U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 03 June 2010

CASE NOS.: 2010-FRS-21

In the Matter of:

KAREN DEPKON,
Claimant

v.

NORFOLK SOUTHERN RAILROAD,
Employer

RULING AND ORDER DISMISSING COMPLAINT

Background

Procedural and Factual Background

A hearing, involving the above-named parties, was to be conducted pursuant to the employee protection provisions of the Federal Rail Safety Act [hereinafter "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), beginning on August 18, 2010, in Pittsburgh, Pennsylvania.

This matter arises out of a workplace injury allegedly suffered by the Complainant on July 7, 2009. After an investigatory hearing where it was determined that the Complainant falsified her injury and made false and conflicting statements about the injury, the Respondent terminated the Complainant on September 4, 2009.

The Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration [hereinafter "OSHA"], under the FRSA, on November 10, 2009. The Complainant alleged her termination was in retaliation for reporting her injury and requesting medical attention. On February 23, 2010, OSHA found in favor of the Respondent. OSHA's findings stated that the Respondent and Complainant had sixty (60) days from the receipt of the findings to file an objection and request a hearing before an Administrative Law Judge. The Complainant objected to OSHA's findings and requested a hearing on April 20, 2010. On April 29, 2010, I issued a Notice of Hearing and Order to Show Cause Why Complaint Should Not Be Dismissed.

The Law

To govern the procedure of whistleblower complaints under the FRSA, the statute incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century [hereinafter "AIR21"], 49 U.S.C. § 42121(b). § 42121(b)(2)(A) states that objections to the Secretary's Findings must be filed no later than thirty (30) days after the date of notification of the findings. If no objections are received within thirty (30) days, the findings become a final order not subject to judicial review.

Complainant's Contentions

The Complainant argues that although she did not timely object to OSHA's findings, her failure to do so was the result of OSHA's erroneous statement that she had sixty, rather than thirty, days to request a hearing. The Complainant cites 29 C.F.R. § 24.115, which provides:

> In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties, waive any rule or issue any orders that justice or the administration of any of the statutes listed in § 24.100(a) requires.

The Complainant argues that even though she did not comply with the technical requirement of 29 C.F.R. § 24.106 (a), this case presents special circumstances and good cause to waive the requirement. She relied on the statement in OSHA's findings that the objections and request for hearing must be made within sixty days. In support of her argument the Complainant cites cases concerning analogous situations where courts have waived filing deadlines for good cause.

Respondent's Contentions

The Respondent argues that 29 C.F.R. § 24.115 is inapplicable to FRSA cases. Rather, the Respondent argues that the thirty day time limitation is statutory, not a matter of Department of Labor regulation. The Respondent also discusses why the doctrine of equitable tolling is not appropriate in this case. The Respondent cites case law holding that there are narrow situations in which equitable tolling should be applied and the facts of this case do not qualify.

Discussion

The Respondent is correct to point out that 29 C.F.R. § 24.115 is not applicable in this case. The thirty-day time limitation for the Complainant to file her objections and request a hearing is statutory. However, the Secretary and the Administrative Review Board ("ARB") have held that the thirty day limitation contained in the whistleblower statutes, such as the AIR21, is not jurisdictional.[1] Therefore, the doctrine of equitable tolling could be applicable to prevent the dismissal of the Complainant's case.

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[1] *See, e.g., Shelton v. Oak Ridge National Laboratories,* 1995-CAA-19 (ARB March 30, 2001); *Degostin v. Bartlett Nuclear, Inc.,* 1998-ERA-7 (ARB, May 4, 1998); *Staskelunas v. Northeast Utilities Company,* 1998-ERA-8 (ARB, May 4, 1998); *Spearman v. Roadway Express*, 1992-STA-1 (Sec'y, August 5, 1992).

There are three instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases. First is where the employer has misled or concealed information from the employee. Second is where the employee has in some extraordinary way been prevented from asserting her rights. Third, is when the employee raised the precise statutory claim but did so in the wrong forum. *City of Allentown v. Marshall,* 657 F.2d 16 (3rd Cir. 1981). "The tolling exception is not an open-ended invitation…to disregard limitations periods." *Id.* At 20. The ARB has delineated other factors to be considered in determining whether equitable tolling of a limitations period was appropriate. Those factors are whether the complainant lacked actual or constructive notice of the filing requirements, whether the complainant exercised due diligence in pursing his rights, whether tolling would prejudice the respondent, and whether the complainant was reasonably ignorant of his rights. *Salsbury v. Department of Veteran's Affairs*, 2004-ERA-7 (ARB July 31, 2007).

Viewed in light of the above principles, the facts of this case do not warrant application of the equitable tolling doctrine. Complainant has not alleged that Respondent concealed or misled her. Complainant has not alleged that he was prevented from asserting her rights in some extraordinary way. The notice to file objections received by Complainant was timely, complete and adequate. Complainant did not raise his claim in the wrong forum. It is true that the Secretary's Findings received by the Complainant contained incorrect information regarding the allowable time for filing objections and requesting a hearing. This does not serve as a lack of adequate notice and does not make the Complainant's ignorance of the correct filing period reasonable. The principles of equitable tolling "do not extend to what is at best a garden variety claim of excusable neglect." *Irwin v. Department of Veteran's Affairs*, 49 U.S. 89, 93 (1990). "One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). The Complainant was represented by counsel at the time she received the Secretary's Findings. Her counsel was presumptively aware of the correct filing deadline.[2] An erroneous statement by OSHA does not excuse the Complainant or her counsel from being aware of the statutory requirements of the FRSA employee protection provisions.

Conclusion

The Complainant did not file her objection to OSHA's findings and request for a hearing within the time period allowed by the statute. The fact that the Complainant and her counsel relied on an erroneous statement by OSHA does not warrant application of the doctrine of equitable tolling.

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[2] *Mitchell v. EG&G*, No. 1987-ERA-22 (Sec'y July 22, 1993); *Howell v. PPL Servs., Inc.*, 2005-ERA-14 (Feb. 28, 2007); *Hall v. EG&G Defense Materials, Inc*., 1997-SDW-9, (ARB Sept. 30, 1998); *Wakefield v. R.R. Retirement Bd*., 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast. Utils.,* 1999-ERA-14, -15 (ARB Aug. 31, 2000).

ORDER

As her objections and request for a hearing were not timely filed, the Complainant, Karen Depkon's claim is DISMISSED. The hearing scheduled for August 18, 2010 is cancelled.

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RICHARD A. MORGAN
Administrative Law Judge