



Issue Date: 25 November 2011

Case No.: 2011-STA-00029

In the Matter of:

MARCUS WHITLEY,

Complainants,

v.

SALEM LEASING CORPORATION,

Respondent.

**DECISION AND ORDER DISMISSING
THE COMPLAINT ON
GROUNDS OF UNTIMELINESS**

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, 49 U.S.C. § 31105, and the corresponding agency regulations, 29 C.F.R. Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate those rules.

The Complainant, Mr. Marcus Whitley, filed a complaint with the Occupational Safety and Health Administration (OSHA) on February 4, 2011. This complaint asserted that the Respondent, Salem Leasing Corporation (“Salem”), had fired Mr. Whitley in retaliation for reporting safety violations.

OSHA determined that Mr. Whitley was terminated in September 2009, and dismissed his complaint on the ground that it was untimely. He filed a request for hearing with the Office of the Chief Administrative Law Judge and the case was assigned to me. I ordered him to show cause why the claim should not be dismissed as untimely.

In response to this order Mr. Whitley sent a letter in which he stated that

In October of 2009 I filed a claim against Salem Carriers through the Equal Employment Opportunity Commission (EEOC) stating that I was wrongfully fired. EEOC had investigated my case for a year and a half before I found out that I should have filed my claim through

Occupational Safety and Health Administration (OSHA) instead of the EEOC. After finding this out I immediately filed a claim with OSHA.

This letter did not include a copy of the complaint to the EEOC, or any other documentation of what was in the complaint.

This response suggested the possibility that the doctrine of equitable tolling of the statute of limitations might apply. In order to develop the record on this point further I issued a supplement to my original show cause order, in which I directed Mr. Whitley “to provide this office with a copy of his complaint to the EEOC, and/or any other documentation of the date of his complaint to that agency and the nature of the illegal activities that he alleged against the Respondent in that complaint.”

In a letter dated November 9, 2011, he forwarded 35 pages of documents that he stated he had submitted to both EEOC and OSHA.

DISCUSSION

Under 49 U.S.C. § 31105(b), an STAA complaint must be filed within 180 days after the alleged violation occurred. Mr. Whitley filed his complaint with OSHA more than 16 months after his employment was terminated. However, even when a complaint is filed outside the period of the statute of limitations, the time for filing a complaint may be tolled for reasons warranted by applicable case law. Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982, 75 Fed. Reg. 53544, 53554 (Aug. 31, 2010) (amending 29 C.F.R. Part 1978).

A plaintiff or complainant seeking to relax the statute of limitations has the burden of justifying the application of these doctrines. *Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26, at 20 (ALJ) (Feb. 23, 2007). One of the recognized grounds for equitable tolling of the statute is when a complainant has raised the precise statutory claim at issue within the limitations period but has done so in the wrong forum. *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981). An example of this would be asserting an STAA whistleblower protection claim in a complaint to a different federal agency such as the EEOC.

The retaliatory actions prohibited by STAA are spelled out as follows:

(a) Prohibitions. - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related

to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses to operate a vehicle because -

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

49 U.S.C. § 31105(a).

In order for the STAA statutory filing requirement to be relaxed it would be necessary for Mr. Whitley to have claimed a violation of one of those provisions in his EEOC complaint.

Much of the documentation that Mr. Whitley submitted is unrelated to motor vehicle safety. For example, one of the reasons that Salem gave for firing him was absenteeism. To rebut this, Mr. Whitley submitted copies of medical appointment slips and other documents verifying occasions when he had valid reasons for being unavailable for work.

The documents that Mr. Whitley submitted include a handwritten log covering the period from June 2008 to July 2009. These pages include several entries relating to safety issues. He records several incidents when he was assigned to drive trucks with flat tires, electrical short circuits or other discrepancies. These notes were interspersed with others involving discrepancies not related to safe operation of trucks. These included missing bills of lading, assignments to go to the wrong destination, and disputes with the dispatch office on trip scheduling.

In response to the order to show cause Mr. Whitley provided a copy of what he submitted to EEOC. Looking at these documents in the light most favorable to him, those documents indicate that on several occasions he was assigned to drive trucks with mechanical discrepancies. The documents do not, however, allege that there was any complaint, investigation, refusal to drive, or any of the other forms of activity protected under 49 U.S.C. § 31105(a).

Mr. Whitley's submission to the EEOC may have raised a complaint of discrimination on one or more of the grounds within that agency's jurisdiction. However, the documents that he has submitted do not give any indication that he made a claim of an STAA violation to the EEOC. In short, he did not make the precise statutory claim in the wrong forum, and his EEOC filing does not justify tolling the statute of limitations.

ORDER

The complaint of violation of the STAA is **DISMISSED** on the grounds that it was not timely filed.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc