

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 06 September 2017

ALJ NO.: 2017-FRS-00060

In the Matter of:

DAVID CERRITO,
Complainant,

v.

NATIONAL RAILROAD PASSENGER CORP.,
a/k/a AMTRAK,
Respondent.

ORDER GRANTING MOTION FOR SUMMARY DECISION

I. Procedural Background

This proceeding arises from a complaint of discrimination filed under the Federal Rail Safety Act (“the FRSA”), 49 U.S.C. § 20109 (2008). By letter dated May 12, 2017, the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued a Preliminary Order dismissing Complainant, David Cerrito’s (“Cerrito” or “Complainant”) complaint as being untimely. On May 22, 2017, the Cerrito filed an objection to the Secretary’s findings and requested a de novo hearing before an administrative law judge pursuant to 29 C.F.R. § 1982.106 (2015). Because the complaint appeared untimely on its face, on June 28, 2017, I held an initial status conference on the record and set a deadline for filing dispositive motions. On July 24, 2017, National Railroad Passenger Corp. a/k/a Amtrak (“Amtrak” or “Respondent”) filed a “Motion for Dispositive Action.”¹ On August 11, 2017, Cerrito, in his capacity as a self-represented litigant, filed a response to the motion. For the reasons set forth below, I find that the alleged adverse employment action of

¹ While called a motion for dispositive action under 29 C.F.R. § 18.70, because there are exhibits attached to the motion and the response, I will treat the matter as a request for summary decision under section 18.72.

termination occurred more than 180 days from the date the complaint was filed, and cannot be considered under the FRSA and is DISMISSED. Additionally, to the extent Cerrito is requesting a de novo hearing of an OSHA finding made on November 22, 2016, such request is untimely under 29 C.F.R. § 1982.106(a).

II. Background²

David Cerrito (Cerrito) filed a complaint with OSHA on August 22, 2013, alleging that he was suspended on June 17, 2013 for a period of ten days in retaliation for filing an earlier whistleblower complaint with OSHA. The August 22, 2013 complaint was dismissed by OSHA in a letter dated November 22, 2016, wherein OSHA found that Amtrak proved by clear and convincing evidence the Cerrito's suspension was due to his insubordination for refusal to shovel snow off switches.

On May 9, 2017, Cerrito filed another complaint with OSHA under the FRSA alleging that Amtrak terminated him on September 16, 2016 in retaliation for reporting a workplace injury. By letter dated May 12, 2017, OSHA dismissed this complaint as untimely, and Cerrito seeks de novo review of this finding.

Prior to receiving Cerrito's response to the motion, I was not aware of the events surrounding his 2013 suspension, but the majority of his opposition appears to be addressing those facts. I am not sure how the 2013 events relate to the instant proceeding other than perhaps being an additional ground of protected activity for the instant case.³ Whether it is an additional instance of alleged protected activity for the 2017 complaint or whether Cerrito is somehow seeking a de novo appeal of the November 2016 OSHA finding, it makes little difference in the outcome of this proceeding. Regardless of what the alleged protected activity is, the instant complaint is untimely as it was filed more than 180 days after Cerrito's termination. Additionally, any appeal of the November 2016 OSHA finding would have had to occur within 30 days of receipt of the finding and preliminary order. 29 C.F.R. § 1982.106(a). Cerrito makes no suggestion that he received the 2016 finding late, and there is little I can do under the law to aid Cerrito in pursuing claims that are clearly time-bared.

² For purposes of this decision, I have taken the facts from Amtrak's motion and exhibits thereto and they are construed in a light most favorable to Cerrito.

³ For purposes of this portion of my decision, I will assume Cerrito engaged in protected activity.

III. Discussion

The standard for summary decision under the Rules of Practice and Procedure for the Office of Administrative Law Judges mirrors that of summary judgment under the Federal Rules of Civil Procedure. *See Hasan v. Enercon Servs., Inc.*, ARB No. 04-045, ALJ No. 2003-ERA-31 (ARB May 18, 2005); 29 C.F.R. § 18.40; Fed. R. Civ. P. 56. Under 29 C.F.R § 18.72, summary decision shall be granted “if the movant show that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.” 29 C.F.R § 18.72(a). A genuine issue of material fact exists where, based on the substantive law in question, the disputed fact might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party moving for summary decision bears the initial burden of demonstrating the absence of any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts showing there is a disputed issue that could affect the outcome of the litigation. *Anderson*, 477 U.S. at 248; 29 C.F.R § 18.40(c). The evidence presented by the non-moving party must be “more than mere speculation, conjecture, or fantasy.” *Gregory v. Rogers*, 974 F.2d 1006 (8th Cir. 1992) (*quoting Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985)).

In deciding a motion for summary decision, I must view all facts and inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 249. While findings of fact are not required, a summary decision inquiry should determine if the issue is appropriate for a hearing because it could reasonably be resolved in favor of either party. *Id.* at 250. Summary decision is appropriate when there is a “failure of proof concerning an essential element of the nonmoving party's case [which] necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 323.

The whistleblower protection provision of the FRSA states that a railroad carrier engaged in interstate commerce

may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done-

...

3) to file a complaint, or directly cause to be brought a proceeding related to the enforcement of this part or, as applicable to railroad safety or security, chapter 51 or 57 of this title, or to testify in that proceeding; [or]

(4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee...

49 U.S.C. § 20109(a).

The FRSA and federal regulations require that any complaint under the FRSA must be filed within 180 days of an alleged violation of the Act. 49 U.S.C. §20109(d)(2)(A)(ii). The regulation states: “Within 180 days after an alleged violation of ... FRSA occurs, any employee who believes that he or she has been retaliated against in violation of ... FRSA may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.” 29 C.F.R. § 1982.103(d). Here, Cerrito filed an oral complaint on May 9, 2017. To be actionable, any alleged retaliatory conduct on the part of Amtrak had to occur on or after November 10, 2016. Cerrito was terminated on September 16, 2016. This adverse employment action occurred 55 days prior to November 10, 2016, and is therefore untimely. Additionally, to the extent Cerrito is seeking to appeal the November 2016 OSHA finding, that too is time-bared under 29 C.F.R. § 1982.106(a).

Based upon the foregoing, it is hereby ORDERED that:

(1) Amtrak’s motion is GRANTED; and

(2) David Cerrito’s oral complaint filed on May 9, 2017 is DISMISSED as untimely.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

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).