



Issue Date: 13 January 2009

Case No.: 2009-FRS-00001

IN THE MATTER OF:

Frederick Washington,
Complainant,

v.

CSX Transportation, Inc.,
Respondent.

APPEARANCES:

Frederick Washington, Pro Se Complainant

Joseph C. Devine, Esq., for Respondent

BEFORE:

DANIEL A. SARNO, JR.
Administrative Law Judge

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY
DECISION and DISMISSING THE COMPLAINT**

This matter arises out of a claim filed by the Complainant under the employee protection provisions of the Federal Rail 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. The 9/11 Act was the result of a Conference Report H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.). Section 1521 of the 9/11 Act amends the FRSA by modifying the railroad carrier employee whistleblower provision - both expanding what constitutes protected activity and enhancing administrative and civil remedies for employees to mirror those found in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. §42121. Additionally, the amended FRSA Section 20109 will follow the AIR21 procedure for adjudication at the Department of Labor.

Respondent, CSX Transportation, Inc., has filed a motion for summary decision dated December 18, 2005. Employer asserts that there is no genuine issue of material fact preventing Complainant, Frederick Washington's (Complainant) complaint from being dismissed. Respondent avers that the alleged protected conduct and adverse employment action upon which the complaint is based occurred before the applicable provisions of the FRSA were effective. In addition and in the alternative, Respondent failed to file within 180 days of Complainant's termination, making the complaint untimely.

As of the date of this decision and order, Complainant has not filed a response to the motion.¹

FINDINGS OF FACT

The Complainant was terminated from employment by letter effective December 14, 2006. (Exhibit B). Approximately 18 months later, on June 4, 2008, Complainant filed a complaint against Respondent under the employee protection provisions of the FRSA, 49 U.S.C. §20109, as amended by §1521 of the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. No. 10-53 (“9/11 Act”).

The Respondent is a railroad carrier for purposes of 49 U. S. C. §§20102 and 20109, but the Complainant’s termination predated the August 3, 2007, amendments to the FRSA giving the Secretary jurisdiction over such matters. The FRSA also requires a complaint to be filed no later than 180 days after the date of the adverse action.

DISCUSSION

Lack of Jurisdiction

It is clear that the alleged adverse action (Complainant’s termination) took place on December 14, 2006, well before the August 3, 2007, amendments to the FRSA giving the Secretary jurisdiction over such matters. There is a strong presumption against applying legislation retroactively. See Landgraf v. USI Film Prods., 511 U.S. 244 (1994). In Landgraf, the U. S. Supreme Court set forth a two-step analysis to determine whether a statute should be applied retroactively. First, the Court looks for clear language in the statute which indicates Congress’ express or implied intent for the Statute to be applied retroactively. The statute in question contains no explicit or implicit intent for retroactive application.

Second, if the statute contains no explicit or implicit intent for retroactive application, the Court looks to determine if applying the statute retroactively would impose new legal duties on past conduct. A statute increasing a party’s liability for conduct occurring before its enactment may not be applied retroactively. The amendment to Section 20109 increases liability of employers by adding provisions for compensatory damages, including special damages, by raising a cap on punitive damages and by expanding the circumstances in which these remedies are available. Therefore, the amendment to Section 20109 of the FRSA is more than procedural because it changes the rights and obligations of the parties by expanding the scope of protected activity and significantly increases penalties for employers. Consequently, retroactively applying the statute would impose new legal duties on past conduct. Thus, retroactive application fails on both prongs and it would be improper to apply the amended FRSA to conduct occurring prior to its enactment. For this reason alone, the complaint must be dismissed.

Untimely Complaint

There is no dispute that Complainant failed to file his complaint within the 180 day statute of limitations. Complainant was terminated on December 14, 2006. The complaint was filed on June 4, 2008. Respondent assumes the Complainant will argue that his complaint was timely because the filing time was tolled until January 25, 2008, the date Complainant’s grievance was finally decided. Respondent is correct that the pendency of grievance-arbitration proceedings do not toll the 180 day filing deadline. Thus, complaint was not timely filed.

¹ In my pre-hearing order #1, dated November 26, 2008, I notified Complainant that should Respondent file a motion for summary decision, Complainant should file a response within two weeks of receipt.

For the above-stated reasons, the above complainant is hereby dismissed.

ORDER

IT IS ORDERED that this complaint is hereby DISMISSED.

SO ORDERED.

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DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/ccb
Newport News, Virginia

NOTICE: Review of this Decision and Order is by the Administrative Review Board pursuant to ¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Regulations, however, have not yet been promulgated by the Department of Labor detailing the process for review by the Administrative Review Board of decisions by Administrative Law Judges under the employee protection provision of the Federal Railroad Safety Act. Accordingly, this Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. However, since procedural regulations have not yet been promulgated, it is suggested that any party wishing to appeal this Decision and Order should also formally submit a Petition for Review with the Administrative Review Board.