



Issue Date: 15 August 2017

Case No.: 2017-FRS-00047

In the Matter of

JOHN F. GUERRA, JR.
Complainant

v.

CONSOLIDATED RAIL CORPORATION
Respondent

ORDER DISMISSING COMPLAINANT'S COMPLAINT

This matter arises out of a complaint filed by John F. Guerra, Jr. ("Complainant") against Consolidated Rail Corporation ("Respondent") pursuant to the employee protection provisions of the Federal Railroad Safety Act ("FRSA" or the "Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. Applicable regulations are set forth at 29 C.F.R. Part 1982. Both parties are represented by counsel.

Procedural Background

By letter dated March 7, 2017, the OSHA Regional Administrator issued the Secretary's Findings, which dismissed Complainant's FRSA complaint as untimely on the basis that Complainant was notified of his 45-day suspension on April 6, 2016 and OSHA did not receive the complaint until November 28, 2016, outside FRSA's 180-day statute of limitations period. *See* April 11, 2017 Order to Show Cause. The Secretary's Findings also stated:

Complainant's attorney alleged that a complaint was sent to the Region II, OSHA Regional Office on May 10, 2016 by regular U.S. Mail. There is no evidence that such a complaint was filed with the Regional Office. Furthermore, previous complaints filed by Complainant's attorney in other matters were faxed or sent by tracked delivery. There is nothing to indicate that this complaint was ever filed with OSHA or circumstances to allow tolling.

See CX D.

Complainant, through counsel, submitted his “Objection and Request for ALJ hearing” by letter dated March 27, 2017 and the matter was subsequently forwarded to the U.S. Department of Labor Office of Administrative Law Judges. On April 11, 2017, an Order to Show Cause Why Complaint Should Not be Dismissed as Untimely (“Order to Show Cause”) was issued informing the parties of Complainant’s burden to demonstrate either the timeliness of the complaint’s filing, or, in the absence of timely filing, why equitable tolling of the statute of limitations should apply; the elements of equitable tolling were also explained. *Id.* at 2-3.

Complainant responded to the Order to Show Cause on May 2, 2017, arguing that he timely filed his complaint pursuant to the common law mailbox rule. *See* Complainant’s Response at 8-11. Complainant did not argue that equitable tolling of the statute of limitations should be applied in this case. *Id.* Respondent replied to the Order to Show Cause on June 2, 2017, asserting that Complainant’s complaint should be dismissed as untimely because Complainant failed to establish entitlement to the mailbox rule’s presumption of mail receipt. *See generally* Respondent’s Reply. On June 6, 2017, Complainant submitted a second affidavit from Attorney Katz, which was characterized as a ‘Supplemental Affidavit.’”

Parties’ Arguments

Complainant’s Response

Complainant argues that he timely filed his complaint pursuant to the mailbox rule. *See generally* Complainant’s Response. Complainant notes that the employee protection provisions of the FRSA should be construed liberally due to the Act’s remedial nature. *See id.* at 8. He asserts that the only affirmative evidence in this case – his attorneys’ sworn affidavits – establishes that his complaint was sent via regular mail on May 10, 2016, well within the statute of limitations period. Additionally, Complainant states that the evidence “confirms that the envelope containing the complaint and transmittal letter was never returned by the U.S. Post Office.” *Id.* Complainant contends that, under the mailbox rule, the complaint is presumed to have been delivered to OSHA within a reasonable period after mailing. *Id.* (citing *Phila. Marine Trade Ass’n-Int’l Longshoremen’s Ass’n Pension Fund v. C.I.R.*, 523 F.3d 140, 147 (3d Cir. 2008) and *Lupyan v. Corinthian Colleges, Inc.*, 761 F.3d 314, 319 (3d Cir. 2014)). He further asserts that a sworn statement is credible evidence of mailing for purposes of the mailbox rule. *Id.* at 9 (citing *Schikore v. Bank of America Supplemental Ret. Plan*, 269 F.3d 956, 964 (9th Cir. 2001), *Simpson v. Jefferson Standard Life Ins. Co.*, 465 F.2d 1320, 1323 (6th Cir. 1972, and *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 420 (5th Cir. 2007)). According to Complainant, his counsels’ affidavits stating that the complaint was sent on May 10, 2016 should be deemed sufficient to establish mailing of his complaint because the FRSA should be construed liberally. *Id.* at 10.

Complainant also points out that OSHA’s own regulation permits complainants to submit complaints via regular mail. *See id.* at 8-9 (citing 29 § C.F.R. 1982.103) As such, Complainant maintains that “[w]here OSHA specifically permits FRSA complaints to be filed by ordinary mail, and does not mandate proof of mailing or delivery, it cannot turn around and suggest that a complaint was not timely filed because there is no proof of it having been mailed.” *Id.* at 9-10. Complainant takes issue with OSHA’s position that sending Complainant’s complaint via regular mail was inconsistent with Complainant’s attorneys’ prior practice of submitting complaints via

tracked forms of delivery. *See id.* at 10. Complainant avers that a reasonable explanation was provided for the discrepancy: it was an oversight by counsel's support staff.¹ *See id.* Regardless, he argues, whether Complainant's complaint was sent by regular mail is irrelevant because OSHA permits complaints to be sent via regular mail. *See id.*

Complainant also notes that OSHA's statement that it had no record of Complainant's complaint is different from stating that it was not received. *See id.* He asserts that it is plausible that OSHA misplaced or misfiled the complaint because it was not returned to his counsel's office. *See id.* Complainant contends he should be afforded the benefit of the doubt regarding timely mailing of the complaint given the FRSA's remedial purpose, the mailbox rule, and OSHA's regulation permitting complaints to be sent via regular mail. *See id.*

In the alternative, Complainant seeks leave to conduct discovery of OSHA concerning its procedures for processing incoming FRSA claims and its history of losing, misplacing, misfiling, or failing to accurately docket such claims. *Id.* at 11.

Attachments to Complainant's Response

Exhibit A: Affidavit of Lawrence A Katz, Esq.

The relevant paragraphs of Attorney Katz's affidavit state:

I first met the Claimant, John F. Guerra Jr., in the office of Coffey, Kaye, Myers & Olley, on April 21, 2016.

On that date, I attended a meeting between Robert E Myers, Esquire, a partner at Coffey, Kaye, Myers & Olley, and John F. Guerra, Jr.

The purpose of the meeting was to review an adverse employment action imposed by Conrail on Mr. Guerra, i.e., a 45-day suspension, which he asserted was retaliation

After reviewing documents presented by Mr. Guerra, and discussing with him the chronology of events, comments made by Conrail management personnel, and other relevant matters, Mr. Meyers and I concluded that there was sufficient evidence to present a prima facie case of a FRSA retaliation claim against Conrail. . . .

It was determined that Mr. Guerra had provided enough information and evidence to permit the expeditious filing of the OSHA Complaint.

¹ It is noted that neither Attorney Katz nor Attorney Meyers explained in their sworn affidavits that sending Complainant's complaint via regular mail was an oversight by support staff; this assertion is only stated in the body of Complainant's Response. *See generally* CX A; CX B.

In early May, 2016, a short-form OSHA Complaint was prepared and dictated.

On May 10, 2016, the Complaint was transmitted to OSHA at 201 Varick Street, Room 670, New York, N.Y. by regular U.S. mail. Regular U.S. mail is one of the modes of transmission permitted by OSHA under 29 C.F. R. § 1982.103.

On November 28, 2016, because OSHA had not yet arranged to take Mr. Guerra's statement, I placed a telephone call to OSHA Regional Investigator Dennis Vamvakas, who was involved in other FRSA cases brought on behalf of Coffey Kaye Myers & Olley clients.

When I spoke with Mr. Vamvakas, I informed him that we filed an OSHA short-form complaint on behalf of Mr. Guerra on May 10, 2016, but had not yet received any response from OSHA. During that conversation, I requested that he look into this matter for me.

On November 28, 2016, at his request, I emailed a copy of the short-form OSHA Complaint and transmittal letter to Mr. Vamvarkas [sic].

At Mr. Vamvarka's [sic] request, I also sent a copy of the Complaint and transmittal letter to Acting Assistant Regional Administrator Christopher J. Carlin.

On that same date, Mr. Carlin asked by email for verification of transmittal and I responded by email that the Complaint was sent by first-class mail as permitted by OSHA regulations, and delivery is presumed because the letter was never returned. . . .

On March 7, 2017, Acting Assistant Regional Administrator Christopher J. Carlin sent me a letter dismissing Mr. Guerra's Complaint.

No envelope containing the May 10, 2016 transmittal letter to OSHA and the short-form OSHA complaint was returned to Coffey Kaye Myers & Olley. as [sic] undeliverable, wrongly addressed, or otherwise by the U.S. Post Office. As such, it deemed [sic] to have been properly delivered. Therefore, that [sic] Mr. Guerra's FRSA Complaint is deemed to have been received by OSHA soon after its May 10, 2016 mailing.

I represented a claimant in another action filed in OSHA District II where OSHA lost, and therefore never docketed, a FRSA complaint.

Attorney Katz's Supplemental Affidavit²

The relevant paragraphs of this affidavit state:

It is my personal practice to review with my assistant or support personnel what was done during the day and what is to be accomplished the next day.

This is [sic] meeting and review usually occurs between 2:30 PM to 3:00 PM.

My normal procedure would have been to ask whether the FRSA Complaint in the Guerra matter had been transmitted. If it had not been transmitted, I would have instructed that she do so at that time.

Therefore, based on my usual procedures and the presence of a transmittal letter in our file, there is no doubt that the FRSA Complaint was transmitted to OSHA on the date noted on the letter, May 10, 2016.

Exhibit B: Affidavit of Robert B. Myers, Esq.

Attorney Myers's affidavit echoed Attorney Katz's affidavit with regard to the meeting between Complainant and the two attorneys, the attorneys' conclusion that Complainant had a viable FRSA retaliation case, and that "a short-form OSHA Complaint was prepared and dictated . . . On May 10, 2016, the OSHA Complaint was filed by regular U.S. Mail." The paragraphs unique to Attorney Myers's affidavit state:

In late November, it was noticed that OSHA had not yet requested Mr. Guerra's statement.

I instructed Mr. Katz to determine the matter's status with OSHA and when Mr. Guerra's statement would be taken.

Exhibit C: Letter from Attorney Katz to OSHA dated May 10, 2016; Short-form FRSA complaint

Exhibit D: Attorney Katz's November 28, 2016 email to Dennis Vamvakas; Attorney Katz's November 28, 2016 email to Christopher Carlin; Attorney Katz's December 29, 2016 letter to OSHA Regional Director Aisha Ferrell-Jennings; the March 7, 2017 OSHA dismissal letter; and Complainant's March 27, 2017 Objection and Request for ALJ Hearing

² This affidavit was not attached to Complainant's Response; it was submitted on June 6, 2017.

Respondent's Reply

Respondent notes that Complainant's Response fails to argue Complainant has satisfied any of the elements to warrant equitable tolling of the statute of limitations; rather "Complainant argued solely that his complaint should be presumed to have been timely filed by operation of the common law mailbox rule." Respondent's Reply at 4. Respondent writes that according to the common law mailbox rule, "if a letter properly directed is **proved** to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its designation at the regular time, and was received by the person to whom it was addressed." *Id.* (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)) (emphasis in original). Respondent asserts that the dispositive issue in this case is whether the Complainant has adequately proved, as a matter of law, that his complaint was "properly directed" and "either put into the post office or delivered to the postman." *Id.*

Respondent argues that neither of the Third Circuit cases the Complainant relied on in its Response, i.e., *Phila. Marine Trade* and *Lupyan v. Corinthian Colleges, Inc.*, supports application of the mailbox rule in this case.³ *Id.* at 5. Regarding *Phila. Marine Trade*, Respondent avers that in applying the common law mailbox rule, the court "repeatedly emphasized that the alleged sender relied on evidence beyond the sender's own testimony." *Id.* (citing 523 F.3d at n.7) ("common law mailbox rule remains viable for taxpayers who 'introduce evidence of mailing **beyond their own testimony**'"); 152 ("In sum, we hold that, at least where a taxpayer . . . produces **circumstantial evidence beyond its own testimony** that it mailed the tax document early enough to allow timely physical delivery, it may avail itself of the common-law mailbox rule"; 153 (same)). *Id.*

Respondent argues that the facts regarding the indicia of receipt in *Phila. Marine Trade* are distinguishable from the facts in this case because in *Phila. Marina Trade*: (1) the alleged recipient testified about a "frantic" call from the sender the day before the first alleged mailing; (2) the sender produced a computer printout showing that one of the letters was created the same day it was allegedly mailed; (3) the sender testified that he received a call from the recipient informing of receipt, and the recipient's recollection was inconclusive; (4) the recipient testified that he would have destroyed the file containing the mailed document, so the recipient's lack of possession did not suggest it was not received; and (5) the recipient met with the sender shortly after the alleged receipt of the filing "suggesting that there was a precipitating event – perhaps receipt of a refund request – the [sic] triggered this governmental response." *Id.* at 5-6 (citing and quoting 523 F.3d at 153, 146-47. Respondent asserts that Complainant possesses none of these indicia of timely mailing that were present in *Phila. Marine Trade*; rather he relied solely on his attorneys' statements that the complaint was timely mailed by an "unidentifiable person." *Id.* at 6.

Regarding *Lupyan v. Corinthian Colleges, Inc.*, Respondent writes that the Third Circuit held that the rebuttable inference of receipt is "weaker" when a document is sent via regular mail. *Id.* at 6. Respondent states that the sender in *Lupyan* submitted affidavits from its Mailroom Supervisor and Human Resources Coordinator, who testified that she "personally

³ Respondent, citing 49 U.S.C § 20109(d)(4), correctly noted that any appeal from the U.S. Department of Labor would be to the Third Circuit because the events at issue in Complainant's complaint occurred in New Jersey and Complainant resides in New Jersey. See Respondent's Reply at n.4.

prepared the letter and placed it in the outgoing mail bin.” *Id.* Respondent notes that the sender’s evidence in *Lupyan* was much more detailed than the evidence in this case, and states that the court in *Lupyan* noted:

[T]he only evidence [the sender] submitted consists of self-serving affidavits signed nearly four years after the alleged mailing date. . . . These affidavits implicate the presumption of receipt that arises under the mailbox rule. However, under the circumstances, it is a very weak presumption. Given [the recipient’s] denial, and the ease with which a letter can be certified, tracked, or proof of receipt obtained, that weak rebuttable presumption is not sufficient to establish receipt as a matter of law . . .

Id. at 6-7 (quoting 761 F.3d at 320) (alterations in original).

Respondent argues that while averments of mailing are undoubtedly admissible as an evidentiary matter, other courts have held in accordance with the Third Circuit that a sender’s self-serving averments of mailing, without corroborating evidence, is insufficient to invoke the mailbox rule. *See id.* (discussing *Sorrentino v. IRS*, 183 F.3d 1187, 1191 (10th Cir. 2004) (“self-serving declarations of mailing, without more, are insufficient to invoke the presumption [of receipt]”); *In re: Managed Care Litigation*, 2008 WL 2944897, *4-5 (S.D. Fla. 2008); *Spencer v. U.S. Postal Service*, 2007 WL 2566031, *4-5 (N.D. Fla. 2007) (“holding that party was not entitled to common law mailbox rule presumption of receipt where the only evidence of mailing was an affidavit from the party’s attorney detailing his and his secretary’s preparation and mailing of the document”); *Pizzuto v. IRS*, 384 B.R. 105, 111 (Bankr. D.N.J. 2008)). Respondent also cited a case in which a Department of Labor ALJ granted a respondent’s motion to dismiss, holding that the complainant’s complaint was untimely where the only evidence of timely filing was the complainant’s own affidavit. *See id.* at 8. (citing *Barker v. Perma-Fix of Dayton, Inc.*, ALJ Case No. 2006-SOX-01, slip op. at 3 (OALJ Jan. 11, 2006)).

Respondent responds to Complainant’s argument that OSHA regulations permit filing of a complaint via regular mail by asserting that this point is not in contention. *See id.* at 9. Respondent argues that if the regulations did not allow filing by regular mail, “this case would be summarily disposed of without consideration of the common law mailbox rule.” *Id.* Respondent states that the issue in this matter is which party bears the risk of non-receipt when the sender, like those in the cases Respondent cited, allegedly chooses to use regular mail and a government agency as the intended recipient later denies receipt. *See id.*

Respondent asserts that if Complainant used a non-trackable form of delivery, either by choice or “oversight by counsel’s support staff,” his attorney should have at least contacted OSHA in the days or weeks after the complaint was mailed to verify that it was received and filed, especially if his attorneys did not receive the customary docketing letter from OSHA shortly after receipt of the complaint.⁴ *See id.* Instead, Respondent observes, Complainant’s attorneys “admittedly waited six and a half months before contacting OSHA, an omission made

⁴ Respondent asks that judicial notice be taken of the OSHA Whistleblower’s Investigation Manual. *See id.* at 3, n.2. Respondent asserts that this manual provides details regarding OSHA’s customary procedure of issuing both parties a docketing letter after receiving a complaint. *See id.* at 3.

all the more puzzling by [Complainant's] attorney's belief that the same OSHA office lost and failed to docket the FRSA complaint of another client." *Id.* (citing Katz Aff. at ¶ 19).

Respondent also argues that, although the FRSA is a remedial statute, avoiding the potential harshness of dismissal cannot be used as a reason to confer jurisdiction where Congress has not chosen to do so. *Id.* (citing *Chertkow v. Office of Personnel Management*, 52 F.3d 961, 966 (3d Cir. 1995)).

Timeliness Analysis

To be timely, a complainant must file a FRSA whistleblower complaint within 180 days after an alleged violation. 42 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d). The statutory limitation period begins to run when a "complainant has final, definitive, and unequivocal knowledge of a discrete adverse act[.]" *See Cante v. New York City Dep't of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 10 (ARB July 31, 2009).

At issue here is whether Complainant timely submitted his complaint via the common law mailbox rule, and thus, whether he provided sufficient evidence to prove that his attorneys mailed his complaint on May 10, 2016. As discussed above, Complainant relies on the common law mailbox rule's presumption of receipt to prove timeliness; Complainant does not assert that the November 28, 2016 complaint is timely or that it should be considered timely pursuant to equitable tolling of the statute of limitations. *See generally* Complainant's Response. It is undisputed Complainant became aware of the adverse employment action at issue in this case – a 45-day suspension – on April 6, 2016 via a formal Notice of Discipline. *See* Complainant's Response at 5. For Complainant's complaint to be timely, he would have had to file a complaint by October 3, 2016, 180 days after he was on notice of the adverse action. Accordingly, if Complainant has not provided sufficient evidence of mailing on May 10, 2016, Complainant's November 28, 2016 complaint should be dismissed as untimely because it would have been filed over one month outside the FRSA's 180-day statute of limitations period.

The United States Court of Appeals for the Third Circuit has noted that statutory filing requirements generally may only be satisfied by actual, physical delivery to the government.⁵ *Phila. Marine Trade Ass'n-Int'l Longshoreman's Ass'n Pension Fund v. Comm'r*, 523 F.3d 140, 147 (3d Cir. 2008) (citing *United States v. Lombardo*, 241 U.S. 73, 76, 78 (1916)). To help determine when a specific document satisfied this "physical delivery rule," courts developed the common law mailbox rule, which states that "if a document is properly mailed, the court will presume the United States Postal Service delivered the document to the addressee in the usual time." *Id.* (citing *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)); *see also Lupyán v. Corinthian Colleges, Inc.*, 761 F.3d 314, 319 (3d Cir. 2014) ("Under the mailbox rule, if a letter 'properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed . . . that it reached its destination at the regular time, and was received by the person to whom it was addressed.") (quoting *Rosenthal*, 111 U.S. at 193)) (alteration in original)).

⁵ Third Circuit case law governs application of the common law mailbox rule in this matter because the events at issue in Complainant's complaint occurred in New Jersey and Complainant resides in New Jersey. 49 U.S.C. § 20109(d)(4).

The Third Circuit determined that the plaintiffs in *Phila. Marine Trade*, a union trust fund and its administrator, presented sufficient evidence to prove mailing and therefore invoke the mailbox rule's presumption of receipt. *See id.* at 152. The plaintiffs' evidence there included testimony from the fund's CPA that he faxed the letter at issue to the fund's administrator and the administrator's testimony that "she received it, immediately signed it, and sent it via United States Postal Service overnight mail to [the IRS Revenue Officer]." *See id.* at 142. The plaintiffs also provided the following evidence to prove mailing:

[the CPA's] testimony that he drafted the May 8 Letter on or before May 8, 2003; [the CPA's] testimony that [the] Revenue Officer . . . expressly acknowledged receipt of the May 8 Letter; a computer printout showing that [a subsequent] June 13 Letter was in fact composed by [the administrator] on June 13; the IRS's actions after June 2003, which suggest that there was a precipitating event – such as the mailing of a refund request – that triggered this governmental response; and [the] Revenue Officer[s] . . . own testimony that [the CPA and the administrator] were 'frantic,' 'in an uproar,' and 'so nervous and concerned' when they called him on May 7, 2003.

Id. at 152.

The court in *Phila. Marine Trade* also expressly stated it was not deciding "whether a plaintiff whose evidence of mailing consists entirely of the plaintiff's own testimony may put into play the presumption provided by the mailbox rule, because this case does not present [such] facts." *Id.* at n.6. However, it repeatedly emphasized that the plaintiffs relied on more evidence than just the plaintiffs own testimony. For example, the court stated in its holding, "Specifically, we hold that, where a taxpayer . . . produces evidence beyond its own testimony that it mailed the tax document early enough to allow timely receipt by the IRS in the regular course of business, it may avail itself of the mailbox rule." *Id.* at 147 (emphasis added).

Although the Third Circuit in *Phila. Marine Trade* was hesitant to say that self-serving affidavits alone were sufficient to invoke the mailbox rule, in *Lupyan*, the court seemed to hold that affidavits were enough to establish the presumption, but that it was "weak" and easily rebutted. In *Lupyan*, the court divided the mailbox rule presumption into two categories – a strong presumption and a weak presumption. *See* 761 F.3d at 319. The court explained that "[a] 'strong presumption' of receipt applies when notice is sent by certified mail, because it creates actual evidence of delivery in the form of a receipt." *Id.* (citing *De Regla Santana Gonzalez v. Att'y Gen.*, 506 F.3d 274, 279 (3d Cir. 2007)). The presumption is weak if delivery is sent via regular mail with no proof of receipt or delivery generated. *Id.* The *Lupyan* court noted that in the absence of actual proof of delivery, circumstantial evidence of "business practices or office customs pertaining to mail" may be used to prove receipt. *Id.* (internal citation omitted). The court explained that this evidence may be in the form of a sworn statement, but "because the presumption is weak where proof of receipt is attempted solely by circumstantial evidence," the affiant has to have personal knowledge of the procedures in place at the time of the mailing. *Id.* at 319-20. (internal citations omitted).

To prove mailing of the letter at issue, the employer in *Lupyan* provided an affidavit from the employer's Mailroom Supervisor and an affidavit from the employer's Human Resources Manager, "both of whom had personal knowledge of [the employer's] customary mailing practices when the letter was allegedly mailed" *See id.* at 320. The Human Resources Manager "swore that she personally prepared the letter and placed it in the outgoing mail bin." *Id.* The court held that these affidavits:

implicate the presumption of receipt that arises under the mailbox rule. However, under the circumstances, it is a very weak presumption. Given [plaintiff's] denial, and the ease with which a letter can be certified, tracked, or proof of receipt obtained, that weak rebuttable presumption is not sufficient to establish receipt as a matter of law

523 F.3d at 3210.

Other circuit courts have also stated that sworn affidavits are credible evidence of mailing. *See Shikore v BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 964 (9th Cir. 2001); *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 420 (5th Cir. 2007). Still, there are other courts that have held that self-serving affidavits alone are insufficient to prove mailing. *See, e.g., Sorrentino v. IRS*, 383 F.3d 1187, 1191 (10th Cir. 2004) ("[s]elf-serving declarations, without more, are insufficient to invoke the presumption."); *Estate of Wood v. Comm'r*, 909 F.2d 1155, 1161 (8th Cir. 1990); *Barker v. Perma-Fix of Dayton, Inc.*, ALJ Case No. 2006-SOX-01 (OALJ Jan. 11, 2006) ("I do not find Complainant's sworn affirmance that she mailed her request for an investigation on July 22nd or 23rd to be sufficient proof of filing.").

Although affidavits may constitute credible evidence of mailing, Complainant failed to provide sufficient evidence to prove that his complaint was mailed on May 10, 2016 because the only evidence he submitted to prove mailing, two self-serving affidavits, do not indicate who drafted the complaint, who dictated the complaint, and most importantly, who mailed the complaint. *See CX A; CX B.*

Pursuant to Third Circuit case law, Complainant's complaint should be dismissed because Complainant has only provided self-serving affidavits as evidence, and the affidavits provide significantly less salient proof of mailing than the affidavits in *Lupyan* which "implicated" a "very weak presumption." In *Phila. Marine Trade*, the Third Circuit repeatedly emphasized that its holding relied on the fact that the plaintiffs relied on evidence beyond their own testimony. The plaintiffs there had considerably more evidence of mailing than Complainant presents in this case; plaintiffs there presented evidence, for example, that the recipient met with the sender shortly after the alleged receipt of the filing, "suggesting that there was a precipitating event – perhaps receipt of a refund request – that triggered this governmental response." Additionally, the plaintiffs presented the administrator's testimony that "she received [the letter], immediately signed it, and sent it via United States Postal Service overnight mail to [the IRS Revenue Officer]."

In *Lupyan*, although the court said that a weak presumption was implicated based solely on self-serving affidavits, both affiants had personal knowledge of the employer's customary

mailing practices, and one of the affiants swore that she personally prepared the letter and placed it in the company's outgoing mail. *Cf. Shikore v BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 964 (9th Cir. 2001) (remanding for determination of whether the plaintiff invoked the common law mailbox rule where plaintiff presented "a sworn declaration that *she mailed the benefit payment election form . . .*") (emphasis added).⁶ Here, Complainant has provided no such evidence; Complainant's attorneys' sworn affidavits make no averment as to: (1) who drafted the complaint; (2) who dictated the complaint; or (3) who mailed the complaint. *See* CX A; CX B. As such, Complainant has failed, as a matter of law, to invoke the "weak" presumption of receipt that applies when a document is sent via regular mail with no proof of receipt or delivery generated.

Indeed, more conclusions may be drawn from the information that is missing from the affidavits than the information that Complainant's attorneys provided. Complainant's attorneys wrote in passive voice with regard to the drafting, dictating, and mailing of the complaint, failing to state who actually drafted or mailed the complaint. *See* CX A; CX B. In contrast, Attorney Katz wrote in the first person in his affidavit that he personally called OSHA in November 2016 to inquire about the complaint. In his affidavit, Attorney Myers wrote that he personally directed Attorney Katz to contact OSHA in November 2016. Moreover, both attorneys wrote that they personally met with Complainant in April 2016 and that they personally decided that Complainant had a viable cause of action under the FRSA. It must be presumed that Complainant's attorneys' distinction is intentional; the passive voice with no individual identified as to who wrote, dictated, or sent the complaint indicates that Complainant's attorneys do not have actual, personal knowledge that the complaint was mailed. Finally, if Attorney Katz's assistant or other support staff member drafted or sent the complaint, Complainant's attorneys could have had such staff member submit an affidavit saying so.⁷

Similarly, although Attorney Katz states in his Supplemental Affidavit that it is his "personal practice to review with my assistant or support personnel what was done during the day and what is to be accomplished the next day," noticeably absent from the affidavit are averments as to: (1) whether he actually met with his assistant or another member of his support staff on May 10, 2016; (2) what member of his support staff he met with on May 10, 2016; (3) whether he actually asked his assistant or other member of his support staff if he or she sent Complainant's complaint; (3) whether the unidentified support staff member actually stated that

⁶In *Shikore*, the Ninth Circuit stated, "Like the application of all common law rules, the application of the mailbox rule to an [Employee Retirement Income Security Act (ERISA)] plan's benefit decision must be done in a manner consistent with the purposes of ERISA, the central purpose of which is to 'protect the interests of participants in employee benefit plans and their beneficiaries.'" *Shikore*, 269 F.3d at 962-63. Similarly, Complainant argues that that Complainant's counsels' affidavits should be accepted as proof of mailing because the FRSA should be construed liberally. Complainant's Response at 10. Even if the common law mailbox rule were to be applied liberally in light of the FRSA's goals, the party seeking to invoke the mailbox rule's presumption in *Shikore* presented a sworn declaration that she personally mailed the form at issue. 269 F.3d at 964. As has been discussed, Complainant failed to present such evidence.

Therefore, even if, as Complainant argues, the common law mailbox rule should be interpreted liberally in pursuant to the goals of the FRSA, as the Ninth Circuit suggested it should be interpreted in relation to the Employee Retirement Income Security Act, the affidavits here are still much less probative evidence of mailing than the evidence in *Shikore* where the plaintiff submitted a declaration that she personally mailed the letter at issue.

⁷ Complainant's attorneys asserted in the body of Complainant's Response that sending the complaint via regular mail was an oversight by Complainant's attorneys' support staff, but they did not proffer this explanation as evidence in their sworn affidavits. *See* Complainant's Response at 10.

he or she sent the complaint; or (4) whether Complainant's complaint was ever discussed at all. He only states that his normal procedure "would have been to ask" whether Complainant's complaint was sent, rather than what specifically occurred in this matter. Attorney Katz requests an inference be drawn that the complaint was timely sent because, if it were not, he would have directed his assistant or support personnel to send the complaint, and, his assistant would then have mailed the complaint.

The sworn statements of his counsel Complainant has proffered are much less probative than, for example, the evidence of business practices and office customs pertaining to mail the defendant provided in *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 422 (5th Cir. 2007). In that case, the Fifth Circuit held that the case should not be decided at the motion for summary judgment stage because there was a material question of fact as to actual mailing.⁸ To prove mailing, the defendant in *Custer* provided sworn affidavits from its supervisor of mail service and a benefits analyst in the defendant's Benefits Department, which read together "state[d] that in distributing the December 2002 notices, [the defendant] followed its normal mailing procedures and [the mail supervisor] specifically state[d] that 'the envelopes were metered for first-class postage and placed in bins for delivery by the United States Postal Service.'" *Id.* at 420. The affiants also supplied a copy of the mailing list used to label the December 2002 notices, and the list contained the plaintiff's name and address. *Id.* The defendant also presented the affidavit of the manager of the Benefits Department. *Id.* The three affidavits stated that the normal process of the Benefits Department was to "provide mail services with a list of addresses. Mail services then prints labels of those names and addresses, placing them onto envelopes. The envelopes then go back to the Benefits Department for stuffing and sealing after which they are returned to mail services." *Id.* The Benefits Department manager stated that his department stuffed the December 2002 notice of modification into envelopes and that the envelopes were delivered to the mail room; he stated, "My department did the stuffing. The mail room did the mailing." *Id.*

In this matter, Attorney Katz asks an inference of mailing to be drawn based on the assertion that he would have asked a member of his support personnel whether Complainant's complaint was sent. By contrast, the defendant in *Custer* provided: (1) detailed evidence of internal mailing procedures; (2) testimony that the defendant followed its usual mailing procedures, including metering the envelopes for first-class postage and placing them in bins for delivery by the United States Postal Service; (3) a copy of December 2002 mailing list containing the plaintiff's name and address; and (4) affirmative testimony from the Benefits Department manager that his department stuffed the envelopes and sent them to the mailroom. Attorney's Katz's Supplemental Affidavit does not provide details of the firm's office customs pertaining to mailing, and he does not aver, as the affiants did in *Custer*, that any purported mailing customs were actually followed on May 10, 2016. As such, Attorney Katz's Supplemental Affidavit is not sufficient evidence of "business practices or office customs pertaining to mail" to prove mailing. *Lupyan*, 761 F.3d at 319.

⁸ In *Custer*, the court noted that the mailbox rule did not actually apply because it serves as a presumption to prove receipt, and at issue in this case was not whether the plaintiffs received the defendant plan's notice, but whether "the plan administrator 'used measures reasonably calculated to ensure actual receipt.'" *Id.* at 419 (quoting 29 C.F.R. § 2520.104b-1(b)(1)). However, the court noted that the mailbox rule was still germane to its analysis because a threshold question for the application of the mailbox rule is "whether there is sufficient evidence that the letter was actually mailed." *Id.*

Complainant has failed to provide sufficient evidence to prove that his complaint was mailed on May 10, 2016. As such, he has not invoked the common law mailbox rule's presumption of receipt as a matter of law. Therefore, Complainant's November 28, 2016 complaint must be dismissed as untimely filed.

ORDER

IT IS ORDERED the complaint filed by Complainant John F. Guerra, Jr. under the FRSA be, and hereby is **DISMISSED**.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill New Jersey

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).