



**Issue Date: 11 January 2021**

Case No.: 2020-PSI-00004

In the Matter of

**DAVID DESPOT**

Complainant

v.

**GILLECE SERVICES AND NEXSTAR NETWORK**

Respondents

**DECISION AND ORDER OF DISMISSAL BASED ON UNTIMELY HEARING  
REQUEST**

The above-captioned proceeding arises from a complaint filed by David Despot (“Complainant”) against Gillece Services and Nextstar Network (“Respondents”) under the employee protection (*i.e.*, whistleblower) provisions of the Pipeline Safety Improvement Act of 1992 (“the Act”), 49 U.S.C. § 60129, and its implementing regulations found at 29 C.F.R. Part 1981.

The proceeding will be conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“OALJ”) found at 29 C.F.R. Part 18, Subpart A and the ACA regulations at 29 C.F.R. Part 1984.

**Procedural Background**

The Occupational Safety and Health Administration (“OSHA”) issued a determination letter in this matter dated November 27, 2019, (1) including the Secretary’s Findings that Complainant had failed to engage in protected activity and (2) dismissing the complaint. The November 27, 2019 determination letter, addressed to Complainant, states that Complainant filed his complaint with OSHA on February 24, 2017, alleging his employment with Respondents was terminated on February 12, 2017 in violation of Section 11(c) of the OSH Act and Pipeline Safety Improvement Act (PSIA), 49 U.S.C. §60129.<sup>1</sup>

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<sup>1</sup> As the November 27, 2019 letter from OSHA states, a request for review of the Secretary’s Findings regarding the allegations raised in this matter under Section 11(c) of the OSH Act must be made to OSHA – not OALJ which has no jurisdiction over such allegations.

The OSHA determination letter also stated the following:

With regard to the PSIA complaint, Respondents and Complainant have **60 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ)**. If no objections are filed, these Findings will become final and not subject to court review.

See November 27, 2019 OSHA determination letter, page 2 (Emphasis added).

On July 18, 2020, in an email addressed to the Chief Administrative Law Judge (“ALJ”), amongst others, Complainant states that he did not receive the November 27, 2019 OSHA determination letter and that he advised OSHA that his address had changed from the one to which the OSHA determination letter was sent “way back on May 26, 2017.” In this July 18, 2020 email correspondence from Complainant, he states, in part, that he requests a hearing before the OALJ. The matter was docketed with the OALJ and then forwarded to this District Office for further adjudication.

OALJ received Complainant’s request for hearing on July 18, 2020. The OSHA determination letter advising Complainant of the Secretary’s Findings is dated November 27, 2019. Therefore, Complainant’s hearing request is untimely. Accordingly, along with a Notice of Assignment, the undersigned issued an Order to Show Cause on September 10, 2020, directing Complainant to show cause as to why this matter should not be dismissed due to this untimely hearing request. To date, Complainant has not submitted any response to the Order to Show Cause and the time limit given for such response, i.e., September 21, 2020, has expired. The September 10, 2020 Order to Show Cause advised that failure to respond could result in the dismissal of this matter.

### Findings and Analysis

With regard to submission of a request for hearing, the pertinent regulation provides the following:

Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record **within 60 days of receipt of the findings and preliminary order** pursuant to paragraph (b) of §1981.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001 and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who

issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

29 C.F.R. 1981.106(a)(emphasis added).

It is well-settled that the time limits for filing hearing requests with OALJ under whistleblower statutes are not jurisdictional. *See, e.g., See, e.g., Herron v. N. Am. Cent. Sch. Bus, LLC, ARB No. 16-040, ALJ No. 2015-STA-00055 (ARB Dec. 21, 2016) (applying equitable tolling to the complainant's untimely request for hearing before OALJ under STAA); Shirani v. Calvert Cliffs Nuclear Power Plant, ARB No. 04-101, ALJ No. 2004-ERA-00009, slip op. at 8 (ARB Oct. 31, 2005) (under the Energy Reorganization Act); Shelton v. Oak Ridge Nat'l Labs, ARB No. 98-100, ALJ No. 1995-CAA-00019, slip op. at 5-6 (ARB Mar. 30, 2001) (under the Clean Air Act).*

Thus, the filing time limits set in these statutes are not prerequisites to the exercise of jurisdiction: they rather function as statutes of limitations. Such time limits may then be subject to equitable tolling if certain circumstances exist.

In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 8, 1999), the Administrative Review Board ("ARB" or "Board") identified three principal, though not necessarily exclusive, situations where equitable tolling is appropriate:

- (1) When the defendant has actively misled the plaintiff respecting the cause of action;
- (2) When the plaintiff has in some extraordinary way been prevented from asserting his rights; and,
- (3) When the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

*See Gutierrez* at 4.

The Board in *Gutierrez* then listed five factors to be weighed in determining if a party is entitled to equitable tolling:

- (1) Whether the plaintiff lacked actual notice of the filing requirements;
- (2) Whether the plaintiff lacked constructive notice of the requirements;
- (3) Whether the plaintiff diligently pursued his rights;
- (4) Whether the defendant's rights would be prejudiced by the tolling of the limitations period; and,
- (5) The reasonableness of the plaintiff's ignorance of his rights.

*Id.*

Complainant does not dispute his hearing request was untimely, but rather that there is a reason for equitable tolling of the applicable time limit for submitting such a request. His hearing request includes an assertion that Complainant had apprised OSHA of an address change prior to the determination letter it issued dated November 27, 2019.

Although given the opportunity, Complainant has not, however, provided any evidence in support of that assertion. Accordingly, this matter must be dismissed as untimely with no equitable basis shown for suspension of the applicable time limits for filing a hearing request. In the absence of a timely filing of objections and a hearing request before the OALJ, the Secretary's Findings outlined in the OSHA determination letter dated November 27, 2019 will "become the final decision of the Secretary, not subject to judicial review." 29 C.F.R. § 1981.106(b)(2).

### Conclusion

Complainant's hearing request is untimely and no basis has been demonstrated for equitable tolling (suspension) of the time limits for filing such a request.

### **ORDER**

Complainant's hearing request is **DISMISSED** as untimely and the Secretary's Findings as outlined in the OSHA determination letter dated November 27, 2019 constitutes the final decision of the Secretary in this matter.

**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 ten (10) business days of the date of the administrative law judge's decision.

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. § 1981.110(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. § 1981.110(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. You must also serve the Assistant Secretary, Occupational Safety and

Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1981.110(a).

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. § 1981.110. 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. §§ 1981.109(c) and 1981.110(a) and (b).

### **IMPORTANT NOTICE ABOUT FILING APPEALS:**

**The Notice of Appeal Rights has changed because the Board has implemented a new eFile/eServe system ("EFS") which is available at <https://efile.dol.gov/>.** If you use the Board's prior website link, [dol-appeals.entellitrak.com](http://dol-appeals.entellitrak.com) ("EFSR"), you will be directed to the new system. Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

#### *Filing Your Appeal Online*

Registration with EFS is a two-step process. First, all users, including those who are registered users of the current EFSR system, will need to create an account at [login.gov](http://login.gov) (if they do not have one already). Second, users who have not previously registered with the EFSR system will then have to create a profile with EFS using their [login.gov](http://login.gov) username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at <https://efile.dol.gov/system/files/2020-11/file-new-appeal-arb.pdf> and the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>.

Establishing an EFS account under the new system should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for [login.gov](http://login.gov) and EFS at <https://efile.dol.gov/contact>.

If you file your appeal online, no paper copies need be filed. **You are still responsible for serving the notice of appeal on the other parties to the case.**

#### *Filing Your Appeal by Mail*

You may, in the alternative, including the period when EFSR and EFS are not available, file your appeal using regular mail to this address:

U.S. Department of Labor  
Administrative Review Board  
ATTN: Office of the Clerk of the Appellate Boards (OCAB)

200 Constitution Ave. NW  
Washington, DC 20210-0001

*Access to EFS for Non-Appealing Parties*

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and creating an EFS profile. Written directions and a video tutorial on how to request access to an appeal are located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

*After An Appeal Is Filed*

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

*Service by the Board*

Registered users of EFS will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail. At this time, EFS will not electronically serve other parties. You are still responsible for serving the notice of appeal on the other parties to the case.