U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 20 December 2012

Case No.: 2012-FRS-00073

IN THE MATTER OF:

MICHAEL S. JENKINS,
Complainant,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), 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) and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). A hearing has been requested by Complainant on the determination made by the U. S. Department of Labor.

By motion dated October 26, 2012, Respondent submitted a motion for summary decision. By Pre-Hearing Order #2, the Presiding Judge granted Complainant an extension until November 19, 2012, to file a response in opposition. Newly retained counsel for Complainant filed a timely response to the motion.

Undisputed Facts

1. Complainant, Michael S. Jenkins, was notified by letter dated December 6, 2001, that he was "dismissed from service of CSX Transportation effective immediately." The reason given for his termination was that Complainant violated CSX Transportation Operating Rule 103-C. The letter of termination.[1]

2. On January 9, 2012, Craig Spangler, Local Chairman, L.974, United Transportation Union filed a formal grievance for Complainant pursuant to Article 10 of the UTU/CSXT Labor Agreement. (RX E, F).

[1] Respondent exhibits are referred to as RX. Complainant exhibits are referred to as CX.

3. Complainant waited until July 18, 2012, to file a complaint against CSXT with the Occupational Safety and Health Administration (OSHA) alleging unlawful retaliation of the FRSA. In his complaint, Complainant alleged he was terminated on December 6, 2011, in retaliation for contacting Federal Railroad Administration (FRA) concerning safety violations in April/May 2011. Following an investigation by OSHA, the complaint was dismissed for not being timely filed within 180 days of the termination. (RX A, C).

4. Subsequent to his termination on December 6, 2011, and prior to filing his OSHA complaint on July 18, 2012, Complainant worked with two union representatives to explore with management the possibility of reinstatement of Complainant with CSXT. Affidavits by Complainant (CX 1), Reuben Newsome (CX 2), and Craig Spangler (CX 3) agree that negotiations were drawn out because of the need to meet with at least three management people who would have input in any determination to reinstated Complainant[2]. Complainant, Newsome, and Spangler are unclear as to how many meetings took place. What is clear that it took several months to meet with all three management individuals. There is no documentation with regard to what was decided in these meetings. Complainant and the union representatives recall that Harris and Estrada eventually agreed to the reinstatement. Moreover, they recalled that in a prior meeting Burris agreed that Complainant would be reinstated if Harris and Estrada recommended it to him. The final meeting with Burris took place on August 9, 2012. The decision was that Complainant would not be reinstated.

Discussion

Summary decision may be entered pursuant to 29 C.F.R. § 18.40 (d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson,* 477 U.S. at 251-252. In determining whether a genuine issue of material fact exists, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus.Co., Ltd. V. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact exists that must be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 386 U.S. 464, 467 (1962).

Under FRSA and its implementing regulations, a complaint must be filed with OSHA not later than 180 days after the alleged violation of the FRSA occurs. 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d). The 180-day limitation is not jurisdictional, however, and may be subject to equitable tolling. *Ibid.*

[2] First, Complainant needed to get the concurrence of two train masters, Messrs. Estrada and Harris. Then the final determination would be made by the General Manager, Mr. Burris.

Here, the notice of termination was issued to Complainant on December 6, 2011, and he filed his OSHA complain on July 18, 2012, which was 225 days after his employment was terminated. Clearly, his action is time-barred.

As mentioned above, the 180-day limit is not jurisdictional, and may be extended by equitable tolling principles. Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting his rights' or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981) (citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978)). *See also Harvey v. Home Depot U.S.A., supra*. Courts have held that the restrictions on equitable tolling must be scrupously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.* 1987 ERA 53 (Sec'y, Sept. 29, 1989). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. *See Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984).

Complainant has not alleged that equitable tolling is appropriate under any of the three above listed scenarios. First, there is no evidence in the record that Respondent actively misled Complainant respecting the cause action. Nor is there any evidence that the Complainant has in some extraordinary way been prevented from asserting his rights. Furthermore, there is no evidence that Complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Accordingly, I conclude that equitable tolling is not appropriate in this case.

While Complainant has not specifically argued that the applicability of equitable tolling, he has argued that equitable estoppel is appropriate in this case.

Equitable tolling and equitable estoppel are different and distinct concepts in equity. "Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights." *Rhodes v. Guiberson Oil Tools Div.* 927 F.2d 876, 878 (5th Cir. 1991), quoting *Felty v. Graves-Humphreys*, 785 F.2d 516, 519 (4th Cir. 1986). As the First Circuit further explained, while equitable tolling focuses upon a plaintiff's excusable ignorance of the facts underlying his or her claim, "equitable estoppel occurs where an employee is aware of his [statutory] rights but does not make a timely filing due to his reasonable reliance on his employer's misleading or confusing representations or conduct." *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 752 (1st Cir. 1988).

Complainant argues that Respondent should be equitably estopped from defending on the grounds the Complainant failed to timely file his claim within the 180-day period. Complainant argues that the evidence clearly shows the Respondent induced Complainant to reasonably rely upon Respondent's misleading or confusing representations that he would be reinstated, thereby inducing Complainant to delay filing a timely FRS claim.

The evidence of record does not support the assertion that Respondent induced Complainant to refrain from exercising his rights. First of all, as soon as Complainant was terminated, he appealed under the terms of the collective bargaining agreement, as was his right. He also had a right to file an FRS claim with 180 days. This he did not do. There is evidence in the file record that the parties began to discuss the possibility of reinstatement; however, there is no evidence in the record that Respondent induced Complainant to defer filing an FRS complaint during the pendency of these discussions.

The evidence merely shows that the logistics of arranging and holding the requisite meetings with the appropriate individuals caused a considerable delay in getting the final determination with regard to Complainant's ultimate non-reinstatement. However, there is no evidence to support Complainant's assertion that Respondent somehow not only induced Complainant to refrain from filing his FRS complaint but then stonewalled making the reinstatement decision until the 180-day filing period had elapsed. This is mere speculation on Complainant's part.

For some unknown reason, he filed his FRS complaint on July 18, 2012. Unfortunately, by then the 180-day filing period had elapsed. Consequently, I conclude that it has not been established that Respondent induced Complainant to refrain from exercising his rights. Therefore, equitable estoppel is not appropriate.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED; and

2. This matter is DISMISSED with prejudice.

SO ORDERED.

DANIEL A. SARNO, JR.
District Chief Judge

DAS,JR/dlh
Newport News, Virginia

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).