



Issue Date: 19 July 2011

Case Nos.: **2011-FRS-14**
2011-FRS-20

In the Matter of:
MATTHEW A. SHARPE,
Complainant

v.

WISCONSIN CENTRAL LTD.,
Respondent

Appearances:

Randal W. LeNeave, Esq.
Hunegs, LeNeave & Kvas, P.A.
Minneapolis, Minnesota
For the Complainant

Holly Robbins, Esq.
Joseph D. Weiner
Littler Mendelson, P.C.
Minneapolis, Minnesota
For the Respondent

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIMS

These claims are before me on the Respondent's motions to dismiss the claims because the requests for hearing were not timely filed. The motions were served by mail on June 21, 2011. The Complainant's responses were due on July 6, 2011.¹ No response having been filed by the Complainant, I find that the Respondents' motions should be granted.

PROCEDURAL HISTORY

This proceeding arises from two claims of whistleblower protection under the Federal Rail Safety Act (FRSA), as amended.² The Complainant, Matthew Sharpe ("Sharpe"), is a conductor assigned to the Fond du Lac, Wisconsin, rail yard operated by

¹ See 29 C.F.R. §§ 18.4 and 18.6.

² 49 U.S.C. § 20109.

the Respondent, Wisconsin Central Ltd. (“Wisconsin Central”). See the “Appeal and Request for Hearing Before Administrative Law Judge” filed by Sharpe in both claims. In the first claim, Sharpe alleged that Wisconsin Central gave him discipline of 15 days without pay in violation of the FRSA. This claim was assigned Case Number 5-0170-10-005 by the Occupational Health and Safety Administration (OSHA), and Case Number 2011-FRS-14 by the Office of Administrative Law Judges (OALJ). In the second claim, Sharpe alleged that Wisconsin Central also gave him discipline of 30 days without pay assessed to run concurrently with the 15-day suspension, a second violation of the FRSA. That claim was assigned OSHA case number 5-0170-10-008, and OALJ case number 2011-FRS-20.

Somehow the two claims became separated, and the second claim was lost in transmission between OSHA and OALJ. When the file was assigned to me, it contained only the first claim along with OSHA’s findings and Sharpe’s objections and request for a hearing. I held two telephone conferences on the first claim. During the first conference, held May 20, 2011, it became apparent that the second claim was missing. In addition, counsel for Wisconsin Central asserted that the requests for hearing on both claims were not timely filed, while counsel for Sharpe indicated that he was considering whether to pursue the claims in federal court, as permitted by the FRSA when the Department of Labor fails to issue a final decision within 210 days of the date a claim is filed. During the second conference, held on June 7, 2011, I advised the parties that I had not yet located the second claim. Counsel for Sharpe said he would be deciding whether to file in federal court during the following week. Wisconsin Central had prepared a motion to dismiss the first claim, but decided not to file it until Sharpe’s counsel made a decision whether to proceed before OALJ, or in court. On June 15, 2011, I notified the parties that the second claim had been located and assigned to me. Sharpe’s counsel did not submit any notice that he intended to transfer the claim to federal court. Wisconsin Central then filed its motions to dismiss. Sharpe has not responded to the motions.

APPLICABLE STANDARD

An employee who believes that he has been retaliated against by an employer in violation of the FRSA may file a complaint with OSHA.³ OSHA conducts an investigation and issues findings.⁴ Any party who desires review of OSHA’s findings must file objections and/or a request for a hearing before OALJ within 30 days of receipt of OSHA’s findings. For objections filed by mail, as in this case, the date of the postmark is considered to be the date of filing.⁵ Failure to timely file objections to OSHA’s findings is not a jurisdictional bar to pursuing the claim. Rather, the deadline for filing objections is subject to equitable tolling.⁶

³ 29 C.F.R. § 1982.103, 75 Fed. Reg. 53529–30 (2010).

⁴ 29 C.F.R. §§ 1982.104–105, 75 Fed. Reg. 53530–31 (2010).

⁵ 29 C.F.R. § 1982.106, 75 Fed. Reg. 53531 (2010).

⁶ See *Lotspeich v. Starke Memorial Hospital*, ARB No. 05-072, slip. op. at 3 (July 31, 2006) (SOX); *Swint v. Net Jets Aviation, Inc.*, 2003-AIR-26, slip op. at 7–8 (ALJ July 9, 2003).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On November 17, 2009, Sharpe filed a complaint with OSHA, Case Number 5-0170-10-005 (OALJ No. 2011-FRS-14) (“case number 005”), alleging that Wisconsin Central retaliated against him in violation of the FRSA when it suspended him for 15 days. *See* OSHA Case Activity Worksheet dated November 29, 2009, and Secretary’s Findings on case number 005 dated March 15, 2011.

2. On December 17, 2009, Sharpe filed a complaint with OSHA, Case Number 5-0170-10-008 (OALJ No. 2011-FRS-20) (“case number 008”), alleging that Wisconsin Central retaliated against him in violation of the FRSA when it suspended him for 30 days. *See* Secretary’s Findings on case number 008 dated March 15, 2011.

3. On March 15, 2011, OSHA issued findings dismissing both complaints. *See* Secretary’s Findings dated March 15, 2011.

4. OSHA’s findings on the two claims were served on Sharpe in separate mailings, each by certified mail. A signed receipt for certified mail shows that Sharpe received the findings on case number 008 on March 17, 2011. A “Track and Confirm” from the U.S. Postal Service shows that Sharpe received notice that the findings on case number 005 were available at the post office on March 18, 2011, and a signed receipt shows that he actually received the findings on case number 005 on March 30, 2011. *See* exhibits to Wisconsin Central’s motions.

5. Sharpe filed separate appeals on the two claims. Both were mailed on April 21, 2011, 35 days after receipt of the findings on case number 008, 34 days after receipt of notice that the findings on case number 005 were available at the post office, and 22 days after actual receipt of the findings on case number 005.

6. Sharpe’s request for a hearing on case number 008 was filed more than 30 days after he actually received OSHA’s findings. Thus his appeal of case number 008 was not timely filed.

7. Sharpe’s request for a hearing on case number 005 was filed more than 30 days after he received notice that OSHA’s findings were available at the post office, but less than 30 days after he actually received the findings.

8. Wisconsin Central contends that the 30 day deadline for filing a request for hearing on case number 005 should be counted from the date Sharpe received notice that the findings were available at the post office, citing cases brought under Title VII of the Civil Rights Act of 1964,⁷ the Age Discrimination in Employment Act of 1967,⁸ and the Rehabilitation Act of 1973.⁹ I am not aware of any binding precedent under the FRSA on whether the deadline should be counted from the date of first notice from the post office, as Wisconsin Central contends, or from the date of actual receipt of OSHA’s

⁷ 42 U.S.C. § 2000e *et seq.*

⁸ 29 U.S.C. § 621 *et seq.*

⁹ 29 U.S.C. § 791.

findings. Other administrative law judges have disagreed on this point in the context of other whistleblower protection laws.¹⁰ But I find that the cases cited by Wisconsin Central under employment discrimination laws provide a persuasive analogy. Moreover, under the circumstances of this case, in which Sharpe had actual notice that OSHA had dismissed case number 008 on March 17, I conclude that the April 21 filing was untimely for both claims.

9. Sharpe has failed to respond to the motions, or make any showing why equitable tolling should apply.

10. Wisconsin Central's motions to dismiss the claims should be granted.

11. Wisconsin Central seeks sanctions of attorney's fees and costs under 28 U.S.C. § 1927 to be assessed for "engaging in serious and studied disregard for the orderly process of justice; pursu[ing] a claim that is without a plausible legal or factual basis and lacking in justification; or pursu[ing] a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." The regulations implementing FRSA allow an administrative law judge to assess up to \$1000.00 in fees if a claim was frivolous or brought in bad faith.¹¹ I find no basis for awarding Wisconsin Central its attorney fees or costs under the circumstances in this case.

ORDER

The claims Sharpe filed with OSHA on November 17, 2009, and December 17, 2009, are DISMISSED.

A

Alice M. Craft
Administrative Law Judge

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.

¹⁰ Compare *Richards v. Lexmark International, Inc.*, 2004-SOX-49 (ALJ Oct. 1, 2004) (date of actual receipt governs) with *Robinson v. Northwest Airlines, Inc.*, 2004-AIR-37 (ALJ Oct. 28, 2004) (date of first post office notification governs).

¹¹ 29 C.F.R. § 1982.105(b), 75 Fed. Reg. 53531 (2010).

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.¹² Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically.¹³

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.¹⁴

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.¹⁵

¹² See 29 C.F.R. § 1982.110(a), 75 Fed. Reg. 52532 (2010).

¹³ See 29 C.F.R. § 1982.110(a).

¹⁴ See 29 C.F.R. § 1982.110(a).

¹⁵ See 29 C.F.R. §§ 1982.110(a) and (b).