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Issue Date: 11 December 2012

CASE NO.: 2012-FRS-00070

WILLIAM J. KAMINSKI,
Complainant

v.

NORFOLK SOUTHERN RAILWAY COMPANY
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

This matter arises from a complaint filed with the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, by William Kaminski, Complainant, against Norfolk Southern Railway Company, Respondent. Complainant asserts he was discharged from employment on May 24, 2011, as a result of engaging in activities which are protected pursuant to the provisions of the Federal Railroad Safety Act ("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), as further amended by Pub. L. No. 110-432 (October 16, 2008).

BACKGROUND

On May 24, 2011, after alleged misconduct and investigation by Employer, Complainant was terminated from his position. He appealed his termination pursuant to the Collective Bargaining Agreement ("CBA") grievance procedures; his appeal was denied by Employer. After exhausting appeals to the company, Complainant appealed his discharge to the Public Law Board. The Public Law Board issued a decision denying the appeal on January 17, 2012, which Complainant avers he received on February 7, 2012. On July 29, 2012, Complainant filed his complaint with the Secretary of Labor, exceeding the 180 day time limit established by the applicable statute and regulations. In a letter dated August 21, 2012, Complainant objected to the dismissal of his complaint by OSHA, and requested a hearing with this Court.

On November 13, 2012, Employer filed a Memorandum in Support of Motion for Summary Decision, arguing Complainant did not timely file his whistleblower claim. On November 30, 2012, Complainant filed an Opposition to Respondent's Motion for Summary

Decision, averring that the statute should be tolled for equitable reasons, thus making his complaint timely.

SUMMARY DECISION STANDARD

An administrative law judge may enter summary decision for either party on an issue 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. 29 C.F.R. § 18.40(d). The non-moving party may not rest upon mere allegations, speculation or denials in his pleadings, but must set forth specific facts through affidavits, material obtained by discovery or otherwise, on each issue upon which he would bear the ultimate burden of proof. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256 (1986). The response must set forth specific facts showing that there is a genuine issue of material fact for the hearing. 29 C.F.R. § 18.40(c).

The complainant bears the burden of justifying the application of equitable modification principles. *Wyatt v. J.B. Hunt Transport, Inc.,* ARB No. 11-039, ALJ No. 2010-STA-069 (Sept. 21, 2012), citing *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). In order to defeat Respondent's Motion, Complainant must set forth specific facts showing there is a genuine issue concerning equitable tolling. *See Tracy v. Consolidated Edison Company of New York, Inc*., 1992 WL 752657, ALJ No. 89-CCA-1 (July 8, 1992).

APPLICABLE LAW

Section 20109 of the FRSA provides that "An action . . . shall be commenced not later than 180 days after the date on which the alleged violation of subsection (a), (b) or (c) of this section occurs." 49 U.S.C. § 20109(d)(2)(A)(ii). Additionally, "statutes of limitation in cases involving terminations of employment should run from the initial termination decision." *Hite v. Norfolk Southern Railway Co*., 181 Fed. Appx. 514, 517 (6th Cir. 2006); *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). Importantly, the statute of limitations will not be tolled during the utilization of a grievance period. *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980); *Electrical Workers v. Robbins & Meyers, Inc*., 429 U.S. 229 (1976) (use of the grievance procedures under the collective bargaining agreement did not toll the time period for filing a complaint with the EEOC under Title VII); *Hite*, 181 Fed. Appx. at 517 (statute of limitations not affected by pendency of administrative reviews in employment termination decisions).

An FRSA complaint will be dismissed if not filed within 180 days of the alleged adverse action. 29 C.F.R. § 1982.103. However, the timing for filing may be tolled for reasons warranted by applicable caselaw. § 1982.103. The administrative review board ("ARB") recognizes two distinct concepts in equity which may allow a late-filed complaint to survive, including equitable tolling and equitable estoppel. *Hyman v. KD Resources*, ARB No. 09-076 (March 31, 2010). "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." *Id*., quoting *Felty v. Graves-Humphrey's*, 785 F.2d 516, 519 (4th Cir. 1986). Importantly, the

Supreme Court has noted that equitable tolling is available only sparingly. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

DISCUSSION

First, Complainant argues that the statute of limitations did not begin to run on his FRSA claim until receiving word that his position was not reinstated from the Public Law Board on February 2, 2012. However, this argument is without legal support. Federal and administrative caselaw establishes unequivocally that a statute of limitations begins to run when the employee is initially terminated, which in this case was on May 24, 2011. This is supported by the law that grievance procedures do not toll the statute of limitations in an employment termination case. Thus, the collective bargaining agreement process Complainant partook in had no bearing on his 180 day timeline to file a complaint with the Secretary of Labor. However, in some instances equitable tolling or equitable estoppel may be appropriate to toll the limitation period, which is discussed *infra*.

A. Equitable Tolling

The Sixth Circuit has established five factors where equitable tolling, due to plaintiff's excusable ignorance, may be necessary, including: 1) lack of notice of the filing requirement; 2) lack of constructive knowledge of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to defendant; and 5) the plaintiff's reasonableness in remaining ignorant of the legal requirements. *Dixon v. Gonzales*, 481 F.3d 324, 331 (6th Cir. 2007). The factors are not exclusive and should be determined on a case-by-case basis. *Seay v. Tennessee Valley Auth*., 339 F.3d 454, 469 (6th Cir.2003). Ignorance of the law is generally not a factor warranting equitable modification. *Flood v. Cendant Corp*., ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005).

a. Actual knowledge

Complainant argues he has met all five Sixth Circuit factors necessary to establish equitable tolling. After reviewing the factors in tandem with the facts of the case, I find Complainant has failed to prove equitable tolling is mandated.

First, Complainant argues in his opposition motion that he planned to testify he had no actual knowledge of the filing requirement. However, that is insufficient in opposition to a motion for summary decision where Complainant carries the ultimate burden of proof to establish tolling. Claimant offers no exhibits or affidavits to support that he had no knowledge of the limitation period.

b. Constructive knowledge

Second, Complainant claims he had no constructive notice of the time limitation. However, a party is found to have constructive knowledge when represented by an attorney or a union official. *See Fort v. State of Ohio Dept. of Rehabilitation and Corrections*, 22 Fed. Appx. 494, 496 (6th Cir. 2001); *see also Cruce v. Brazosport Ind. Sch. Dist*., 703 F.2d 862, 864 (5th

Cir. 1983). Here, Respondent argues, and we agree, that Complainant's union representative knew or should have known of the OSHA filing deadline, and that knowledge is imputed to Complainant. Complainant argues he was told multiple times by his union representative that he was not permitted to obtain an attorney until his grievance appeals were exhausted. However, that assertion is unsubstantiated by any evidence, and Complainant must do more than rest on his pleadings to survive this motion.

c. Diligence in pursuing rights

For the third factor, Complainant must show he was diligent in pursing his rights; I find the evidence does not weigh in his favor. Complainant appealed his termination after the original notice in May 2011, but waited until July 29, 2012 to file his complaint with OSHA, even though he knew his termination was final on February 7, 2012. Thus, he waited over five months after the Public Law Board made their final decision to file with the Secretary, which does not suggest a diligent effort. Even if the statute of limitations had not begun to run until February 7, 2012, the filing of his complaint with the Secretary would have been reaching the end of the acceptable time period.

d. Lack of prejudice to respondent

It is unlikely that Respondent is prejudiced in this case; Complainant's complaint was filed in July 2012, less than a year from when the statute of limitations eclipsed. Thus, it is unclear what records or testimony, if any, is now unavailable to Respondent or more difficult to obtain in order to defend their case. However, lack of prejudice to the respondent is but one factor in this analysis and not determinative. "It is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984).*

e. Reasonableness in ignorance

The final factor examines whether Complainant was reasonable in remaining ignorant of legal requirements. There is no evidence that Complainant was reasonable in his ignorance. In fact, he "and his representatives took every opportunity available to him to participate fully in the proceedings under the CBA grievance procedures, and "knew that his termination was in violation of the Federal Rail Safety Act due to a prior reported injury." (Complainant's Opposition Motion, p. 5). As discussed above, a complainant with a union representative is imputed to have knowledge of filing deadlines, and for someone participating in the process with knowledge of an FRSA violation, the ignorance is not objectively reasonable. Again, Complainant put forth no evidence in his opposition that he was misled by his union representative or any representative of Respondent.

B. Equitable Estoppel

Three principle situations where tolling for equitable estoppel may be invoked include: 1) the defendant actively misleads the plaintiff respecting the cause of action; 2) the plaintiff is prevented from exercising his rights in some extraordinary way; or 3) the plaintiff raises the

statutory claim but does so in the wrong forum. *School Dist. Of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981); *Udofot v. NASA*, ARB No. 10-027 (Dec. 20, 2011).

Here, Complainant did not raise the statutory claim in the wrong forum, and does not attempt to argue so. Instead, Complainant makes a case for equitable estoppel by alleging Respondent "created the circumstances by which pursuing one's claim under the remedial statute 49 U.S.C. §20109 ("FRSA") is not possible." (Complainant's Opposition Motion, p. 18). In sum, Complainant argues Respondent negotiated the CBA in a way which prevents the timely filing of a whistleblower claim. "The FRSA requires the exhaustion of contractual remedies under the grievance procedures of the Collective Bargaining Agreement." (Complainant's Opposition Motion, p. 18). Complainant states the CBA procedure takes 210 days from the date of the notice of intent to terminate, which is longer than the 180 days allowed to file with the Secretary under the FRSA, and that CBA procedures must be exhausted before the FRSA claim can "ripen."

Complainant cites *Thurston v. Burlington N. Santa Fe Corp.*, 2008 U.S. Dist. LEXIS 18392, 10, 2008 WL 511889 (D. Colo. Feb. 22, 2008), in an attempt to prove why he was unable to timely file his complaint due to the terms of the CBA agreement. Complainant alleged the *Thurston* court dismissed an FRSA whistleblower complaint because the complainant's grievance was still being processed. In fact, *Thurston* dismissed the FRSA complaint because the complainant did not first, before raising the claim in federal district court, file with the Secretary of Labor. Thurston, 2008 WL 511889, at p. 2. "Resort to the district court may be had only if the Secretary does not issue a final decision . . . and when the Secretary has issued a final order, appeal must be taken directly to the appropriate court of appeals." *Id*. Thus, the administrative remedies the complainant failed to exhaust in *Thurston* were not, as in the case at hand, collective bargaining agreement grievance procedures, but those administrative remedies detailed under the FRSA statute found at § 20109(c)(3) and (4). *Id*.[1]

The FRSA contains no provision that parties' CBA grievance procedures be exhausted prior to filing with the Secretary. *See* 49 U.S.C. § 20109 *et seq*. Consequently, Respondent could not have created a grievance procedure that would require exhaustion prior to filing a complaint under the FRSA. If however, the CBA contained language to indicate that internal appeals must be exhausted prior to filing a complaint with OSHA, then that could potentially be misleading for a Complainant, or create an extraordinary situation preventing a Complainant from filing timely, thus necessitating equitable relief. However, after close examination of the requirements of the parties' CBA, there is no such provision. (Respondent's Motion for Summary Decision, EX-A). Complainant offers no other evidence that Respondent mislead him or exceptional circumstances prevented him from filing his complaint timely.

[1] Additionally, Complainant argued that the claim is considered a "minor dispute" as defined by the Railway Labor Act 45 U.S.C. §153 (RLA), which, Complainant argues, requires exhaustion of grievance procedures, including Public Law Board Arbitration proceedings. (Complainant's Opposition Motion, p. 20). Under the RLA, grievance procedures contained in a CBA must be exhausted prior to submitting a case for arbitration to the National Railroad Adjustment Board. *See* 45 U.S.C. §153(i); Thurston, 2008 WL 511889, p. 3. This assertion is misplaced, as Complainant's whistleblower complaint falls under the FRSA statute and accompanying regulations, and not the procedures defined under the RLA.

Complainant filed his complaint under the FRSA on July 29, 2012, over a year after he was terminated on May 24, 2011 from his position with Respondent. In his opposition to Respondent's Motion for Summary Decision, he has pointed to no particular evidence, including affidavits, depositions, or exhibits, which would raise a genuine issue of material fact on which equitable relief could be granted. Accordingly, I find his complaint was not timely filed.

ORDER

It is therefore **ORDERED** that Respondent's Motion for Summary Decision be **GRANTED**. The claim is **DISMISSED**.

So ORDERED.

Digitally signed by LARRY PRICE
DN: CN=LARRY PRICE,
OU=JUDGE, O=Office of
Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

LARRY W. PRICE
ADMINISTRATIVE LAW JUDGE