

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 13 January 2015

CASE NO.: 2015-FRS-00004

In the Matter of:

MARVIN JENKINS,
Complainant,

v.

BNSF RAILWAY,
Respondent.

ORDER GRANTING SUMMARY DECISION

This matter arises under the Federal Rail Safety Act (“FRSA”), 49 U.S.C. § 20109, and the implementing regulations found at 29 C.F.R. Part 1982. A hearing is set for February 23 and 24, 2015, in Long Beach, California. Complainant filed a whistleblower complaint under the FRSA with the Occupational Safety and Health Administration (“OSHA”) on July 30, 2014. OSHA denied the whistleblower complaint on August 14, 2014. Complainant filed an appeal of the denial in this Office on October 15, 2014 (“Complaint”). Complainant is not represented by an attorney.

On December 12, 2014, Respondent filed a Motion for Summary Decision (hereafter “Motion”) pursuant to 29 C.F.R. § 18.40. On December 18, 2014, I issued an Order Regarding Motion for Summary Decision outlining what Complainant needed to address in responding to the Motion. Complainant filed an opposition on December 22, 2014 (hereafter “Opposition”). Respondent requested permission to file a reply brief, which is granted and the reply was filed on January 2, 2015.

The Motion asserts two grounds for dismissal. First, that Complainant did not file his appeal of OSHA’s denial with this Office within 30 days as required by the statute. Therefore, Respondent argues that the Secretary’s findings are final and this Office has no jurisdiction to hear the matter. Second, that Complainant filed his complaint with OSHA on or about July 30, 2014, which is more than 180 days after he was terminated by BNSF on November 25, 2008, and his complaint is therefore barred by the statute of limitations. Therefore, Respondent asserts that it is entitled to summary decision as a matter of law.

In his Opposition, Complainant argued that the 30 days for the appeal runs from the date of receipt of the OSHA denial, and since Respondent did not provide proof of when Complainant received the denial, Respondent's Motion must fail. Complainant did not acknowledge that in his Complaint to this Office he noted that he missed the filing deadline. Complainant also addressed the statute of limitations argument asserted by BNSF.

As explained below, I grant the Motion for Summary Decision because Complainant did not timely file his appeal from the OSHA denial. Because I am denying the appeal as not timely filed, I do not reach the argument that Complainant did not timely file the matter with OSHA. The information for this ruling is taken from the Motion, Opposition and Reply filed by the parties, as well as the documents in the file.

Background

Complainant worked for Respondent from May 2005 until he was dismissed on November 24, 2008. Mot. at 1. Complainant filed his complaint with OSHA on or about July 30, 2014, and alleged that he was terminated in November 2009. Mot. at 2. OSHA dismissed the complaint because more than 180 days had elapsed since the dates of the alleged adverse action and the filing of the OSHA complaint. Mot. at 2. Complainant's appeal of the OSHA denial was postmarked October 9, 2014, Mot. at 2, Ex. D, and received at this Office on October 15, 2014. Mot. at 2.

The Complaint to this Office included a statement asking that the objections be considered timely because of the death of two immediate family members in September 2014 that required travel to New Orleans, Louisiana. There was no additional information provided. I note that in the appeal, Complainant alleged death in the family as an explanation for an alleged unauthorized work absence for which he was disciplined in June 2008. Complaint at 11, Ex. A. The Complaint alleges numerous allegations, including conspiracy to prevent advancement, violations of the collective bargaining agreement, denial of FMLA leave, wrongful termination and intentional infliction of emotional distress, but a liberal reading of the Complaint shows that Complainant alleged only that he was reprimanded for reporting unsafe conditions and loose tracks on or about September 18, 2007. Complaint at 1.

According to the Complaint, Complainant filed a union grievance, though the date was not specified, regarding his termination. A document attached to the Complaint by Complainant dated April 2, 2014 notes that Complainant was dismissed on November 24, 2008, and, as had been told to Complainant since 2009, the matter had long been considered closed. Complaint at 12, Ex. B. The letter appears to be from the union who represented Complainant when he worked for Respondent. The Complaint included documents from 2008 regarding Complainant's lack of advancement at work, a 2008 doctor's note excusing Complainant from work from July 28, 2008 to September 30, 2008, and a doctor's note with Complainant's name at the top dated August 6, 2010, that says "he" is able to go back to work with no restrictions. Complaint at 18-21, Ex. D-F. Complainant also included a copy of an email exchange discussing his request for reinstatement from November 2013. Complaint at 15, Ex. B.

Applicable Law

1. Summary Decision Legal Standard

In cases before this Office, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, slip op. at 5 (ARB June 28, 2011); *Frederickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). Under 29 C.F.R. § 18.40(d), an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show there is no genuine issue as to any material fact and the party is entitled to summary decision as a matter of law. *Mara*, ARB. No. 10-051, at 5. “A genuine issue of material fact is one, the resolution of which could establish an element of a claim or defense and, therefore, affect the outcome of the litigation.” *Frederickson*, ARB No. 07-100, at 5-6 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The primary purpose of summary judgment is to isolate and promptly dispose of unsupported claims or defenses. *Catrett*, 477 U.S. at 323-24.

If the party moving for summary decision demonstrates an absence of evidence supporting the non-moving party’s position, the burden shifts to the non-moving party to prove the existence of a genuine issue of material fact that might affect the outcome of the case and is supported by sufficient evidence. *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006). The non-moving party may not rest upon the mere allegations of his or her pleadings, but must instead set forth “specific facts” showing there is a genuine issue of fact for hearing. 29 C.F.R. § 18.40(c); *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6. Where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial,” there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23. In assessing a motion for summary decision, the administrative law judge must consider the record in the light most favorable to the non-moving party and draw all inferences in favor of the non-moving party. *Mara*, ARB. No. 10-051, at 5; *Frederickson*, ARB No. 07-100, at 6.

2. Timeliness of Appeal

An employee who believes that he has been retaliated against in violation of the FRSA must file a complaint with OSHA alleging such retaliation within 180 days after the alleged violation of the FRSA occurs. 29 C.F.R. § 1982.103(d). The time for filing a complaint may be tolled for reasons warranted by applicable case law. *Id.* Once OSHA issues its report, any party objecting to the OSHA findings must file a request for hearing with this Office within 30 days of receipt of the findings. 29 C.F.R. § 1982.106(a). If no timely objection is filed with respect to the OSHA findings, the findings become the final decision of the Secretary, not subject to judicial review. 29 C.F.R. § 1982.106(b).

3. Equitable Tolling

There are three principal situations where equitable modification may apply: 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; and, 3) when the complainant has raised the right statutory claim in issue but has done so in the wrong forum. *Moldauer v. Canandaigua Wine Co.*, ARB Case No. 04-022, ALJ Case No. 2003-SOX-00026, slip op. at 5 (Dec. 30, 2005). The timelines are not jurisdictional and are subject to equitable modification. *Woods v. Boeing-South Carolina*, ARB Case No. 11-067, ALJ Case No. 2011-AIR-00009, slip op. at 8 (Dec. 10, 2012); *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011). However, equitable tolling should be used sparingly and the party seeking to toll the filing period bears the burden of justifying the application of equitable modification principles. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Woods*, ARB Case No. 11-067, slip op. at 8.

Analysis and Legal Conclusions

Respondent first alleges that there is no factual dispute regarding the filing of Complainant's appeal with this Office. Respondent correctly notes that OSHA issued the denial to Complainant on August 14, 2014, but Complainant did not mail his Complaint to this Office until October 9, and it was received on October 15, 2014. In his Complaint, Complainant did not assert when he received the OSHA denial or that he did not receive the denial in a timely manner. Complainant instead asserted that the statutory timelines for filing his appeal should be forgiven because of the alleged death of two family members in September 2014. Other than his unsupported statement, he provided no information or declarations. The December 18 Order specifically advised Complainant that he should include declarations and provide specific factual information regarding his allegations. In his Opposition, Complainant does not mention that he acknowledged filing the Complaint with this Office well beyond the statutory deadline, but instead argues that Respondent did not prove when he received the denial. Again, he does not assert that he did not timely receive the OSHA denial. I find Complainant's argument disingenuous and not credible in light of his earlier acknowledgment that he missed the filing deadline for a different reason. Based upon the information before me, I find that there is no factual dispute regarding the filing of his appeal with this Office and that the appeal was not timely filed.

Equitable principles may be applied sparingly and only in limited situations, which do not apply here. *Irwin*, 498 U.S. at 96; *Moldauer*, ARB Case No. 04-022, slip op. at 5; *Woods*, ARB Case No. 11-067, slip op. at 8. The unsubstantiated information about a death in the family alone does not rise to the level of an extraordinary situation that would have prevented a timely filing, and I decline to toll the period in this circumstance. Complainant has not otherwise alleged any information from which to find that the filing period should be equitably tolled.

OSHA issued its denial on August 14, 2014. Complainant filed his appeal with this Office on October 15, 2014, which far exceeds the 30 day statutory for filing. Because the appeal was not timely filed, the Motion for Summary Decision is granted.¹ All dates are vacated. The case is dismissed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

San Francisco, California

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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1982.110(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. § 1982.110(a).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

¹ Because the appeal to this Office was not timely filed, I do not reach Respondent's second argument that Complainant did not timely file his complaint with OSHA. Had I needed to reach that issue, I would have found that Complainant did not timely file his appeal with OSHA. The only allegations in the Complaint allege a possible adverse action in 2007, but Complainant did not file his whistleblower complaint until 2014, well beyond the 180 days statute. Complainant also did not allege information that would have otherwise implicated equitable tolling principles.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).