U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 January 2020

CASE NO.: 2020-FRS-00002

In the Matter of:

ISAAC WILBUR,
Complainant,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent,

BEFORE: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case arises under the whistleblower protection of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53. (Aug. 3, 2007), as further amended by Pub. L. No. 110-432 (October 16, 2008). The FRSA prohibits covered employers from discharging or otherwise discriminating against employees who engage in certain protected activities related to the terms or conditions of employment.

Complainant initiated this action on August 28, 2019, with the Occupational Safety and Health Administration (OSHA), alleging that he was constructively discharged on February 1, 2019, due to unsafe working conditions. On September 12, 2019, OSHA dismissed the matter because Complainant did not file his Complaint within 180 of the adverse action as required by 49 U.S.C. § 20109. On September 26, 2019, Complainant requested a hearing before the Office of Administrative Law Judges (OALJ).

On December 26, 2019, Respondent filed its Motion for Summary Decision arguing that the Complaint was not timely filed. On January 6, 2020, the Court issued an Order to Show Cause advising Complainant of the Motion. I advised Complainant of what summary decision is, that it could result in a decision of the case unfavorable to him without a hearing, that he had a right to retain counsel and what was required when opposing summary decision. Complainant filed his Reply on January 24, 2020. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. SUMMARY DECISION STANDARD

Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.72; *see also Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, 2012 WL 6849447 (Dec. 28, 2012). At the summary decision stage, the administrative law judge assesses the evidence "for the limited purpose of deciding whether it shows a genuine issue as to a material fact…." If Complainant fails to establish an element essential to his case, there can be "no genuine issue as to a material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, 2007 WL 4107740 at 3-4 (Jul. 31, 2007).

In evaluating if Respondent is entitled to a summary decision in this matter, all facts and reasonable inferences therefrom are considered in the light most favorable to the non-moving Complainant. *Battle v. Seibles Bruce Ins. Co.*, 288 F.3d 596 (4th Cir. 2002), citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). "However, even when all evidence is viewed in the light most favorable to the non-moving party, the non-moving party cannot defeat a properly supported summary judgment motion without presenting 'significant probative evidence.'" *Pueschel v. Peters*, 340 Fed. Appx 858, 860 (4th Cir. 2009) (unpub.), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading; [the response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When the information submitted for consideration with a motion for summary decision and the response to that motion demonstrates that there is no genuine issue as to any material fact, the request for summary decision should be granted. Where a genuine question of a material fact remains, a motion for summary decision must be denied.

II. UNDISPUTED MATERIAL FACTS

For purposes of this Decision and Order, I find the following material facts undisputed:

1. On January 31, 2019, Complainant resigned his employment with Respondent effective February 1, 2019, due to unsatisfactory work conditions.

2. On August 28, 2019, 208 days following his resignation, Complainant filed a Whistleblower Online Complaint with OSHA.

3. On September 12, 2019, OSHA dismissed the Complaint as untimely finding that Complainant failed to proffer any circumstance that would have prevented him from timely filing his Complaint.

4. On September 26, 2019, Complainant requested a hearing before an ALJ. Therein he stated that he was unable to prepare and submit his complaint because it was difficult to find the necessary information/resources to support his claim and he was not aware of the time restraints for filing a complaint.

5. In his Reply, Complainant sites no circumstances that prevented him from timely filing the Complaint.

III. WHISTLEBLOWER PROTECTION UNDER THE STAA

A. Timeliness

Employees alleging employer retaliation in violation of the FRSA must file their complaints with OSHA not later than 180 days after the alleged violation occurred. 49 U.S.C. § 20109. The undisputed facts establish that the Complaint was filed 208 days after the alleged violation occurred.

The FRSA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling principles. The law has recognized three situations in which tolling is proper: 1) When the opposing party has actively misled the movant regarding the cause of action; 2) when the movant has in some extraordinary way been prevented from filing his action; or 3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum. Further, equitable estoppel provides relief where the opposing party's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his rights. Equitable tolling should be applied sparingly and only when exceptional circumstances prevented timely filing through no fault of the complainant. Only exceptional circumstances, not garden variety claims of excusable neglect, allow tolling of the statute of limitations. *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981).

Complainant has not alleged that any action on the part of Respondent prevented him from timely filing his Complaint. Nor has he alleged that he filed the same claim in another forum. Further, I find the fact that Complainant may have been unable to prepare and submit his complaint because it was difficult to find the necessary information/resources to support his claim and he was not aware of the time restraints for filing a complaint do not qualify as extraordinary circumstances that prevented him from filing his Complaint in a timely fashion. I find this to be more of the garden variety of excusable neglect to which the Supreme Court has declared that "the principles of equitable tolling … do not extend to … garden variety claim of excusable neglect." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990).

The Court finds that Complainant has failed to establish a basis for equitable relief from his failure to file his Complaint within the applicable 180-day limitations period.

IV. ORDER

Based upon the foregoing and upon the entire record, Respondent's Motion for Summary Decision is hereby **GRANTED.** Case No. 2020-FRS-00002 is **DISMISSED WITH PREJUDICE.**

SO ORDERED.

LARRY W. PRICE
Administrative Law Judge

LWP/ksw
Newport News, Virginia

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).