



Issue Date: 23 April 2015

Case No. 2014-FRS-00133

In the Matter of:

SHANNON PHILLIPS,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

**DECISION AND ORDER GRANTING EMPLOYER'S MOTION FOR SUMMARY
DECISION AND DISMISSING COMPLAINT**

This matter arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA") as amended by Section 1521 of the Implementing Regulations of the 9/11 Commission Safety Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. (Aug. 3, 2007), the applicable regulations contained in Title 29 of the Code of Federal Regulations at Part 1982, and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008.) On September 4, 2012, Shannon Phillips ("Complainant"), filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that Norfolk Southern Railway Co. ("Respondent") terminated the Complainant in retaliation for reporting a work related injury. The Respondent has moved for summary decision on the grounds that the Complainant's appeal is barred by the 30 day statute of limitations, and also because the Complainant filed a complaint on the same matter in US District Court, removing this Court's jurisdiction. No hearing has been set in the matter since there are threshold questions of timeliness and jurisdiction. For the reasons set forth below, I find:

1. Complainant's request for a hearing with this Office was untimely, as the OSHA decision underlying this case was issued on May 13, 2014, and Complainant's appeal was dated July 10, 2014; even allowing 5 days for postal delivery, the appeal was filed after the 30 day deadline per 29 C.F.R § 1982.106(a); and
2. Complainant's filing of a complaint on this same matter in Federal District Court without notice as required by 29 C.F.R. § 1982.114 divests this Office of jurisdiction; Accordingly, Norfolk Southern Railway's motion for summary decision is hereby granted.

Procedural History

On September 4, 2012, the Complainant filed a complaint of retaliatory termination with OSHA. On May 13, 2014, the OSHA Regional Administrator dismissed the Complainant's complaint on the merits, determining that the Complainant's protected activity was not a contributing factor in the adverse employment action. The notice of appeal rights contained in the OSHA decision explicitly advised that the Complainant had 30 days to appeal before the OSHA decision would become final.¹ The Complainant filed his appeal with this Office on July 15, 2014. On August 14, 2014, I issued a notice of Assignment and Intent to Schedule a Telephone Conference. On December 15, 2014, I convened a prehearing telephone conference with the parties.

During the telephone conference, counsel for the Respondent indicated his intent to file a motion for summary decision. I indicated that I would allow the Complainant 30 days from the filing of the motion to respond. On December 22, 2014, the Respondent filed a motion for summary judgment with evidence and a memorandum in support of the motion. On December 31, 2014, I issued a show cause order, set out the applicable standards for summary decision as a courtesy since the Complainant was pro se, gave notice of the 30 day deadline for the Complainant's response to Respondent's motion, and indicated to the Complainant the importance of obtaining counsel. On January 20, 2015, the Complainant filed a memorandum in response to the motion for summary decision. The Respondent filed a Request for Entry of Judgment on April 3, 2015, stating that the Complainant had failed to respond to the Motion for Summary Decision. Although the memorandum the Complainant filed on January 20, 2015 was not clearly labeled as a response to this Motion, the contents of the memorandum (arguments of fact, the subheading "Response to dismissal," and supporting evidence) show its intended purpose. The Complainant filed a response to the Request for Entry of Judgment on April 13, 2015; it did not contain new evidence, but instead mere allegations and copies of evidence already in the record. The Respondent filed a response on April 17, 2015, in support of its motion for entry of judgment.²

Standard for Summary Decision

The standard for summary decision under the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges is essentially the same as that contained in Federal Rule of Civil Procedure 56, the rule governing summary judgment in federal courts.³ Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁴ A material fact is one that might affect the outcome of the suit under the governing law, and a dispute about a material fact is genuine if

¹ The relevant language in the OSHA decision states, "Respondent and Complainant have 30 days from receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ) If no objections are filed, these Findings will become final and not subject to court review."

² These two documents, along with the Request for Entry of Judgment, were filed subsequent to the motion for summary decision, and do not contain any new, relevant evidence.

³ See 29 C.F.R. § 18.40-41.

⁴ See *Celotex Corp. v. Cartrett*, 277 U.S. 317, 322 (1986).

the evidence is such that a reasonable finder of fact could return a verdict for either party.⁵ The movant has the initial burden of demonstrating the absence of a genuine issue of material fact; once the movant meets his or her burden, the burden shifts to the non-movant to present evidence showing there is a genuine issue of material fact.⁶ The party opposing the motion “may not rest on the mere allegations or denials of [the] pleadings. Such response must set forth specific facts showing there is a genuine issue for the hearing.”⁷ In determining whether a genuine issue of material fact exists, the trier of fact must consider all evidence and factual inferences in the light most favorable to the party opposing the motion.⁸

Facts

As mentioned supra, OSHA issued its findings on May 13, 2014, in response to the Complainant’s complaint and included in the findings the 30 day deadline under 29 C.F.R § 1982.106(a) to file for an appeals hearing before an Administrative Law Judge. In a letter dated July 10, 2014, postmarked July 9, 2014, and filed July 15, 2014, the Complainant appealed to the Chief Administrative Law Judge for a hearing. The Respondent’s motion for summary decision was filed December 22, 2014. It contained a memorandum and evidence in support of the motion. In the supporting evidence, the Respondent included a copy of the federal district court complaint filed by the Complainant and evidence showing the timing of the OSHA decision and the Complainant’s appeal.⁹ The Complainant never filed a copy of his District Court complaint with the ALJ as required by 29 C.F.R. § 1982.114(b).

The Complainant filed a memorandum and supporting evidence in response to the Respondent’s motion for summary decision on January 20, 2015. In the memorandum, the Complainant provided these additional facts: his attorney withdrew and he is currently unrepresented, his attorney did not help him file an appeal, he had corresponded with the OSHA investigator by email and appealed by this email, the deadline was not repeated to him through email, the dates were conflicting (there was a typographical error on the date in the heading of the OSHA decision, although it did not affect the content of the decision), and the OSHA decision was left at his door and he had not signed for it.

The evidence presented in the Complainant’s response support a finding that the Complainant’s attorney had withdrawn and that the Complainant had exchanged emails with the OSHA regional investigator, who did not mention the 30 day deadline. The emails between the OSHA regional investigator and the Complainant predated the OSHA decision and could thus not have represented an appeal.¹⁰

⁵ *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, slip op. at 5 (ARB Feb. 28, 2006) (CAA) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁶ *Celotex*, 477 U.S. at 323; *Anderson*, 477 U.S. at 250.

⁷ 29 C.F.R. § 18.40(c).

⁸ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, slip op. at 2 (ARB Aug. 23, 2003) (STA).

⁹ Respondent’s Exhibit (“RX”) 5.

¹⁰ Complainant’s Exhibit (“CX”) 1.

Law and Analysis

Since the Complainant is pro se, I will construe the papers filed by the Complainant “liberally in deference to [his] lack of training in the law” and with a degree of adjudicative latitude.¹¹ However, there is a limit to this; judges are not expected to immunize pro se litigants from the dangers of proceeding without trained counsel.¹² Deadlines are not a technical nuance, especially when OSHA expressly notified the Complainant of the 30 day appeals period in its decision.¹³

A. Timeliness

29 C.F.R. § 1982.106(a), the relevant procedural rule here, states that any party who desires review of the findings and preliminary order must file objections or request a hearing within 30 days of receipt of the findings and preliminary order or the findings become final, and that the date of the postmark will be considered the date of filing. This section, which OSHA included at the end of its decision, as required by 29 C.F.R. § 1982.105, also states how to properly file these documents and provides pertinent contact information.

Even assuming that the OSHA decision took 5 days to arrive by mail (pursuant to 29 C.F.R. 18.4(C)(1)) after it was issued, and granting an additional day since May 18, 2014¹⁴ was a Sunday, the 30 day appeals period would have closed on June 18, 2014. This would be the latest possible date before the findings and preliminary order became final. The Complainant’s request for hearing was postmarked July 9, 2014. This was 21 days after June 18.

For whistleblower claims, the Administrative Review Board has recognized four principal, nonexclusive situations for equitable modification of the statute of limitations: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.¹⁵ Equitable tolling is a “narrow and specific exemption to the

¹¹ *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).

¹² *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).

¹³ See *Robinson v. Northwest Airlines, Inc.*, ALJ No. 2004-AIR-37, slip op. at 4 (ALJ Oct. 28, 2014).

¹⁴ However, I must note that OSHA provided a copy of the UPS delivery notification which states that OSHA’s delivery to the Complainant was completed May 13, 2014, at 6:20 PM. The UPS delivery notification states that the shipment was delivered to the Complainant’s front porch. The Complainant corroborates this evidence in his January 20, 2015, memorandum in response to the Respondent’s motion for summary decision; therein, the Complainant states, “[The decision] was not signed by the Phillips but left at the door.” This evidence supports a finding that the receipt was actually May 12, 2014, making the OSHA decision final on June 12, 2014, and the Complainant’s appeal even more untimely. However, for the sake of argument, I have used the longest possible deadline.

¹⁵ *Williams v. Nat’l Railroad Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 5 (ARB Dec. 19, 2013), citing *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012).

general rule that statutory filing periods are to be strictly construed.”¹⁶ The Complainant did not present any evidence that would justify equitable tolling of the statute of limitations. His primary arguments, that he did not know about the 30 day period to appeal the findings and preliminary order, and that he was unrepresented, do not justify the common law doctrine of equitable tolling.

The Complainant has not presented evidence that he was actively misled or lulled into foregoing a prompt attempt to vindicate his rights. He has presented evidence showing his confusion about the procedure for appeals and lack of assistance of counsel. This would not fall under the extraordinary prevention exception; this exception is for circumstances much more severe than mistakes and carelessness, such as when a complainant suffers from a mental disability.¹⁷ The Complainant might argue that he raised his complaint in the wrong forum, since he corresponded by email with the OSHA regional investigator in addition to filing an appeal. However, he filed his appeal to the right address, exactly as set out in the Notice of Appeal Rights included in the OSHA decision, albeit almost a month after the date the decision became final. The Complainant sent the email to the regional investigator after filing the untimely appeal. This evidence supports that although the Complainant was confused about the proper procedure, he did not raise his complaint in the wrong forum. The evidence shows that the Complainant’s attorney withdrew and returned all of the Complainant’s documents within a day of the OSHA decision being issued.¹⁸ The Complainant had plenty of time to secure new representation to assist him in filing a timely appeal.

Although inability to demonstrate one of the abovementioned situations does not preclude entitlement to equitable tolling, the Complainant bears the burden of justifying the application of equitable tolling principles.¹⁹ Here, the Complainant presented evidence that he was pro se and was confused by the different dates. Ignorance of the law will generally not support a finding of entitlement to equitable tolling.²⁰ Although the assistance of counsel is extremely important, lack of counsel does not justify equitable tolling. A clerical error on the date of the OSHA decision does not affect the requirements: in context, the error is plain. Additionally, the appeal rights notice states that the 30 day limitations period begins running from receipt of the decision. No date on any document is needed to understand when one has received a document and what date is 30 days after receipt. The Complainant filed his appeal to this Office properly besides the untimeliness problem; had he used greater care and due diligence, he could have complied with the procedural requirements. The Complainant has not established that he is entitled to equitable tolling; thus, the complaint falls outside the statutorily prescribed limitations period. The evidence presented does not show a genuine issue of material fact on the issue of timeliness. Thus, I find the complaint was untimely, and the Complainant has failed to show that he is eligible for equitable tolling.

¹⁶ *Swint v. Net Jets Aviation*, ALJ No. 2003-AIR-26 (ALJ July 9, 2003).

¹⁷ *Beister v. Midwest Health Services*, 77 F.3d 1264, 1268 (10th Cir. 1996); *Stoll v. Runyun*, 165 F.3d 1238, 1242 (9th Cir. 1999).

¹⁸ CX 2 (incorrectly labelled as CX 1).

¹⁹ *Udvari v. US Airways, Inc.*, ALJ No. 2014-AIR-0069, slip op. at 3 (Jan. 17, 2014), citing *Wilson v. Sec’y of Veterans Affairs*, 63 F.3d 402, 404 (5th Cir. 1995) and *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993).

²⁰ *Id.*, citing *Wakefield v. R.R. Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997) and *Hemingway v. Northwest Utilities*, ARB No. 00-0074, ALJ Nos. 99-ERA-014, 015, slip op at 4, 5 (ARB Aug. 31, 2000).

B. Jurisdiction

The Complainant filed a complaint regarding this same claim in Federal District Court on September 24, 2014, as authorized by 49 U.S.C. § 20109(d)(3). He did not file a copy with the Office of Administrative Law Judges as required by 29 C.F.R. § 1982.114, but the Respondant submitted into evidence proof that the Complainant filed a complaint in the Southern District of West Virginia to support its argument that this Court now lacks jurisdiction.²¹ Complainants may file Federal District Court complaints under FRSA, but doing so is an *alternative* remedy.²²

While this decision is not a motion to dismiss based on lack of jurisdiction, it is true that election of the alternative remedy divests this Court of jurisdiction under the abovementioned laws. Even if the complaint were not untimely, the case could be dismissed *sua sponte* since the Complainant has sought *de novo* review of the case in Federal District Court, as is his right under the FRSA.²³ Failure to timely notify the Office of Administrative Law Judges or Administrative Review Board (whichever the case is before at the time) of intent to file a complaint in Federal District Court on the same issue that was previously before the ALJ has also been held to be grounds for dismissal under 29 C.F.R. § 1982.114(b).²⁴ The rules require a complainant to provide notice 15 days prior to filing the action in District Court, which must be served on all parties, to the Regional Administrator, the Department of Labor, and others.²⁵ Here, the Complainant did not provide notice to this Office that he filed a complaint in Federal District Court. The Complainant presented no evidence at all on the issue of jurisdiction; therefore, I find the Complainant has failed to meet his burden of proof on this issue.

Conclusion

Based on the foregoing, the Respondent's motion for summary decision is granted and the Complainant's claim is DISMISSED as a matter of law insofar as the complaint was filed 20 days after the findings of the OSHA Regional Investigator became law, the Complainant failed to meet his burden demonstrating entitlement to equitable tolling, and the Complainant's claim on the same matter in Federal District Court divests this Court of jurisdiction. The Respondent's evidence shows that there is no genuine issue of material fact as to these issues, and the Complainant has failed to provide sufficient evidence to rebut these findings.

²¹ RX 5.

²² 49 U.S.C. § 20109; 49 U.S.C § 42121; 29 C.F.R 1982.114.

²³ 49 U.S.C. § 20109

²⁴ See *Pfeifer v. Union Pac. R. R. Co.*, ARB No. 12-087, ALJ No. 2011-FRS-038 (Nov. 19, 2012)

²⁵ 29 C.F.R. § 1982.114(b)

ORDER

IT IS HEREBY ORDERED that summary decision be entered in favor of Norfolk Southern Railway Co., and that Shannon Phillips' claim be dismissed.

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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 on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(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. §§ 1980.109(e) and 1980.110(b). 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. § 1980.110(b).