



Issue Date: 24 January 2017

Case No.: 2016-FRS-00071
OSHA No.: 6-3280-16-066

In the Matter of:

DAVID GARDNER,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Federal Railroad Safety Act of 2007 (“FRSA”), 49 U.S.C. § 20109, as amended, and implementing regulations at 29 C.F.R. Part 1982. Jurisdiction for this case is vested in the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ” or “Office”) by subsection 20109(c)(2)(a), which applies the rules and procedures set forth in 49 U.S.C. § 42121(b) relating to whistleblower complaints under the Aviation Investment and Reform Act for the 21st Century (“AIR 21”).

Background

David Gardner (“Complainant”) filed a complaint with the Secretary of Labor on March 8, 2016,¹ alleging that Respondent violated the FRSA when it retaliated against him by “harassing, and discriminating against [him] because of [his] veteran’s status.” In separate letters dated May 20 and 23, 2016,² the Secretary of Labor, acting through the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VI, dismissed the complaint after finding “no reasonable cause to believe Respondent violated the FRSA.” On July 22, 2016, this matter was docketed with the OALJ upon Complainant’s submission of a July 15, 2016 letter purportedly appealing the dismissal and requesting advice “on how I may have my complaint investigated.”

¹ Although the Secretary’s Findings indicate that the complaint was filed on April 8, 2016, it appears from a preliminary letter sent to Complainant that the complaint was originally filed on March 8, 2016.

² These two letters will be referred to collectively as the “Secretary’s Findings”.

After reviewing the hearing request and the Secretary's Findings, it was unclear whether Complainant could actually demonstrate that he engaged in activity protected under the FRSA. The Secretary's Findings indicate that Complainant was alleging discrimination because of his status as a military veteran, but neither the Secretary's Findings nor Complainant's hearing request mention any specific protected activity as defined under the FRSA. However, Complainant did aver in his July 15, 2016 letter that "[t]he reason the investigator states is different than my reason for reporting to OSHA."³

Additionally, it appeared that Complainant's hearing request may have been untimely filed. Complainant had 30 days after being notified of the Secretary's Findings to request a hearing before an administrative law judge.⁴ The Secretary's Findings are dated May 20, 2016 and May 23, 2016. The Complainant's letter requesting a hearing is dated July 15, 2016, with a United States Postal Service postmark of July 16, 2016, and was received by the OALJ Chief Docket Clerk on July 22, 2016.

On July 27, 2016, I issued a *Notice of Docketing and Order to Show Cause* ("Order to Show Cause") explaining OALJ's jurisdiction over the FRSA⁵ and instructed Complainant to show good cause within 30 days why the matter should not be dismissed. The Order to Show Cause specified that Complainant's filing should address: (i) the protected activity that Complainant alleges he engaged in; (ii) the retaliation or discrimination that Complainant alleges was due, in whole or in part, to the protected activity; (iii) whether Complainant's appeal request was timely filed, including the date(s) that Complainant received the Secretary's Findings; and (iv) any reasons that the statutory filing period should be equitably tolled. Respondent was given leave to file a reply within 30 days of receipt of Complainant's filing.

³ As a self-represented complainant apparently lacking legal expertise, this Court analyzed Mr. Gardner's filings "with a degree of adjudicative latitude." *Hyman v. KD Resources, Inc.*, ARB No. 09-076, ALJ No. 2009-SOX-20, slip. op. at 8 (ARB Mar. 28, 2010) (citing *Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-36, slip op. at 6 (ARB Aug. 27, 2008)).

⁴ 29 C.F.R. § 1982.106 provides, in pertinent part, that any party who desires review, including judicial review, of the findings and preliminary order must file a request for a hearing on the record with the Chief Administrative Law Judge, U.S. Department of Labor within 30 days of receipt of the findings and preliminary order pursuant to § 1982.105. The date of the postmark is considered the date of filing. Here, Complainant's hearing request is dated July 15, 2016 but postmarked July 16, 2016.

⁵ The FRSA prohibits a railroad carrier from retaliating against an employee for engaging in several categories of protected activities enumerated in 49 U.S.C. § 20109. In general, the FRSA prohibits retaliation against an employee for providing information about or refusing to participate in conduct he or she reasonably believes violates railroad safety or security regulations; giving notification of a work-related injury or illness; or accurately reporting on-duty hours. *Id.* § 20109(a). The FRSA also prohibits a railroad carrier from discriminating against an employee for reporting a hazardous safety or security condition; refusing to work when confronted with such a situation, where no reasonable alternative was available; or refusing to authorize the use of any safety-related equipment or structures believed to be in a hazardous safety or security condition, where no reasonable alternative is available. *Id.* § 20109(b). Lastly, the FRSA prohibits a railroad carrier from disciplining an employee for requesting medical treatment, or for following the order or treatment plan of a treating physician. *Id.* § 20109(c).

On August 24, 2016, Complainant filed a response to the Order to Show Cause. Respondent filed its reply on October 25, 2016.⁶ As Complainant did not address whether his complaint was timely filed or whether equitable grounds exist to excuse an untimely appeal, I issued a *Second Order to Show Cause* on November 7, 2016. That order again instructed Complainant to show cause why the matter should not be dismissed and requested that Complainant address the following: (i) the specific protected activity, as defined by the FRSA, Complainant alleges he engaged in; (ii) the retaliation or discrimination that Complainant alleges was due, in whole or in part, to this protected activity; (iii) whether Complainant's appeal request was timely filed, including the date(s) that Complainant actually received the Secretary's Findings; and (iv) any reasons that the filing period should be equitably tolled, if necessary. Respondent was given leave to file a reply within 30 days of receipt of Complainant's filing. Complainant filed a response on November 29, 2016. Respondent has indicated that it will not file a reply.

Parties' Arguments

In his response, Complainant states that he filed a complaint with OSHA on March 8, 2016. Complainant explains his actions after that filing:

[O]n 8 April 2016, I received a letter from Ms. Angela B. Fisher, Regional Supervisory Investigator, Baton Rouge, LA, listing "Graphics Packaging International" versus Union Pacific Railroad and it was focused only on a denial to investigate because my situation involved some concerns over my "veteran status." After no response from Ms. Fisher to my concerns until 23 May 2016, I initiated a second complaint, 30413782, on 16 July 2016. I subsequently contacted the U.S. Department of Labor- Office of the Inspector General for assistance in navigating her chain of command and to hopefully get an actual investigation initiated. I was never contacted by any investigator contrary to the 23 May 2016⁷ letter from Ms. Fisher. Therefore, how could an investigator understand the situation or have completed a thorough investigation?

Complainant explains that he believes he received the Secretary's Findings "some time around May 26, 2016 or thereafter, because that is what was listed on the envelope." Complainant further explains that he "did not know how to respond and was focused on [his] complaint not having been investigated and it being dismissed already." Complainant argues for equitable tolling of the statutory filing period because:

the 23 May 2016 letter from Ms. Fisher included no contact information for your office, there was no explanation as to why an investigation had not taken place nor was any procedural information provided, and I was making every attempt to gain clarification such as contacting OSHA – IG and attempting a new claim. I

⁶ Respondent did not receive Complainant's response until October 11, 2016, when a member of my staff contacted its legal counsel.

⁷ Complainant also inquires as to the May 20, 2016 Secretary's Findings referenced in my *Second Order to Show Cause*. The May 20 and 23, 2016 Secretary's Findings are substantively the same, but vary slightly in format.

was so surprised by my complaint being dismissed when it had not been investigated. Of course, I object to the Secretary's finding of insufficient evidence and the lack of including the totality of my complaint.

For its part, Respondent asserts in its reply to the first Order to Show Cause that Complainant's letter requesting a hearing was filed "too late" and requests that Complainant's appeal be dismissed as untimely. It further posits that Complainant has failed to state a prima facie claim under the FRSA. I construe Respondent's request for dismissal of Complainant's request for hearing to be a motion for summary decision.

Applicable Law

The regulations provide that the Secretary's Findings will inform the parties of the right to request a hearing with this Office and must include the address of the Chief Administrative Law Judge where that request must be filed. The Assistant Secretary also files a copy of the original complaint and the findings with the Chief Administrative Law Judge. 29 C.F.R. § 1982.105(b). The Secretary's Findings "will be effective 30 days after receipt by the respondent . . . unless an objection and/or a request for a hearing has been timely filed as provided at § 1982.106." *Id.* § 1982.105(c). A request for hearing is deemed to be filed on the date it is postmarked. *Id.* § 1982.106(a). "If no timely objection is filed with respect to . . . the findings . . . the findings . . . will become the final decision of the Secretary, not subject to judicial review." *Id.* § 1982.106(b).

The Administrative Review Board ("ARB") has found equitable tolling appropriate in at least three circumstances⁸: (i) "when the defendant has actively misled the plaintiff regarding the cause of action"; (ii) "when the plaintiff has in some extraordinary way been prevented from filing his action"; and (iii) "when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-007, slip op. at 8 (ARB Sept. 29, 2006).

The standard of review for a motion for summary decision is essentially the same as the one used in Rule 56 of the Federal Rules of Civil Procedure, which governs summary judgment in the federal courts. *Hasan v. Burns & Roe Enter., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-000006, slip op. at 6 (ARB Jan. 30, 2011). Specifically, the Rules of Practice and Procedure for Administrative Hearings before the OALJ provide that an administrative law judge "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law." 29 C.F.R. § 18.72(a). 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 produces sufficient evidence of a material fact that a factfinder 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, 288-290 (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

⁸ The ARB has made clear that other situations may also warrant equitable tolling. *See, e.g., Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012).

non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party moving for summary decision⁹ has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Zenith Radio Corp.*, 477 U.S. 317, 325 (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*, 477 U.S. at 257. In reviewing the request for summary decision, all of the evidence must be viewed in a light most favorable to the non-moving party. *See, e.g., Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001). A genuine issue of material fact exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. However, granting a summary decision motion is not appropriate where the information submitted is insufficient to determine if material facts are at issue. *Anderson*, 477 U.S. at 242.

Discussion

I find that Complainant filed his request for hearing on July 16, 2016, 51 days after receiving the Secretary’s Findings on May 26, 2016. As this is well beyond the 30-day filing period provided by 29 C.F.R. § 1982.106, I conclude that Complainant’s request for review before an administrative law judge in this Office is untimely filed. Moreover, Complainant is unable to show that the doctrine of equitable tolling applies to his untimely request. Although Complainant asserts that the Secretary’s Findings did not include an address for this Office, I find that both letters (dated May 20 and May 23, 2016) included the full and correct address. Complainant does not allege that he was misled by Respondent regarding the cause of action or prevented in some way from filing the request for hearing. Complainant does not argue that he mistakenly appealed or requested a hearing in the wrong forum. Although Complainant details filing a new complaint and contacting the Office of the Inspector General, he states that those actions began on July 16, 2016 – the same date of the USPS postmark of his request for hearing before this Office. Finally, Complainant does not provide other facts or arguments that support equitable tolling for any other reason.

Accordingly, I find that there is no genuine issue of material fact and Respondent is entitled to summary decision on the issue of whether Complainant’s request for review of the Secretary of Labor’s May 23, 2016 preliminary findings and order was timely filed.¹⁰ As a matter of law, I find the hearing request is barred by the regulations set forth at § 1982.106(b).

⁹ A judge may order summary decision sua sponte if the record establishes that there is no genuine dispute as to any material fact and one of the parties is entitled to a decision as a matter of law. 29 C.F.R. § 18.72(f)(3).

¹⁰ Given the resolution of this matter, I need not decide whether retaliation based on status as a military veteran is a protected activity under the FRSA.

Order

Based on the foregoing, Complainant's July 16, 2016 hearing request is DENIED as untimely filed. By operation of law, the preliminary findings and order rendered by the Regional Administrator for OSHA on May 23, 2016 dismissing the complaint constitute the final decision of the Secretary of Labor.¹¹ 29 C.F.R. § 1982.106(b).

SO ORDERED:

STEPHEN R. HENLEY
Chief 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

¹¹ This Decision applies only to the above-captioned matter, OSHA complaint number 6-3280-16-066, and does not apply to any complaint reportedly filed with OSHA on July 16, 2016 or any other complaints.

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).