



Issue Date: 03 October 2005

CASE NO: 2005 STA 46

In the Matter of:

WILLIAM S. FARRAR,
Complainant,

v.

ROADWAY EXPRESS,
Respondent.

**RECOMMENDED DECISION AND ORDER
DISMISSING COMPLAINT AS UNTIMELY FILED**

Statement of the Case

This proceeding involves a claim under the “whistleblower” protection provisions of § 405 of the Surface Transportation Assistance Act (STAA or Act), 49 U.S.C. §31105, and the implementing regulations at 29 CFR Part 1978. The claim has been investigated by the Occupational Safety and Health Administration (OSHA), which notified Complainant by letter dated June 2, 2005, that the complaint was untimely filed, and upon Complainant’s request for a hearing dated June 14, 2005, referred the complaint to the Chief Administrative Law Judge (OALJ) by undated letter which was received on June 7, 2005. Complainant objected to the findings and order of the Secretary by letter dated June 14, 2005, and filed, June 22, 2005. Such notice contains Complainant’s timely request for hearing. The case has been assigned to the undersigned for *de novo* hearing pursuant to the implementing regulations at 29 CFR Part 1978.

Respondent filed a Motion To Dismiss the complaint on July 21, 2005, contending that the complaint was not timely filed within 180 days after the violation occurred as prescribed by 49 U.S.C. § 31105(b)(1).¹ In addition to supporting argument, Respondent has submitted the affidavit of Michael Doss, a Service Team Manager for Respondent purporting to have knowledge of pertinent facts pertaining to the circumstances of Complainant’s discharge, together with certain exhibits. Complainant has filed a Brief in Opposition to the motion, which, in addition to argument, is supported by his affidavit and certain exhibits. All reasonable inferences have been made in favor of Complainant as the nonmoving party. *See Lane v.*

¹ Respondent framed its motion as a request that the dismissal of the complaint by OSHA be affirmed. Because the case is now before this tribunal *de novo*, the motion is treated as a motion to dismiss the complaint pending before this tribunal.

Roadway Express, Inc., 2002-STA-38 (ARB, Feb. 27, 2004). This tribunal finds that the motion to dismiss the complaint as untimely has merit and should be granted.

Issue Presented

The sole issue presently to be determined is whether Complainant filed his complaint within the 180 day time limit prescribed by statute and regulation. 29 CFR § 1978.102(d). Jurisdiction under the Act is not in issue.²

Findings of Fact

OSHA's Findings

Complainant filed a complaint with OSHA on April 20, 2005, alleging that his discharge by Respondent was in violation of § 31105 of STAA. According to OSHA's findings dated June 2, 2005, Complainant "claimed to be fired by Respondent, Roadway Express, in retaliation for previously filing an STAA complaint in 2000." OSHA further found that "Complainant was discharged based on 'work record and having a serious preventable accident'." The complaint filed by Complainant which OSHA investigated was dated April 16, 2005, and received by OSHA on April 20, 2005. It alleged retaliation for STAA protected activities and discharge as a commercial driver on or about October 26, 2004, by decision of a specified grievance panel based on work record and having a serious preventable accident. The OSHA findings contained in the notice letter to Complainant dated June 2, 2005, determined that the complaint was untimely filed, and that Notice of Discharge was issued August 7, 2004, and was sent to Complainant by certified mail and received on August 11, 2004. The termination by its terms was effective August 1, 2004. OSHA found that Complainant was discharged on or about August 1, 2004. OSHA found no evidence or legitimate reason for tolling the statutory limitation. These findings of fact pertinent to Complainant's termination and the timing of his complaint to OSHA under STAA are supported by the record, and adopted by reference by this tribunal.

Respondent's Position

Respondent alleges that Complainant was discharged effective August 1, 2004, for causing a preventable accident on that date. The accident involved significant damage to Respondent's tractor trailer, but Complainant disputes that it was preventable. Complainant unsuccessfully grieved his discharge. Respondent avers, in substance, that the complaint was filed more than 180 days after the effective date of Complainant's discharge, which is the pertinent adverse employment action, and thus the complaint was filed out of time under the applicable 180 day statutory and regulatory limit. Respondent also avers that Complainant has filed two previous STAA complaints against Respondent, and challenges Complainant's claim

² OSHA found, and it is not disputed, that Respondent is a person and commercial motor carrier within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105, engaged in transporting products on highways. Respondent maintains a place of business in Lake Park, Georgia, and hired Complainant as a driver of a truck with a gross vehicle weight rating of 10,001 pounds or more, to transport products in commerce over highways, which directly affected commercial motor vehicle safety.

that he did not file within the 180 day period because he thought he was required to complete the grievance process before filing an STAA complaint. Respondent also contends that Complainant is charged with knowledge of the statutory limitations, regardless of what he might have been told by government officials. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947).

Complainant's Position

Complainant's objection and request for hearing complained in material part of the quality of the investigation by OSHA, and of the allegedly retaliatory conduct of Respondent's agents in presenting false information and misleading statements at the grievance proceeding. Complainant suggested that the date of that hearing should be the relevant date of adverse action, and would bring his complaint filing date within the 180 day limit. He also complained of the rationale of the OSHA findings, and a variety of matters which are essentially immaterial to the issue presently before this tribunal.

In his opposition to the Respondent's motion to dismiss, Complainant avers that he was relieved of duty pending investigation of an accident on August 1, 2004; that a Notice of Discharge was issued on August 7, 2004; and that "[o]n October 5, 2004, Complainant filed his complaint in a timely fashion with OSHA from a truck stop in the Ocala, FL, area. The OSHA agent instructed Farrar to wait for the grievance process and then contact NLRB." There is no evidence that OSHA responded in any way or recorded such a complaint. In his affidavit, with apparent reference to the alleged October 5, 2004, contact with OSHA and after a local hearing in September, Complainant states, "11. Suspecting another retaliatory act by Mr. Doss and Roadway, I called OSHA, NLRB, and EOC on October 5, 2004, just to give them a head's up on what may happen." Complainant cites *Harrison v. Roadway Express, Inc.*, 1999-STA-37 (ALJ Dec. 16, 1999) for the proposition, "Nature of Filing. No particular form of complaint is required," which is a restatement of the regulation at § 1978.102(b). He contends that his complaint satisfied the filing requirements.

Complainant has supported his opposition with his affidavit which in material part establishes the August 1, 2004, date of the accident when he was relieved of duty, the August 7, 2004, notice of discharge for that accident, which he received on August 11, and that he filed the grievance over the discharge. The affidavit contains a variety of other allegations, including collateral attacks on the conduct of the grievance proceeding, which are immaterial to the issue of the timeliness of filing of the complaint after his discharge.

Conclusions of Law and Discussion

The operative event which starts the 180 day limitation period is Complainant's discharge relating to the accident, whether it be technically counted from the August 1 date of the accident when he was relieved of duty, or the August 7 date of the Notice of Discharge, or the undisputed August 11, 2004, date of his receipt of that notice. The April 16 complaint to OSHA, postmarked, and therefore filed, April 18, 2005, is more than 180 days after Complainant's discharge by Respondent. Complainant's pleadings conjuring up a variety of complaints against

Respondent after his discharge identify no claims or factual allegations which are material to the issue of timeliness before this tribunal. There is no documentation or other record identified, no corroboration, and no description of the alleged complaint beyond Complainant's allegation first raised in his opposition to the motion to dismiss that he allegedly telephoned OSHA and two other agencies from a truck stop in the vicinity of Ocala, Florida, "just to give them a head's up on what may happen." Consequently, Complainant's suggestion that such an action, assuming it occurred as described, would qualify as a complaint to OSHA under the Act within the prescribed statutory 180 day limit is deemed frivolous and establishes no basis for relief.

Complainant's citation of *Harrison v. Roadway Express, Inc.*, *supra*, for the proposition that a valid complaint may take any form does not support his contention. It is evident from the footnote in Judge Kaplan's final decision referring to his preliminary finding in that case that the complaint to OSHA in that case was timely filed, that the "filing" in question had involved an actual visit by the Complainant to OSHA, which visit was actually recorded, and which clearly involved a formal and official contact of fundamentally different character than Complainant's alleged "head's up" telephone call from an undefined place and under otherwise undefined circumstances to OSHA as one of three agencies. *See Harrison v. Roadway Express, Inc.*, 1999-STA-37 (ALJ March 30, 2000) [Final Decision & Order ARB, Dec. 31, 2002]. *See generally Valerio v. Putnam Associates, Inc.*, No. 98-1339 (1st Cir. Apr. 9, 1999) for a general discussion of what might qualify as filing a complaint. Indeed, the fact that Complainant allegedly called three agencies, as well as his characterization of the call as a "heads up" message, belies the contention that his purpose was to file a complaint under the STAA.

None of Complainant's other diffuse and impertinent allegations is sufficiently material to require analysis or provide an equitable basis for tolling the 180 day limit. Complainant's contention that he was under the impression, which he alleged was given to him by government officials, that he should pursue his grievance before filing an STAA complaint must be explicitly rejected because the applicable regulations expressly provide that pending grievance-arbitration proceedings do not toll the 180 day limitation. 29 CFR § 1978.102(d)(3). It follows that filing a grievance would not postpone the effective date of discharge in relation to a complaint filed under the STAA. Like OSHA, this tribunal finds that the complaint in this case was not timely filed and should be dismissed.

RECOMMENDED ORDER

This complaint of William S. Farrar against Roadway Express is untimely filed and is therefore dismissed.

A

Edward Terhune Miller
Administrative Law Judge