

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 October 2018

OALJ No. 2018-AIR-00031
OSHA No. 4-1760-18-060

In the Matter of:

MARYLYN BEASLEY,
Complainant,

v.

FEDEX TRADE NETWORKS, INC.,
Respondent,

ORDER DISMISSING COMPLAINT AS UNTIMELY FILED

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21” or the “Act”). The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure.¹ Implementing regulations are at 29 CFR Part 1979, published at 68 Fed. Reg. 14,107 (Mar. 1, 2003).

On March 6, 2018, Ms. Marylyn Beasley (“Complainant”) filed a complaint with the Department of Labor’s Occupational Safety & Health Administration (“OSHA”) alleging FedEx Trade Networks, Inc. (“FedEx” or “Respondent”) retaliated against her in violation of AIR 21 when she was terminated after reporting safety and security concerns. OSHA dismissed the complaint on March 26, 2018, finding “Complainant was terminated on or about March 27, 2017” and concluding “[a]s this complaint was not filed within 90 days of the alleged adverse action, it is deemed untimely.”

On April 22, 2018, Complainant, representing herself, filed a letter with the Office of Administrative Law Judges (“OALJ”) objecting to the Secretary’s Findings, arguing that equitable tolling was appropriate in this case because “FedEx deliberately extended their Fair Review Process to make me ineligible to meet the 90-day deadline.” I denied Respondent’s Motion for Summary Judgement on July 12, 2018 and a preliminary hearing, limited to the issue of whether the complaint in this case was timely filed, was held on August 1, 2018 in Memphis, Tennessee.

Generally speaking, an AIR 21 complaint must be filed no later than 90 days after the date that an alleged violation of the Act occurs, or after the date on which the employee became

¹ Pub. L. 106-181, tit. V, 519(a), Apr. 5, 2000, 114 Stat. 145. *See* 49 U.S.C. § 42121.

aware of the violation. 29 C.F.R. § 1979.103(d). Thus, an employer potentially violates AIR 21 on the day that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action. *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001). The parties do not dispute that Respondent terminated Complainant's employment on March 27, 2017 and that Complainant filed a complaint with OSHA on March 6, 2018, which is more than 90 days after she was terminated.

However, the AIR 21 90-day filing period may be equitably tolled for extenuating circumstances. The Department of Labor's Administrative Review Board ("ARB") has found equitable tolling appropriate in at least four circumstances²: (i) "when the defendant has actively misled the plaintiff regarding the cause of action"; (ii) "when the plaintiff has in some extraordinary way been prevented from filing his action"; (iii) "when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (iv) where the defendant's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate her rights." *Selig v. Aurora Flight Sciences*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

Complainant alleges the first and fourth circumstances here, specifically that "FedEx deliberately extended their Fair Review Process to make me ineligible to meet the 90-day deadline." Complainant's complaint letter from March 6, 2018 also states, "On July 29, I received a letter from the FedEx Executive Review Panel, dated July 28, 2017, which upheld my termination. Because of the statute of limitations of 90 days to file an AIR 21 whistleblower complaint with the FAA and OSHA, I did not file one. By design, FedEx had prolonged their review, and by design, FedEx had achieved their purpose." (Response Exhibit B at 1). Complainant's addendum letter of March 13, 2018 states, "I reasonably believed that my termination would be reversed because Joy Ferreira, Manager, FedEx HR Compliance Programs and Employee Relations, having read my FAIR Appeal, told me she was personally optimistic about my request that my termination be reversed." (Response Exhibit 6 at 1). Finally, she argues, "I believe I was deliberately misled during the Review." *Id.*

Essential Findings of Fact

Complainant began working for Respondent in Memphis, Tennessee on or about October 3, 2005, where she trained and certified Transportation Services Administration ("TSA") employees. Complainant conducted such training in Atlanta, Georgia in January 2017 where she observed and reported potential safety and security screening violations in two FedEx facilities to her supervisor, Michelle Rogers, on or about January 30, 2017. Rogers suspended Complainant on March 17, 2017 and terminated her employment on March 27, 2017 for unrelated violations of performance improvement and acceptable conduct policies. Complainant received notice of the termination on March 28, 2017.

Complainant was aware of the employee protection provisions of AIR 21 in March 2017.

² The ARB has made clear that other situations may also warrant equitable tolling. *See, e.g., Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012).

On April 4, 2017, Complainant exercised her rights under the collective bargaining agreement and appealed her termination through Respondent's internal review process. On or about April 19, 2017, Joy Ferreira, a FedEx human resources manager, told Complainant that she was personally optimistic about the appeal, but that the review may go beyond June 2017. This was the only time Ferreira or any FedEx employee talked to Complainant about a possible successful outcome and Ferreira did not tell Complainant that she would win her appeal or that she would get her job back. No FedEx employee, to include Ferreira, suggested to or told Complainant to delay filing any complaint regarding her termination until the FedEx review was complete, or words to that effect. Neither Ferreira, nor any other FedEx employee, was aware that Complainant believed she was being punished for reporting potential safety violations and no FedEx employee was aware that Complainant was contemplating filing a whistleblower complaint before July 29, 2017. Ms. Ferreira did not learn about Complainant's whistleblower complaint until June 2018.

On June 5 and June 8, 2017, Complainant talked to, but did not hire, two different attorneys about her FedEx termination.

The FedEx Executive Review Panel upheld Complainant's termination on July 28, 2017 and Complainant received written notice on or about July 29, 2017. Other work priorities were the only cause for the delay. Respondent did not delay the review so a decision would be rendered more than 90 days after Complainant's termination.

On August 24, 2017 and October 10, 2017, Complainant emailed Kathleen Kelly, Principal Security Inspector, Office of Security Operations, Transportation Security Administration ("TSA") about the safety and security violations she had witnessed in Atlanta in January. Complainant referenced the January 2017 safety and security violations in the August 24, 2017 email. Complainant alleged in the October 10, 2017 email that she believed she was fired for reporting the violations.

Complainant filed a formal complaint with OSHA on March 6, 2018 alleging her March 27, 2017 termination was in retaliation for reporting the potential safety and security violations in January 2017.

Complainant did not raise the subject of retaliation or whistleblowing with anyone until sending the second email to Ms. Kelly on October 10, 2017.

Complainant was physically and mentally able to file her complaint any time on or after March 28, 2017.

Conclusions of Law

The sole issue currently before me is not whether Complainant was wrongly terminated or whether she should have been terminated at all. Instead, I must decide whether the statute of limitations period for filing her OSHA whistleblower complaint should be tolled. If FedEx actively misled Complainant regarding her appeal rights during her review process or if FedEx's

own acts or omissions lulled Complainant into foregoing a prompt attempt to vindicate her employment rights, then equitable tolling might be appropriate. However, the facts of this case do not support this finding. Respondent did not actively mislead Complainant regarding her cause of action or lull her into delaying filing her complaint.

Complainant reported potential safety violations before her March 2017 suspension and was aware of the employee protection provisions of AIR 21 at that time. She subjectively believed the two were related as she unsuccessfully sought legal representation in June 2017. Yet she filed no complaint. Neither Ms. Ferreira nor any other FedEx employee instructed, intimidated, told, or even suggested to Complainant that she delay the filing of any whistleblower complaint pending the outcome of the review process. In fact, Ms. Ferreira, and everyone else at FedEx, was unaware that Ms. Beasley was even contemplating filing a retaliation complaint. Additionally, Ms. Ferreira only offered her opinion once, on or about April 19, 2017, that she was personally optimistic about the success of the appeal, but in the same conversation she also told Complainant the review could extend past June. Further, continuing Complainant's review hearing until July 2017 was due to schedule conflicts, not an attempt to impede Complainant's rights. While Complainant properly grieved her termination, the pendency of the grievance did not toll the limitations period in this case.³ Accordingly, I find Complainant has not established a basis for equitable tolling of the filing period.⁴

Even accepting Complainant's argument that "FedEx deliberately extended their Fair Review Process to make [her] ineligible to meet the 90-day [AIR 21 filing] deadline," Complainant received notice of the Executive Review Panel's decision upholding her termination on July 29, 2017, effectively restarting the 90 day filing period, which would have expired on October 27, 2017. Complainant filed her complaint on March 6, 2018, again more than 90 days after being notified her termination was upheld.⁵

While Complainant admits she was aware in March 2017 of AIR 21's protections against termination for giving unfavorable reports to her employer, she submits her ignorance of the 90 day filing deadline should be excused. Attorney negligence or incompetence is not grounds for equitable tolling as a client ultimately bears responsibility for their attorney's actions or inactions. *See generally Cadet v. State of Florida Department of Corrections*, 742 F.3d 473 (11th Cir. 2014) (attorney negligence, even if gross or egregious, does not qualify as an extraordinary circumstance for purposes of equitable tolling). Applying the same standard to self-represented

³ *See Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

⁴ As the complaining party, it is Ms. Beasley's burden to demonstrate why equitable principles should be applied to toll the limitations period. *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). As a self-represented complainant apparently lacking legal expertise, this Court has provided Ms. Beasley "with a degree of adjudicative latitude." *Hyman v. KD Resources, Inc., et al.*, ARB No. 09-076, ALJ No. 2009-SOX-20, slip. op. at 8 (ARB March 28, 2010) (*citing Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-36, slip. op. at 6 (ARB Aug. 27, 2008)). However, while a self-represented litigant may be held to a lesser standard than that of legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination, or establish the basis for equitable tolling of a filing period, is no less. *See Fleener v. H.K. Cupp Inc.*, 90-STA-42 (Oct. 10, 1991).

⁵ Complainant has not argued that the October 20, 2017 email to Ms. Kelly constitutes a separate basis for equitable tolling, namely that she raised the same statutory claim in issue here but did so in the wrong forum.

litigants, I find ignorance of a filing deadline is not an extraordinary circumstance warranting equitable tolling. Nothing here physically prevented Complainant from filing her complaint on time, and Respondent did nothing to suggest Complainant postpone or defer any attempt to vindicate her rights until a decision on her grievance was reached. Complainant could have filed her complaint with OSHA, or TSA for that matter, on time and simply withdrawn it if her appeal was successful. She did not. Complainant admits she was aware of AIR 21 and its protections in March 2017. If she believed the reason she was terminated was for engaging in activity protected by AIR 21, a quick review of the statute and implementing regulations would have reminded Complainant of the 90-day filing deadline well before its expiration. In other words, it was Complainant's responsibility to know what the law required, and comply.⁶

Conclusion

Ms. Marylyn Beasley filed her OSHA complaint on March 6, 2018. For the complaint to be timely, some retaliatory act must have occurred on or after December 7, 2017. The only acts alleged in the OSHA complaint are Complainant's suspension and termination, which occurred on March 17 and 27, 2017. Since I have found no basis for tolling the limitations period, Ms. Beasley's AIR 21 complaint is untimely, and her complaint alleging a violation of the AIR 21 employee protection provisions must be dismissed.

ORDER

The complaint for whistleblower protection under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century filed by Marylyn Beasley with the Occupational Safety and Health Administration on March 6, 2018 is hereby **DISMISSED**.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

⁶ Again, I take no position on the merits of Ms. Beasley's complaint that she was terminated for engaging in activity protected by AIR 21 or the propriety of Employer's choice to do so. The scope of my decision is limited to whether her complaint was timely filed.

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).