered was Claimant’s address for the purposes of notice. Generally, parties and judicial bodies are not required to conduct searches for litigants. Rather, they are allowed to rely on the last known address provided to them by the litigant.¹⁶ Thus, the key question is whether the Florida address was, on 14 Jul 04, the last address known to OSHA.

The administrative law judge may enter a summary decision for either party on an issue 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.¹⁷ When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon mere allegations or denials of the pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.¹⁸

With the exception of a 19 October 2004 letter¹⁹ (three months after the OSHA decision was issued), none of the documents filed by Claimant indicate he notified OSHA that they should contact him at a location other than his Florida address. Even his letter

¹³ 29 C.F.R. § 1979.106(a)(2004)

¹⁴ 29 C.F.R. Part 1979 (2004)

¹⁵ 29 C.F.R. §1979.105(b) (2004)

¹⁶ Fed. R. Civ. P. 5(b)(2)(B)

¹⁷ 29 C.F.R. §18.40(d) (2004)

¹⁸ 29 C.F.R. §18.40(c) (2004)

¹⁹ Claimant Brief Exhibit 8

indicating Captain Friday had permission to act on his behalf provides no contact information other than his Florida address.

Claimant's brief does state that he gave OSHA a copy of his Seattle address, but in the context of explaining why the agency should have more fully investigated his case. He does not say who he told, or when he told them. Moreover, his filing was not a verified pleading, and he did not submit any affidavits or documents to support or even corroborate that statement. When a motion for summary decision is made and supported, a party opposing the motion may not rest upon the mere allegations or denials of such pleading.²⁰

Again, the court is aware that as a pro se party, Claimant should be afforded and is afforded a margin of technical latitude. However, the Claimant is not inexperienced in litigation.²¹ More importantly, in this case the Court specifically advised Claimant in its show cause order.

... to be aware of the procedural rules that apply to motions for summary judgment, particularly those found at Part 18, Section 40 of Title 29 of the Code of Federal Regulations. Specifically, claimant should be aware that:

He has the right to file a response opposing the employer's motion. He may submit legal briefs and/or factual arguments in response. He must identify all facts in the employer's motion with which he disagrees. However, simply stating that he disagrees is insufficient. He must set forth his version of the facts by submitting affidavits, sworn statements, or other responsive materials. The court may grant the motion if it finds no genuine issue of fact exists. The failure to respond in a timely fashion or respond at all could result in an adverse ruling and granting of employer's motion to dismiss the case and grant attorney fees. [emphasis in original]

Based on the properly considered record, there is no genuine issue of fact that (1) OSHA's decision was delivered to Claimant's Florida address on 17 Jul 04; (2) That OSHA had anything other than Claimant's Florida address as a contact point; and (3) Claimant's representative did not file his response until 1 Sep 04.

Consequently, there is no genuine issue of material fact that even if the 1 Sep 04 letter was a request for a hearing, it was not timely. The failure to file a timely request provides sufficient basis to dismiss.

²⁰ 29 C.F.R. § 18.40(c) (2004)

²¹ See *supra* text accompanying notes 9-11

Motion for Attorneys Fees

If a complaint is frivolous or brought in bad faith, the court may order the complainant to pay up to \$1000.00.²² Employer argues that the complaint is frivolous and moves the court to order the payment of the maximum amount. The record provides an insufficient basis to establish that Claimant's filing of the motion was frivolous.

Ruling and Order

Therefore, and consistent with the above, Employer's motion to dismiss is **GRANTED**. Employer's motion for fees is **DENIED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

²² 29 C.F.R. §1979.109(b) (2004)