

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 09 September 2014

CASE NO.: 2014-STA-00071

In the Matter of:

ALFRED BENJAMIN,
Complainant,

v.

HERITAGE TRUCKING, INC.,
Respondent.

ORDER DISMISSING CASE

This matter arises under the employee protection provisions of 49 U.S.C. § 31105 of the Surface Transportation Assistance Act of 1982 (“STAA”) and the regulations of the Secretary of Labor published at 29 C.F.R. Part 1978. The matter is not currently set for hearing.

On August 5, 2014, I issued an Order to Show Cause Why the Matter Should Not Be Dismissed (“OSC”) based upon what appeared to be an untimely filing of Complainant’s appeal. I gave Complainant 21 days to respond to the OSC. Complainant did not respond to the OSC, and has not otherwise contacted this office. Therefore, as explained below, this matter is dismissed.

Background

On May 23, 2014, the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) denied Complainant’s whistleblower complaint that he filed in January 2013. Complainant alleged that he was terminated from Respondent on November 8, 2012 in violation of the STAA. According to OSHA’s denial, Complainant failed to cooperate with OSHA during the investigation.

OSHA sent a copy of the denial to the Washington, D.C. OALJ Office (“D.C. OALJ”) with a cover letter dated May 30, 2014. The D.C. OALJ received the copy of the denial on June 10, 2014.

On July 22, 2014, the D.C. OALJ Office received a letter from Complainant requesting a hearing on the denial. Complainant's letter is dated July 9, 2014, but the postmark on the envelope shows it was mailed on July 17, 2014. The matter was assigned to me in the San Francisco OALJ Office for hearing on July 31, 2014.

On July 28, 2014, Respondent submitted a request to dismiss this action alleging that Complainant's appeal was not timely filed. Respondent sent a copy of the letter to Complainant. Respondent asserted that Complainant's appeal had to be received within 30 days of the denial, but Complainant did not postmark his request for review until July 17, 2014, which is 55 days after the denial. 29 C.F.R. § 1978.106(a). Because the denial from OSHA is dated May 23, 2014, and Complainant's request for hearing was postmarked July 17, 2014, it is not timely filed and should be dismissed.

On August 5, 2014, I issued an OSC directing Complainant to submit evidence in writing to show that he timely filed a notice of appeal in this matter. I directed Complainant to specifically address when he received the notice of the denial from OSHA, and to address why his letter requesting an appeal was dated July 9, 2014, but not postmarked until July 17, 2014. I noted that if Complainant required additional time to comply with the OSC, he could request an extension in writing. If Complainant did not submit a sufficient answer, then his appeal would be dismissed without a trial. Complainant has not contacted this Office, or otherwise responded to the OSC.

Discussion and Legal Conclusion

When OSHA denies a whistleblower complaint,

Any party who desires review, including judicial review, must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order . . . The objections and request for a hearing must be in writing . . . The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; . . . Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record and the OSHA official who issued the findings.

29 C.F.R. § 1978.106(a). "If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review." 49 U.S.C. § 31105(b)(2)(B); *see also* 29 C.F.R. § 1978.106(b) ("If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review.").

The information in the record established that Complainant did not file his notice of appeal within the 30 days of OSHA's denial as required by the statute and regulation. As noted by Respondent, Complainant did not postmark his request for review until July 17, 2014, which is 55 days after OSHA denied his complaint on May 23, 2014.

Complainant was required to file his appeal within 30 days of the denial by OSHA, and he did not. Further, he was given the opportunity to explain any reason for the delay, and he has not. Because the evidence established that Complainant untimely filed his notice of appeal in this matter, his complaint is dismissed in its entirety. All dates are vacated. The matter is closed.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge