



Issue Date: 15 September 2014

Case Number: 2014-FRS-00143

In the Matter of:

CARL R. PAYTON,
Complainant

v.

BNSF RAILWAY COMPANY,
Respondent

ORDER OF DISMISSAL

This proceeding arises from a claim under the Federal Railroad Safety Act ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. No. 110-53.

On October 25, 2013, Carl R. Payton ("Complainant" or "Payton") filed a letter with the U.S. Department of Labor, Office of Administrative Law Judges ("Office" or "OALJ") "to request a hearing before an Administrative Law Judge." In short, Complainant alleged that Respondent BNSF Railway Company ("Respondent" or "BNSF") violated the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109 when Respondent dismissed Complainant on April 19, 2013. Complainant noted in his request for hearing: "Now nearly a year later waiting on arbitration to hopefully get my job back I am fed up with how I was harassed and discriminated by BNSF." Payton included his original complaint to the Occupational Safety and Health Administration ("OSHA") with his appeal to this Office.

This Office duly sent a Notice of Docketing and Order to Show Cause to the parties on August 6, 2014. Therein, the parties were ordered to file briefs no later than September 5, 2014 addressing the question of whether Complainant's whistleblower complaint under the FRSA should be dismissed based on Complainant's apparent failure to file his complaint within 180 days of the termination of his employment.

On September 8, 2014, I received from the Respondent a Motion to Dismiss and Supporting Brief in which Respondent argues that Mr. Payton does not dispute his claim is time-barred inasmuch as he admits that his complaint was not filed with OSHA until approximately a year after he was fired. Respondent thus "requests that the Court deny Mr. Payton's hearing request and dismiss his complaint."

To date, Complainant has failed to respond to my August 6, 2014 Notice of Docketing and Order to Show Cause.

Discussion

Dismissal of whistleblower complaints without a hearing may be appropriate under the summary disposition provisions of OALJ's rules at 29 C.F.R. §§ 18.40 and 18.41, or, less frequently, under Fed. R. Civ. P. 12. *See* 29 C.F.R. 18.1(a) ("The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.").

The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001). According to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, an Administrative Law Judge "may enter summary judgment for either party 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." 29 C.F.R. § 18.40(d); *see also*, Fed. R. Civ. P. 56(c), incorporated by reference into the Rules of Practice and Procedure by 29 C.F.R. § 18.1. A "material fact" is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" exists when the non-moving party (here, the Complainant) produces sufficient evidence of a material fact that a fact finder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence. *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-90 (1968). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision (here, the Respondent) has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). In reviewing a request for summary decision, I must view all of the evidence in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). Complainant is *pro se*, and the ARB noted that ALJs must construe 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." *Wyatt v. Hunt Transport*, ARB Case No. 11-039, ALJ Case No. 2010-STA-069 (Sept. 21, 2012), slip op. at 2.

Complainant alleges a violation of Section 20109(c) in which he claims Respondent fired him "for following orders or a treatment plan of a treating physician." 49 U.S.C. § 20109(c)(2). Under the statute and applicable regulations, a FRSA complaint must be filed with OSHA no later than 180 days "after the date on which the alleged violation of subsection (a), (b), or (c) of this section occurs." 49 U.S.C. § 20109(d)(2)(ii).

In Complainant's letter to this Office he admitted that he submitted his complaint to OSHA "about a year after my dismissal," a fact confirmed by Respondent in its Motion to

Dismiss and Supporting Brief. Respondent has provided documentation of receipt of Peyton's notice of dismissal and a Declaration of James Obermiller, Director of Corporate Support and Compliance and the Custodian of Records at BNSF. Mr. Obermiller confirms the receipt by Complainant of the June 18, 2013 dismissal letter that same date. Respondent also notes that Complainant has not made any tolling arguments and "BNSF is not aware of any facts that would support such an argument."

Inasmuch as Respondent has demonstrated that Payton's complaint was not filed within 180 days of the date he was fired and that there is no arguable basis for tolling the relevant filing deadline, there is no genuine issue as to any material fact in this case, and Respondent is therefore entitled to summary decision as a matter of law.

In addition to the foregoing, the regulations applicable to proceedings before OALJ provide that:

If a party or an officer or agent of a party fails to comply with a subpoena or with an order, . . . the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may . . . [r]ule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

29 C.F.R. § 18.6(d)(2)(v).

As noted above, Complainant has failed to respond to both my August 6, 2014 Order to Show Cause. That further justifies dismissal of his complaint pursuant to § 18.6(d)(2)(v).

Based on the foregoing, Complainant's whistleblower complaint under the FRSA, 49 U.S.C. §20109, is **HEREBY DISMISSED** pursuant to 29 C.F.R. §§ 18.40 and 18.41 for failing respond to BNSF Railway's Motion to Dismiss with affirmative evidence to show that a genuine issue of material fact exists, as well as 29 C.F.R. § 18.6(d)(2)(v) for failing to comply with my order of August 6, 2014.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge