



Issue Date: 05 May 2015

Case Number: 2013-ERA-00008

In the Matter of:

MICHAEL HARDAWAY,

Complainant

v.

SOUTHERN NUCLEAR (FARLEY NUCLEAR PLANT),

Respondent.

ORDER DISMISSING CASE AS UNTIMELY

This matter purports to arise under the Energy Reorganization Act (“ERA”), 42 U.S.C. § 5801 and implementing regulations at 29 C.F.R. Part 24.

Background

According to the record before the undersigned, on March 13, 2013, Michael Hardaway (“Complainant”) filed a retaliation complaint with the Occupational Safety and Health Administration (“OSHA”) against his former employer, Southern Nuclear (“Respondent”). This complaint alleged that Complainant suffered “harassment and unfair treatment from approximately 2008, until the time of his retirement on June 1, 2012, as a result of voicing safety concerns and reporting leaks to management.”

After investigating, OSHA dismissed the complaint on April 8, 2013, finding that Complainant failed to present a *prima facie* case that his alleged safety complaints constituted a contributing factor to any adverse action taken by Respondent, as required by 42 U.S.C. § 5851(b). OSHA further found that Complainant’s retaliation complaint was untimely as it was filed more than 180 days of the alleged adverse action taken by Respondent, as required by 29 C.F.R. § 24.103(d)(2).

Complainant appealed these findings and requested a hearing before this office on April 30, 2013. Thereafter, this Office issued a *Notice of Docketing and Order to Show Cause*

(“Notice”), explaining that if Complainant was alleging that “Respondent retaliated against him for engaging in activities protected under the ERA, such as reporting safety violations at the facility where he was employed, and he is seeking some remedy afforded by the statute, such as money damages or reinstatement to his former position, then he must explain why his complaint should not be dismissed as untimely.” The Notice instructed the parties to submit briefs within thirty days explaining why the retaliation complaint should be deemed timely filed under the ERA.

On July 9, 2013, OALJ received a letter from Complainant, stating that he retired on June 1, 2012 under duress, and that he filed his “sole complaint, directly with OSHA, on October 17, 2012.” Attached to Complainant’s letter were copies of various written correspondence between himself and the Nuclear Regulatory Commission in regards to this complaint.

On July 16, 2013, this Office issued an *Order Extending Deadline to Respond to Order to Show Cause* (“Order”). The Order informed the parties that the timeliness of Complainant’s retaliation complaint had still not been established and further development of the record on the specific issue of timeliness was necessary. Complainant was warned that failure to show that his retaliation complaint was timely filed with OSHA would result in a denial of his hearing request and dismissal of his retaliation complaint.

Given the lack of responsive filings and the significant passage of time since the July 2013 Order, on March 31, 2015, this Office issued a *Second Order to Show Cause* providing Complainant one final opportunity to demonstrate that his retaliation complaint was timely filed. This *Second Order to Show Cause* again warned that failure to respond will result in the dismissal of this matter.

On April 13, 2015, Complainant sent a letter to this Office, explaining that his complaints against his former employer concerned two sets of issues: (1) “personnel safety at SOUTHERN Company’s (and possibly others’) facilities, including but not necessarily limited to, the J.M. FARLEY NUCLEAR PLANT (FNP) in particular,” and (2) “mistreatment, which other employees and I suffered over the years, and are suffering.” Complainant enclosed a copy of a safety complaint submitted to OSHA on October 17, 2012, as well as a variety of correspondence with OSHA following this complaint.

Complainant further detailed in this April 13, 2015 letter that “in that subsequent correspondence I expressed my intent to file a retaliation lawsuit, in addition to the safety concerns;” however, Complainant states that his understanding at the time was that his lack of legal representation “precluded my being able or prepared to stand before a judge to plead my case.” Complainant goes on to explain that his October 17, 2012 OSHA complaint was “primarily about hazardous conditions to personnel at the SOUTHERN Company, particularly at FNP, due to the control by unqualified management/supervision,” and that he retired “under duress, effective upon June 1, 2012.”

Discussion

Under the applicable regulations at 29 C.F.R. § 24.103(a), an employee who believes that he has been retaliated against by an employer in violation of the ERA may file a complaint alleging such retaliation. For such a complaint to be timely, a complaint alleging retaliation must be filed within 180 days of the alleged violation (i.e., when the retaliatory decision has been both made and communicated to the complainant). 29 C.F.R. § 24.103(d)(2).

In this case, Complainant provides documentation showing that his initial OSHA *safety* complaint was filed in October of 2012, and explains that this complaint was filed less than 180 days after the alleged violation, Complainant's June 1, 2012 retirement under duress. However, Complainant does not provide argument or evidence to show that his later *retaliation* complaint was filed any earlier than March 13, 2013 as documented in the OSHA findings letter. As the complaint that is relevant to the issue of timeliness is the latter retaliation complaint, and not the former safety complaint, March 13, 2013 constitutes the date of filing that is pertinent to the matter before this Office. Accordingly, the undersigned finds that Complainant's ERA retaliation complaint was filed more than 180 days after the alleged adverse action taken against him by Respondent.

As to the remainder of Complainant's safety allegations against Respondent, this Office is an administrative court of limited jurisdiction. This Office only obtains jurisdiction over a matter when a statute or regulation so provides, and Complainant's letters do not identify additional grounds for this Office's continuing jurisdiction over this matter. The undersigned therefore finds that this Office does not have jurisdiction to consider Complainant's remaining allegations.

ORDER

In light of the foregoing discussion, I find Complainant has failed to timely file a complaint alleging retaliation in violation of the ERA, and has failed to show cause as to why the case should not be dismissed. Accordingly, this case is hereby **DISMISSED** as untimely pursuant to 42 U.S.C. § 5851.

SO ORDERED:

STEPHEN R. HENLEY
Acting Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this 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

The date of the postmark, facsimile transmittal, or e-filing 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 for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.