U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 July 2012

CASE NO.: 2012-FRS-00037

In the Matter of

LARRY BLOCK
Complainant

v.

LIVONIA, AVON & LAKEVILLE RAILROAD
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION; AND DISMISSING CASE

This matter arises under the Federal Railroad Safety Act, (the "Act"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53. (Aug. 3, 2007).[1] Applicable regulations are set forth at 29 C.F.R. Part 1982 (2011). The governing procedural regulation is at 29 C.F.R. Part 18. The Complainant is not represented by counsel. A hearing in this matter is presently scheduled to convene on July 19, 2012, in Rochester, New York.

Procedural History

Based on the record before me, the procedural history of this matter is as follows:

- The Complainant filed his complaint with OSHA (the Department of Labor's Occupational Safety and Health Administration) on January 6, 2012. OSHA Letter, dated Feb. 17, 2012.[2] In his complaint, the Complainant alleged that his employment was terminated in September 2009, after he had made complaints about multiple issues, including safety concerns. OSHA Letter to Chief Administrative Law Judge, dated Feb. 17, 2012.[3]

[1] Section 419(a) of Public Law 110-432, 122 Stat. 4892 (Oct. 16, 2008), further amended 49 U.S.C. § 20109 by adding an additional subsection (c), and redesignating subsections (c) through (i) as subsections (d) through (j) respectively. 49 U.S.C. § 20109(c) is not relevant to this proceeding.
[2] The OSHA letter was addressed to the Complainant and contains the Secretary's Findings and Order.
[3] The OSHA letter informed the Chief Administrative Law Judge that OSHA had denied the Complainant's complaint. Attached as copies to the OSHA letter to the Chief Administrative Law Judge

- On February 17, 2012, OSHA issued the Secretary's Findings and Order dismissing the Complainant's complaint. OSHA Letter, dated Feb. 17, 2012. The Findings and Order stated that the Complainant initially submitted a complaint to the Federal Railroad Administration but, in January 2011, was informed by that agency that he should submit a complaint to OSHA. However, the Complainant did not submit a complaint to OSHA until January 2012, a period of 344 days from the date the Federal Railroad Administration informed him where he should submit his complaint. The Findings and Order determined that the Complainant's claim was untimely because it was "not filed within 180 days of the tolling date."
- By letter dated March 22, 2012, and postmarked March 23, 2012, the Complainant requested a hearing before an administrative law judge. Request for Hearing; envelope addressed to Chief Administrative Law Judge.
- This matter was assigned to me and, on April 3, 2012, I issued a Notice of Hearing and Pre-Hearing Order. In that Order, I directed the parties to submit written position statements, within 10 days; I also directed the Complainant to submit, as an attachment to his submission, a "complete copy of the administrative complaint he filed" with OSHA. Order of Apr. 3, 2012, at 2.
- By letter dated April 10, 2012, counsel for the Respondent entered her appearance and requested an extension of time to submit the Respondent's position statement. By Order dated April 11, 2012, I granted the request, and gave the Respondent until April 25, 2012, to submit a position statement.
- The Respondent filed its position statement, through counsel, on April 25, 2012.
- On May 2, 2012, I issued an Order directing the Complainant to file his position statement (as required in my Order of April 3, 2012), by May 8, 2012.
- By letter dated May 3, 2012, the Complainant requested an extension of time until May 25, 2012, to submit his position statement. On May 16, 2012, I approved the Complainant's request and authorized an extension of time to May 25, 2012, the date the Complainant requested, to submit this item.[4]
- On May 18, 2012, the Respondent filed its Motion for Summary Decision, which I received on May 21, 2012.

Respondent's Motion for Summary Decision

On May 18, 2012, through counsel, the Respondent filed the following documents: Notice of Motion; Respondent's Memorandum of Law in Support of Motion for Summary Decision Pursuant to 29 C.F.R. Parts 18.40 and 18.41; Attorney Affidavit of Laura M. Purcell with seven Exhibits.

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were the Secretary's Findings and Order, and OSHA's "Whistleblower Case Activity Worksheet." The latter document summarizes the substance of the Complainant's complaint to OSHA.

[4] In the Order, I also informed the Complainant that no further requests for extensions of time on this issue would be approved.

In the Motion, the Respondent asserts that it is entitled to summary decision, as a matter of law, because the Complainant failed to file his complaint of retaliation with OSHA within the required 180 day period, and no basis exists on the undisputed facts of the case to toll or extend the limitations period. Affidavit at 1; see also Memorandum of Law at 1.

By Order dated May 31, 2012, I informed the Complainant of the Respondent's Motion. My Order set forth the applicable standard for summary decision, under 29 C.F.R. §§ 18.40, 1841.[5] Additionally, I informed the Complainant that he was entitled to submit a response to the Respondent's Motion, including affidavits and documents; told him that if he failed to counter the Respondent's assertions with an affidavit or evidence, I would presume the Respondent's factual assertions to be true; advised him that if he did not submit a response to the Motion, I would consider the Respondent's Motion to be unopposed; and told him that his deadline for submitting a response to the Respondent's Motion was June 22, 2012.[6] Order of May 31, 2012, at 2-3. Lastly, I informed the Complainant that, in the event I granted the Respondent's Motion for Summary Decision, I would also dismiss his complaint. Order of May 31, 2012, at 3.

To date, I have not received any response to the Respondent's Motion from the Complainant. The time for the Complainant to file a response, as set forth in my Order of May 31, 2012, has passed.[7] Order at 2; see also 29 C.F.R. § 18.6(b). Consequently, as discussed in my Order of May 31, 2012, I will deem the Respondent's Motion to be unopposed. See Order of May 31, 2012, at 2. Nevertheless, I will address the merits of the Respondent's Motion.

Standard for Summary Decision

The governing procedural rules permit a party to file a Motion for Summary Decision. See 29 C.F.R. §§ 18.40, 18.41. An administrative law judge may grant summary decision in favor of a party where no genuine issue of material fact is found to have been raised. § 18.41(a). No genuine issue of material fact is raised when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The standard for granting summary decision is essentially the same as that set forth in the Federal Rules of Civil Procedure governing summary judgment in the federal courts. Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005); see also Fed. R. Civ. P. 56(c).

A party that files a motion for summary decision bears the initial burden of demonstrating there is no disputed issue of material fact, which may be demonstrated by "an absence of

[5] I also provided the Complainant with a verbatim copy of these provisions of the regulation, as well as a copy of 29 C.F.R. § 18.6 (pertaining to Motions).

[6] These notifications were intended to fulfill the requirements set out by the Department of Labor's Administrative Review Board, because the Complainant is not represented by counsel in this matter. See Motarjemi v. Metro. Council, Metro Transit Div., ARB No. 08-135 (ARB Sept. 10, 2010); Hooker v. Wash. Savannah River Co., ARB No. 03-036 (ARB Aug. 26, 2004).

[7] I also note that I have not received any other communication from the Complainant after I issued the Order on May 31, 2012.

evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In adjudicating a summary decision motion, I must view all facts and inferences in the light most favorable to the non-moving party (in this matter, the Complainant). See Celotex Corp., 477 U.S. at 323; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986). This consideration includes factual ambiguities and inferences related to credibility. See Petrosino v. Bell Atl., 385 F.3d 210, 219 (2d Cir. 2004); Inman v. Fannie Mae, ARB No. 08-060, ALJ No. 2007-SOX-00047, slip op. at 8 (ARB June 28, 2011).

In responding to a summary decision motion, a party may not rest upon the mere allegations or denials of his complaint. "Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). Under the regulation, a party may submit evidence (such as documents or affidavits) in support of his position on a motion. See 29 C.F.R. § 18.6(b).

The Complainant's Complaint to OSHA

The record before me is quite sparse regarding the exact substance of the Complainant's complaint to OSHA. I note, for example, that even though I directed the Complainant to provide to me a complete copy of his OSHA complaint, he has not done so. Order of Apr. 3, 2012, at 2. The Respondent has not included a copy of the Complainant's OSHA complaint in its enclosures to its Motion for Summary Decision. Nevertheless, because I must view all facts and inferences in the light most favorable to the Complainant as the non-moving party, I will presume that the Complainant's complaint alleges that the Respondent violated 49 U.S.C. § 20109(a) by discharging him from employment based on activity that is encompassed in that section of the Act.

Timeliness Requirements under the Act

Under the Act, a railroad employee is protected from retaliatory adverse actions from his employer (such as discharge, demotion, suspension, or reprimand) if the action was due, in whole or in part, to the employee's act in providing information about violations of federal law pertaining to railroad safety or security, or information about gross fraud, waste or abuse of public funds intended to be used for railroad safety or security. 49 U.S.C. § 20109(a). A whistleblower complaint under the Federal Railroad Safety Act must be made within 180 days of the alleged retaliatory action. 49 U.S.C. § 20109(d)(2)(A)(ii); see also 29 C.F.R. § 1982.103(d). The regulation also states: "The time for filing a complaint may be tolled for reasons warranted by applicable case law." 29 C.F.R. § 1982.103(d).

The Respondent asserts that the Complainant's employment was terminated by letter dated September 22, 2009, and that the Complainant did not file his complaint with OSHA (the Department of Labor agency authorized to receive such complaints) until January 6, 2012. Memorandum of Law at 3; see also Exhibit 3.[8] Presuming the retaliatory adverse action that

[8] Exhibit 3 is a copy of a letter to the Complainant, dated September 15, 2009, placing him on indefinite suspension without pay for insubordination, pending further investigation. The Secretary's Findings indicate the Complainant was terminated from employment on September 22, 2009. In his request for

forms the basis for the Complainant's complaint is his termination from employment, the lapse of time from the adverse action to the Complainant's OSHA complaint was 836 days, a period far in excess of the statutory limitations period of 180 days.

The record indicates that the Complainant initially filed his complaint with the Federal Railroad Administration (FRA) in September 2009 but was told by that agency in January 2011 to file with OSHA.[9] Secretary's Findings; Whistleblower Case Activity Worksheet. There is no evidence of record contradicting these facts. Indeed, in his Request for Hearing, the Complainant concedes that he filed complaints with the FRA. Request for Hearing.

The regulation states that the time for filing a complaint may be tolled, for reasons warranted by applicable case law. 29 C.F.R. § 1982.103(d). In Turgeau v. Nordam Group, ARB No. 04-005 (ARB Nov. 22, 2004), the Administrative Review Board adopted the rationales for equitable tolling set forth in School District of Allentown v. Marshall, 657 F.2d 16, 19-21 (3d Cir. 1981). These are as follows: the defendant (or respondent) actively misled the plaintiff (or complainant) regarding the cause of action; the plaintiff was in some extraordinary way prevented from filing the claim; or the plaintiff raised the precise statutory claim in the wrong forum. Turgeau, slip op at 3.

Although, as noted above, the evidence as to the precise nature of the Complainant's complaint is thin, I will presume that the Complainant's complaint to the FRA met the standard for equitable tolling in that he raised the precise statutory claim (retaliation based on whistleblowing activity) in the wrong forum (the FRA instead of OSHA). Presuming this to be the case, I find that the Complainant's delay in filing his claim may be tolled for the period the Complainant's complaint was pending at FRA, from September 2009 to January 2011.

I also note, however, that there is no evidence of record relating to the reason(s), if any, for the Complainant's delay in filing his complaint with OSHA from January 2011 to January 6, 2012, a period of almost one year. The record before me indicates that FRA officials told the Complainant he needed to file his complaint at OSHA on at least two occasions, first on January 24, 2011, and then again on January 27, 2011. Whistleblower Case Activity Worksheet. Presuming the limitations period to be tolled through January 27, 2011, the later of the two dates, I find that the Complainant is then required to file his complaint with OSHA within 180 days, or not later than July 26, 2011. However, it was not until January 6, 2012, 133 days after the end of the tolled limitations period, that the Complainant eventually filed his OSHA complaint.

Based on the foregoing, I find, based on the record before me, that the Complainant's OSHA complaint was untimely. I further find that, even drawing all inferences in the Complainant's favor, the record does not indicate any reason for the delay that would merit the

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hearing, the Complainant does not controvert the Secretary's Finding regarding the date of his termination from employment.

[9] Specifically, the Whistleblower Case Activity Worksheet indicates the Complainant contacted the FRA on September 15, 2009 (the date he was suspended without pay) and stated he was "being harassed by Respondent for protected activity." The Whistleblower Case Activity Worksheet indicates Complainant again contacted the FRA in October 2010, purportedly because he had not received any feedback on his initial complaint.

tolling of the limitations period, past January 2011, the date the FRA advised the Complainant to file his complaint with OSHA. Moreover, I find that the Complainant has had notice of the Respondent's Motion for Summary Decision, and also was informed of the consequences of failing to file a response. See Order of May 31, 2012.

Consequently, because I have found the Complainant's filing of his OSHA complaint to be untimely, and have further found no reason to justify equitable tolling of the limitations period, I GRANT the Respondent's Motion for Summary Decision. The Complainant's Complaint is DISMISSED.[10]

SO ORDERED.

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Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

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: ARBCorrespondence@ 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.

[10] The hearing, and all pre-hearing deadlines, are CANCELLED.

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).