

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 December 2016

CASE NO. 2016-FRS-00079

In the Matter of

PHILLIP C. BAKER,
Complainant,

v.

**UNION PACIFIC RAILROAD
COMPANY,**
Respondent.

Appearances: Phillip C. Baker
Self-represented

Steven T. Densley, Esq.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY DECISION

This matter arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982. Respondent Union Pacific moves for summary decision. It asserts that: (1) Complainant Baker filed his administrative complaint untimely; (2) having received an adverse finding from the Occupational Safety & Health Administration, Complainant filed his objections and request for hearing untimely; and (3) Complainant released Respondent from this claim in a written release.

Complainant is self-represented. I therefore served him with an order to show cause. I described generally what a motion for summary decision is, that it could result in a decision adverse to him without a trial, what in general the Railroad was arguing, and what he must do to oppose the motion. I advised Complainant of his right to retain counsel and that, if he succeeded in the litigation, the Railroad would be required to pay fees to his attorney. Complainant continued to represent himself and filed an opposition. Respondent filed a reply, and Complainant filed a surreply.

I find that Complainant failed to file a timely administrative complaint with the Occupational Safety & Health Administration, that he has not shown a basis for equitable tolling, and that his claim is therefore time-barred.

Facts¹

On May 1, 2014, Complainant was injured at work and reported it to Respondent. Respondent delayed medical care and then issued a disciplinary notice to Complainant on December 18, 2014. It terminated the employment on February 10, 2015. Complainant grieved the termination and, in June 2015, was awarded reinstatement.

Prior to returning to work, Complainant submitted to Respondent a letter of resignation, dated July 12, 2015. R.Ex. A (last two pages).² It essentially alleges that Union Pacific's conduct had so devastated him as to leave him unable to perform his job safely, effectively, and in a way that would be beneficial to the Railroad, to himself, and to his co-workers. He alleged extensive damages. He concludes: "After speaking with my family, mental health specialist, and legal counsel [, it] would be in my best interest and that of my family to end my employment with Union Pacific with special circumstances."

Complainant thanks his union for representing him during the grievance process, acknowledges that the process led to "clearing [his name] and setting the record straight; the reinstatement with full back pay and all seniority rights and benefits unimpaired and record cleared of all discipline associated with the Notice of Discipline dated February 10, 2015." He follows this acknowledgement with this statement:

This resignation and separation with full back pay, clean personal record as described in letter from Union Pacific Railroad dated June 22, 2015 and a mutual amicable compensation for incident which occurred on May 01, 2014 will release me from any further claim, suit or liability against Union Pacific Railroad.

Complainant's name is typed at the end of the letter, but there is no signature. Nor does the letter show a signature from Union Pacific.

Complainant offers no evidence and does not allege any adverse action after the constructive discharge,³ which occurred no later than Complainant's letter of resignation on July 12, 2015.

¹ As I must view the evidence in the light most favorable to the non-moving party (Complainant), drawing all reasonable inferences in his favor and making no credibility determinations adverse to him, the facts recited in the text above are for purposes of this motion only.

² Respondent dates the resignation letter as of the next day, July 13, 2015. The record shows that Complainant sent it by email at 7:18 p.m. on July 12, 2015. It is possible that no one at Union Pacific read it until the next day, July 13, 2015. The question is immaterial, as the result on this motion is the same regardless of which of the two dates applies.

³ I find a constructive discharge for purposes of this motion only (viewing the evidence in the light most favorable to Complainant, drawing all reasonable inferences in his favor, and assuming him to be fully credible).

Complainant filed his administrative complaint with OSHA on July 27, 2016. R.Ex. C.⁴ OSHA's Regional Administrator issued "Secretary's Findings" on the following day, July 28, 2016. The Regional Administrator found that Union Pacific was covered by the Act, that Complainant had alleged a retaliatory constructive discharge, but that Complainant had failed to file his complaint within the 180-day statutory filing requirement. He thus denied the claim. He notified Complainant that Complainant could file objections and request a hearing before an administrative law judge within 30 days of his receipt of the Regional Administrator's findings. He gave Complainant an address to send any objections or request for hearing.

Complainant filed objections and request for a hearing by letter dated August 27, 2016, and postmarked August 29, 2016. It was received at the Office of the Chief Administrative Law Judge on September 1, 2016.⁵

Discussion

On summary decision, I must determine if, based on the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. §18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed.R.Civ.P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. §18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.⁶

Respondent's initial insufficient arguments. At the outset, I will dispose of two of the Railroad's three arguments; neither has merit. First, a request for a hearing before an administrative law judge is timely so long as it is *postmarked* within 30 days after the complainant *receives* the Secretary's Findings from OSHA.⁷ 20 C.F.R. § 1982.106(a). The record shows that OSHA issued Secretary's Findings on July 28, 2016, but Respondent offers no evidence of when Complainant *received* the Findings from OSHA. For example, OSHA sends a copy of the same

⁴ "R.Ex." refers to Respondent's exhibits to its motion for summary decision.

⁵ In his opposition, Complainant does not dispute any of the facts recited above. His focus is on the merits. He offers statements about the facts and arguments aimed at showing that Union Pacific retaliated on account of Complainant's activity or that it otherwise violated the Federal Rail Safety Act. But he does not dispute the chronology or that he sent the letter of resignation that Union Pacific submitted for the record.

⁶ The facts in this Discussion section are undisputed when the evidence is taken in the light most favorable to Complainant, who is the non-moving party. I find these facts for purposes of this motion only.

⁷ As the regulation provides: Any party who desires review, including judicial review, of the findings and preliminary order . . . must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to §1982.105 The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing"

Findings to the Chief ALJ. They are file-stamped “received” on August 2, 2016. They were sent from the Denver OSHA office. There is no basis to infer that Complainant received the Findings in West Valley City, Utah any sooner than the Chief ALJ received them in Washington, DC. Certainly, if I am to draw all reasonable inferences in favor of the non-moving party, I cannot infer that Complainant’s request for hearing, postmarked August 29, 2016, was postmarked more than 30 days after he received OSHA’s Findings.

Second, Complainant’s resignation letter does not release this claim. Drawing all reasonable inferences in Complainant’s favor, it appears that Union Pacific gave Complainant nothing more than what the officer who decided the grievance in Complainant’s favor ordered Union Pacific to do. There is insufficient evidence that the Railroad provided any consideration for a release.

In addition, neither Complainant nor any representative of Union Pacific signed the letter. Union Pacific is not a party to the letter in any sense; it just received the letter as the addressee. Again, this suggests that the letter does not memorialize a contractual agreement in which the Railroad provided consideration in return for a release.

Third, in the actual language of the letter, Complainant refers to releasing himself (“release me”), not releasing Union Pacific. At the least, this introduces a degree of ambiguity that would require explanation at trial. Drawing every reasonable inference in favor of Complainant, I cannot conclude that he was releasing Union Pacific without more evidence.

Finally, it is possible that no release of a claim under the Act is permissible without the approval of the Department of Labor. *See* 29 C.F.R. § 1982.111.

I therefore reject for purposes of summary decision both the argument that the request for hearing was late and that Complainant has released Union Pacific from this claim.

Complainant’s administrative complaint was late-filed. I reach the opposite conclusion on the Railroad’s argument that Complainant failed to file a timely complaint with OSHA. An employee who alleges a violation of the Act must commence an action “by filing a complaint with the Secretary of Labor” within 180 days after the date on which the alleged violation occurred. 49 U.S.C. §20109(d)(2)(A)(ii) (“An action . . . shall be commenced not later than 180 days after the date on which the alleged violation . . . occurs.”). The complaint must be filed with OSHA, can be filed orally or in writing, and if in writing and mailed, is effective as of the date postmarked. 29 C.F.R. §1982.103.

The last date on which an alleged adverse action is said to have occurred is July 13, 2015. R.Ex. C. Complainant knew of the action on July 12, 2015, because he wrote the letter (or email) that effectuates the alleged constructive discharge, and he sent it on that date. The complaint therefore had to be filed on or before January 11, 2016, the first Monday after the 180th day following July 13, 2015. Complainant filed his OSHA complaint on July 27, 2016, more than five months late.

The Secretary has allowed an exception to the time requirements consistent with principles of equitable tolling. As the regulation states:

The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

29 C.F.R. § 1982.103(d).

Generally, equitable tolling may be available in whistleblower cases under three circumstances: “when the defendant has actively misled the plaintiff regarding the cause of action;⁸ when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4, citing *School Dist. of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Williams v United Airlines, Inc.*, ARB No. 08-063 at 2 (Sept. 21, 2009) (citing same).⁹ But, “once a claimant retains counsel, tolling ceases because she has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law’s requirements.” See, e.g., *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (2010), (citing *Leorna v. U.S. Dep’t of State*, 105 F.3d 548, 551 (9th Cir. 1997)).

In the present case, Complainant does not assert equitable tolling. He does not offer anything to suggest that the Railroad lulled him into foregoing prompt attempts to vindicate his rights. He does not offer anything to suggest that he timely filed the correct complaint with the wrong agency. Complainant does assert that the termination from employment and the Railroad’s other related conduct was “mentally, physically, and financially draining”; that he almost lost the house into which he had recently moved; and that the termination was otherwise stressful. He notes that his wife’s father and grandfather both had “medical incidents” prior to the constructive discharge. His wife almost had to give up her college schooling. He indicates that he was receiving mental health treatment from a specialist. While I do not minimize the hardship that a termination from employment causes, I find this insufficient to raise equitable tolling for two reasons.

First, these were circumstances that occurred *before* Complainant’s constructive discharge on June 12, 2015. He does not say that he lost his house, that a close relative died, that his wife left college, or that any profoundly destabilizing series of events was ongoing from the date of the constructive discharge through January 11, 2016, which was the filing deadline.

⁸ Where the employer has actively misled the employee, the doctrine is more correctly equitable estoppel, not equitable tolling. See *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011) at 4. This includes, for example, “where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” *Id.* at 5. In some Circuits, this element of the employer’s misleading the plaintiff is generally required for equitable tolling at least in employment discrimination cases. See *Williamson v. Indiana University*, 345 F.3d 459, 463 (7th Cir. 1003); *Amini v. Oberlin College*, 259 F.3d 493, 498 (6th Cir. 2001); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 53 (1st Cir. 1999); see also *Washington v. Washington Metropolitan Area Transit Authority*, 160 F.3d 750, 752-53 (D.C. Cir. 1998).

⁹ Although *Williams* appears to have arisen in the Ninth Circuit, the Board relied on the Third Circuit authority in *Marshall* for its holding.

Even if he had given some facts occurring during the relevant time period, the legal requirement is for a showing that “in some *extraordinary* way” he had “been *prevented* from filing this action” (emphasis added). For example, I certainly would not want anything like this to happen, but had Complainant been in a coma or been mentally incompetent or been held against his will somewhere, those would be extraordinary circumstances that would prevent him from filing timely. Undoubtedly there are events somewhat less extreme that would be sufficient. But events such as the possibility that Complainant’s wife might have to leave college – but in fact didn’t – should not have prevented Complainant from calling OSHA to raise a complaint under the Act. Nor would a disappointing Christmas, a diminished experience of a tenth wedding anniversary, or having to miss a brother’s promotion to colonel in the Air Force – all events that Complainant lists as examples of how the adverse conditions at work and the termination affected him.

More to the point here is that Claimant had the advice of counsel at the time of the constructive discharge. He states explicitly in his resignation letter of July 12, 2015, that he had decided to end his employment at Union Pacific “after speaking with . . . legal counsel.” I must infer from this that, at the time of Union Pacific’s last adverse action, Complainant had legal counsel to advise him of his right to file an action under the Federal Rail Safety Act, of the limitations period with which he must comply, and how and where to file a complaint with OSHA. *See, e.g., Coppinger-Martin v. Solis, supra.* Armed with that information, Complainant could have satisfied the limitations period with a phone call to OSHA on or before January 11, 2016; nothing prevented him from doing so.

Statutes of limitations exist, among other things, to protect defendants against stale or unduly delayed claims and to promote judicial efficiency. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).¹⁰ Complainant unquestionably has strong views on the merits, but a determination of the issues presented on this motion does not turn on the merits of his claim. The determination turns on the policy requiring the timely resolution of disputes of this kind.

Order

Complainant failed to meet the statutory filing deadline for a complaint under the Federal Rail Safety Act. He has not shown a basis for equitable tolling. Accordingly, Respondent’s motion

¹⁰ Although not the case here, employment litigation often involves parties who have an ongoing employment relationship. Congress and state legislatures frequently impose relatively short limitations periods in employment-related cases because the mere threat of potential litigation can have a pernicious effect on the workplace.

for summary decision is GRANTED. This matter is DISMISSED.

SO ORDERED.

STEVEN B. BERLIN
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) 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. § 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).

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 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. §§ 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).