U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, Louisiana 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 19 April 2011

CASE NO.: 2011-FRS-2

IN THE MATTER OF

W. CRAIG SCHUFFERT,
Complainant

v.

BIRMINGHAM SOUTHERN RAILROAD COMPANY,
Respondent

ORDER ON MOTION FOR SUMMARY DECISION

This proceeding arises pursuant to a complaint alleging violations under the employee protective provisions of the Federal Rail Safety Act ("FRSA"), 49 U.S.C. § 20109. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the above Act.

On 10 Aug 10, Complainant filed a complaint with the Occupational Health and Safety Administration ("OSHA") alleging that Respondent had attempted to intimidate and harass him, and reassigned him in retaliation for a work related injury sustained 26 Aug 10. On 9 Sep 10, the Secretary found the complaint to be without merit and Complainant requested a hearing, which was scheduled for 10 May 11.

On 10 Mar 11, Respondent filed a Motion for Summary Decision on three bases:
1) Complainant failed to timely file his objections after notification of the Secretary's findings, 2) Complainant did not establish a *prima facie* case for a Whistleblower claim and, 3) even if the *prima facie* case was established, Respondent could demonstrate the employment action would have been taken anyway.

On 14 Mar 11, Complainant's counsel filed a letter stating it would respond appropriately to the motion upon receipt. On 22 Mar 11, the parties participated in a conference call to discuss pending pretrial matters and during that call, I confirmed that Complainant's counsel had not yet responded to the Motion for Summary Decision and ordered him to file an answer within 14 days, noting that Respondent had not waived its right to a make default argument based upon the untimely response. On 8 Apr 11, Complainant filed his opposition to the Motion for Summary Decision, along with two alternative cross motions, one to hold the decision in abeyance pending further discovery and the other to excuse any filings deemed untimely for good cause shown.

Background

Complainant was employed with the Birmingham Southern Railroad when on 26 Aug 04, he was involved in an on-the-job accident. He has since had four low-back surgeries and has returned to work following each surgery for some period of time. Respondent has at various times since the injury reassigned Complainant to other duties.

On or about 1 Aug 10, Complainant was again reassigned from an engineer's position to light duty. On or about 10 Aug 10, Complainant filed a complaint with OSHA alleging that Respondent discriminated against him in violation of the FRSA, and specifically, that he was reassigned in retaliation for reporting the 2004 injury.

Law

Federal Rail Safety Act

The Federal Rail Safety Act makes it unlawful for a railroad carrier to discipline an employee for reporting a hazardous safety condition,[1] for reporting a work related illness or injury,[2] "for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician."[3] The Act incorporates by reference the procedures and burdens of proof for analogous claims under the Wendell H. Ford Aviation and Investment Reform Act for the 21st Century (AIR 21).[4]

AIR 21 requires a complainant to prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[5] If he meets this burden, he is entitled to relief unless the employer establishes by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.[6]

AIR 21 also provides that if a complainant fails to file objections and demand a *de novo* hearing within 30 days of notification of a preliminary order, the preliminary order shall be deemed a final order that is not subject to judicial review.[7]

The regulations specifically promulgated to administer cases brought under the FRSA are found at 29 CFR Part 1982. They incorporate the General Rules of Practice and Procedure before the Office of Administrative Law Judges (OALJ) at 29 CFR Part 18.[8] The OALJ rules provide that, "[t]o the extent that [they] rules may be inconsistent with a rule of special

[1] 49 U.S.C. §20109(b)(1)(a)(2011).
[2] 49 U.S.C. §20109(a)(4)(2011).
[3] 49 U.S.C. §20109(c)(2)(2011).
[4] 49 U.S.C. §42121 (2011).
[5] *See* 49 U.S.C. §42121(b)(2)(B)(2011).
[6] 29 C.F.R. § 1979.109(a); *see also Barker v. Ameristar Airways, Inc.*, ARB Case No. 05-058 (ARB: Dec. 31, 2007), slip op. at 5; *Hafer v. United Airlines, Inc.*, ARB No. 06-017 (ARB: Jan. 31, 2008), slip op. at 4.
[7] 49 U.S.C. §42121(b)(2)(A)(2011).
[8] 29 C.F.R. § 1982.100(b)(2011).

application as provided by statute, executive order, or regulation, the latter is controlling. The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."[9] The OALJ rules allow for the modification or waiver of "any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby."[10]

The FRSA regulations require any party who desires review to file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order.[11] "The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing …"[12] Those regulations allow, "in special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ [to], upon application, after three days notice to all parties, waive any rule or issue such orders that justice or the administration of… [the] FRSA requires.[13]

The OALJ rules define time periods:

> In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.[14]

They also address delivery by mail:

> (1) Documents are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges. However, when documents are filed by mail, five (5) days shall be added to the prescribed period.
> (2) Service of all documents other than complaints is deemed effected at the time of mailing.
> (3) Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.[15]

---

[9] 29 C.F.R. § 18.1(a)(2011).
[10] 29 C.F.R. § 18.1(b)(2011).
[11] *See* 29 C.F.R. § 1982.106(a)(2011).
[12] *Id.*
[13] 29 C.F.R. § 1982.115(2011). See also 29 C.F.R. § 1980.115(2011)(Sarbanes Oxley whistleblower complaints); 29 C.F.R. § 1978.115(2011)(Surface Transportation Act whistleblower complaints); 29 C.F.R. § 1979.114(2011)(AIR 21 whistleblower complaints); 29 C.F.R. § 24.115(2011)(environmental whistleblower complaints).
[14] 29 C.F.R. § 18.4(a)(2011).
[15] 29 C.F.R. § 18.4(a)(2011).

Equitable Tolling Principles

The time limit for filing a request for a hearing is generally not a jurisdictional prerequisite in whistleblower cases administered by the Secretary[16] and it remains, at all times, within the agency's discretion to "relax or modify its procedural rules ... when ... the ends of justice require it."[17] The expression of that agency discretion has been manifested in the application of equitable tolling. However, "[t]he time limitation period for filing an appeal in a whistleblower action is to be strictly construed"[18] and the general principle mandating strict construction of filing periods in whistleblower cases will apply, unless a complainant can demonstrate the right to avail him or herself to the principle of equitable tolling.[19]

There are three specific instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases: (1) where the employer has concealed or misled the employee;[20] (2) where the employee was prevented from asserting his rights in some extraordinary way;[21] and (3), where the complainant raised the precise statutory claim in the wrong forum.[22]

Motion for Summary Decision

Parties are allowed to seek a summary decision without a full hearing.[23] They are entitled to a summary decision if: "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[24]

The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[25] In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."[26] While all of the evidence must be viewed in the light most favorable to the nonmoving party, the mere existence of some evidence in support of the non-moving

[16] See, e.g., *Shelton v. Oak Ridge Nat'l Lab.,* 1995-CAA-19 (ARB March 30, 2001 (citing *Crosier v. Westinghouse Hanford Co.,* 1992-CAA-3 (Sec'y, January 12, 1994); *Degostin v. Bartlett Nuclear, Inc.,* 1998-ERA-7 (ARB, May 4, 1998); *Staskelunas v. Ne. Util. Co.,* 1998-ERA-8 (ARB, May 4, 1998)).
[17] *Am. Farm Lines v. Black Ball Freight Servs.,* 397 U.S. 532, 539 (1970).
[18] *Howlett v. Ne. Util. Co.,* 1999-ERA-1 (ALJ, December 28, 1998) (citing *Gunderson v. Nuclear Energy Servs., Inc.,* 1992-ERA-48 (Sec'y, November, 19, 1993)). *See Generally*; *Degostin v. Bartlett Nuclear, Inc.,* 1998-ERA-7 (ARB, May 4, 1998); *Staskelunas v. Ne. Util. Co.,* 1998-ERA-8 (ARB, May 4, 1998); *Backen v. Entergy Operations, Inc.,* 1995 ERA-44 (ALJ, June 7, 1996).
[19] *Howlett,*1999-ERA-1 (ALJ, November 28, 1998).
[20] *City of Allentown,* 657 F.2d at 20. See *Hill v. Dept. of Labor,* 65 F.3d 1331,1335 (6th Cir. 1995).
[21] *Id.* (quoting *Smith v. Am. President Lines, Ltd.,* 571 F.2d 102, 109 (2nd Cir. 1978)). *See Crosier v. Westinghouse Hanford Co.,* 1992-CAA-3 (Sec'y, January 12, 1994).
[22] *City of Allentown,* 657 F.2d at 20. *See Gutierrez v. Regents of the Univ. of Cal.,* 1998-ERA-19 (ARB, November 8, 1999).
[23] 29 C.F.R. § 18.40(2011).
[24] 29 C.F.R. §§ 18.40(d), 18.41(a)(2011).
[25] *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ARB) (Dec. 30, 2005).
[26] Wise v. E.I. DuPont De Nemours and Co., 58 F.3d 193 (5th Cir. 1995).

party's position is insufficient; there must be evidence on which the fact finder could reasonably find for the non-moving party.[27]

Evidence[28]

Based on the record, there is no genuine issue of material fact that: On 9 Sep 10, OSHA issued a letter stating that the complaint was dismissed because Complainant's protected activity was not a contributing factor in his reassignment. The notice specifically stated that the parties were given 30 days from the receipt of the findings to file objections and to request a hearing and if no objections were filed, the findings would become final and not subject to court review.[29] Complainant's counsel received that letter on 14 Sep 10. On 24 Sep 10, Complainant's counsel's daughter was diagnosed with non-Hodgkin's lymphoma. On 15 Oct 10, the 31st day following his notification, Complainant's counsel mailed objections and a request for hearing. [30]

Discussion

The threshold issue in this motion for a summary decision is whether Complainant timely filed its opposition to Respondent's motion to dismiss. Even, assuming arguendo, that the response was in some way untimely, any delay was minimal and resulted in no prejudice to Respondent, save the loss of a windfall default ruling. Since the matter falls within the OALJ rules, and not within the statute or FRSA program regulations, I clearly have the discretion to consider Complainant's answer and rule on the motion based on the merits, and elect to do so.

The more problematic and substantive procedural issue is whether Complainant filed a timely demand for hearing. Since the statute specifically provides that the complainant must file his objections and request for hearing within 30 days of receipt of the preliminary order, the real question becomes when objections are "filed." Complainant argues that since he filed his objections by mail, the OALJ regulations gave him an extra five days. Then he points out that since the extra five day period for filing was less than eight days, it does not include intermediate Saturdays, Sundays, and holidays.[31]

However, the general OALJ rules of procedure do not apply where they would be inconsistent with a statute or regulations specifically promulgated to administer a program pursuant to that statute. The applicable statute specifically requires objections to be filed within 30 days and the regulations implementing the FRSA state that a mailed complaint is considered filed on the date of the postmark. The OALJ five day rule meets the concerns of parties whose documents are not deemed filed until received and provides five days for a mailed document to reach its recipient. Those five days are not required when the document is deemed filed when postmarked. As a result the provisions are at least partially in conflict. It would be inconsistent with the plain language and clear meaning of the statute and implementing regulation to apply the general OALJ rule allowing for five additional days (business or otherwise) for mailing

---

[27] *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).
[28] I find no reason to believe any additional discovery would change the basic facts as to timeliness and therefore deny the motion to withhold ruling.
[29] RX(A).
[30] RX(B) & CX(1).
[31] 49 C.F.R. § 18.4(a)(2011).

requests for hearing under the FRSA.[32] Thus, the complaint is untimely and the complaint must be dismissed unless the rules are waived or equitable principles apply.

Complainant's counsel accurately points out that the record demonstrates no specific lack of diligence, a compelling family emergency that understandingly distracted him, and no evidence that that Respondent was prejudiced in any substantive way from the untimely filing. Complainant's counsel notes that the OALJ Rules allow for the modification or waiver of any rule. While that discretionary equitable power may exist, it would be limited to the waiver or modification of the OALJ Rules and that would afford Complainant no relief from his obligation to file his objections within 30 days.

Counsel also notes that the FRSA regulations contain similar language and allow ALJ's to waive any rule or issue such orders that justice or the administration of the Act requires. However, similar language exists in many, if not all the regulation promulgated by the Secretary for the enforcement of whistleblower statutes and the case law does not reflect the use of ALJ discretion to waive the rules for timely filing of objections. The case law does make it clear that the limits are not jurisdictional, but instead of waiving the limits, applies equitable tolling.

As compelling as they are, none of the factors in the case (no prejudice, only one day delay, very serious health issues in counsel's immediate family) bring it within the parameters of equitable tolling. Complainant has not alleged that Respondent concealed information or misled him or was prevented from asserting his rights in some extraordinary way. Complainant did not raise his claim in the wrong forum. The lack of prejudice to the employer does not excuse a late filing of employee's administrative complaint.[33]

ORDER

Respondent's Motion for Summary Decision is hereby **GRANTED** and Complainant, Craig Shuffert's claim is hereby **DISMISSED**. The hearing scheduled for June 28, 2011, in Birmingham, Alabama, is hereby **CANCELLED**.

So ORDERED this 19th day of April, 2011 at Covington, Louisiana.

A

PATRICK M. ROSENOW
Administrative Law Judge

[32] *Swint v. Net Jets Aviation* 2003-AIR-26, (July 9, 2003).
[33] As my ruling on the issue of timeliness rendered the other bases of the motion to dismiss moot, I need not determine if more discovery is necessary to provide Complainant a full opportunity to raise a genuine issue of material fact as to those issues.

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 issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1982.110(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. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).