



Issue Date: 07 August 2017

CASE NO.: 2017-STA-49

IN THE MATTER OF

MANUEL ALVAREZ,

Pro-se Complainant

vs.

OLD DOMINION FREIGHT LINE,

Respondent

ORDER ON MOTION FOR SUMMARY DISMISSAL

This proceeding arises under the Surface Transportation Assistance Act¹ (the “Act”) and the regulations promulgated thereunder.² The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to the terms and conditions of employment because they refused to operate a vehicle when it would violate a regulation, standard, or order of the United States related to commercial motor vehicles.

Procedural Background

Respondent fired Complainant on 28 Jul 16. On 17 Mar 17, Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA). OSHA conducted an investigation and dismissed the complaint, finding that it had not been filed within the requisite 180 days. Complainant’s Counsel objected to the findings and requested a *de novo* hearing. The matter was referred to the OALJ for hearing and after an initial scheduling conference call with both parties, I set the case to be tried on 4 Oct 17. On 6 Jul 17, I conducted another conference call to address discovery issues. During that call, Respondent announced that it would be filing a motion for summary dismissal based on Complainant’s failure to file a timely complaint with OSHA. I ordered Respondent to file that motion no later than 20 Jul 17 and Complainant to file his response no later than seven days after receiving the motion. I specifically cautioned Complainant that he must submit some evidence or legal argument that would allow for a finding that his OSHA complaint was filed within 180 days. Respondent filed its motion, arguing that there was no genuine issue of material fact that would allow for a finding that the OSHA complaint was timely and Complainant filed his response, arguing that he filed in the wrong forum, thus tolling the time limit.

¹ 49 U.S.C. § 31105.

² 29 C.F.R. § 1978.

Applicable Law

Under the Act, an employee adverse action in violation of subsection (a) must file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.³ The time for filing a complaint begins running when the employee becomes aware of the challenged conduct. The time for filing a complaint may be tolled for reasons warranted by applicable case law.⁴

The case law describes four instances in which tolling may be proper: (1) the respondent actively misled the complainant about the cause of action, (2) the complainant was in some extraordinary way prevented from asserting his rights, (3) the respondent lulled the employee into foregoing prompt attempts to vindicate his rights, or (4) the complainant raised the precise statutory claim, but mistakenly did so in the wrong forum.⁵ Even if a complainant alleged elements and facts in an EEO complaint that overlap with those found in his whistleblower complaint, the overlap is not sufficient to establish that the complainant attempted to file the precise complaint under a whistleblower statute with the EEO.⁶ Absence of prejudice to the respondent is only considered in determining whether to toll the limitations period if such tolling is otherwise justified.⁷

A party may be entitled to a summary decision 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.⁸ When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon mere allegations or denials of the pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.⁹ The responsive filings of *pro se* litigants must be interpreted liberally in order to infer the strongest arguments therefrom.¹⁰

³ 49 U.S.C. § 31105 (2010).

⁴ 29 C.F.R. § 1978.104.

⁵ *McAllister v. Lee County Board of County Commissioners*, 2013-AIR-8 (ARB May 6, 2015); *Edmund v. Metropolitan Transit Authority*, 2009-STA-3 (ARB Nov. 19, 2009).

⁶ *Woods v. Boeing-South Carolina*, 2011-AIR-9 (ARB Dec. 10, 2012).

⁷ *Id.*

⁸ 29 C.F.R. § 18.40(d).

⁹ 29 C.F.R. § 18.40(c).

¹⁰ *Coates*, ARB No. 05-050, slip op. at 7.

Factual Background

Having considered all of the documents submitted by the parties and having resolved all issues of credibility and inferences in favor of Complainant, I find there is no genuine issue as to the following material facts:

- On 28 Jul 16, Respondent fired Complainant.
- The same day, Complainant contacted the Texas Workforce Commission to begin the process of seeking unemployment benefits, stating that he had been fired because of complaints from other drivers.
- On 6 Sep 16, the Texas Workforce Commission issued a decision stating that employment benefits were payable.
- On 13 Sep 16, Complainant filed a charge of discrimination to the U.S. Equal Employment Opportunity Commission (EEOC), in which he:
 - Stated that he is Hispanic and was discriminated against by Respondent.
 - Alleged that if he had been white, Respondent would have given him a warning, instead of firing him.
 - Responded to the question of what the basis for his discrimination claim was by checking the box for race and not checking any other box, including the box for retaliation.
- On 28 Oct 16, the EEOC reported that it was unable to substantiate the allegations and notifying Complainant he was entitled to sue.
- On 3 Nov 16, Complainant wrote a letter to Respondent, appealing his termination.
 - Respondent replied that the termination was not subject to appeal or discussion.
- On 17 Mar 17, Complainant filed this whistleblower complaint with OSHA.

Discussion

There is no allegation and the record contains no evidence that Respondent actively misled Complainant about the cause of action, Complainant was in some extraordinary way prevented from asserting his rights, or Respondent lulled Complainant into foregoing prompt attempts to vindicate his rights. Thus, the only question is whether Complainant raised his retaliation claim, but did so in the wrong forum.

Given Complainant's *pro se* status, it is important to allow extra leeway and afford him the benefit of the doubt in terms of arguing legal principles. Indeed, his initial response that I had ordered "towing" appeared to result from some confusion based on our initial conference call, wherein Respondent indicated that it would seek dismissal for an untimely complaint. I explained what that meant to Complainant, and that he might be able to avoid dismissal if he could demonstrate that the 180 day period should be tolled.

However, it is clear that he eventually understood the fundamental issue. His opposition to the motion to dismiss specifically states he did file in a timely manner, but with the EEOC.¹¹ The case law is clear that the equitable relief of tolling applies only if the precise statutory claim is filed in the wrong form or agency. There is no genuine issue of material fact in the record that would allow a factfinder to determine that Complainant filed a retaliation complaint with anyone before his complaint to OSHA. His EEOC complaint specifically identifies race as the basis for discrimination and even where retaliation was suggested as a possibility, he declined to check the box.

In the absence of any basis for equitable tolling, his OSHA complaint was untimely.

The complaint is dismissed.

In view of the foregoing, the hearing scheduled on **4 Oct 17** in **Lubbock, Texas** is hereby **CANCELLED**.

ORDERED this 7th day of August, 2017 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

¹¹ "My motion is that I filed in a timely manner with the EEOC. Which was the wrong agency to file. Also filed the wrong complaint." With those words, Complainant inadvertently, but correctly, highlights the key issue in the case, which is that he did not file the correct complaint, even with the wrong agency.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

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. § 1978.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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. If you e-File your reply brief, only one copy need be uploaded.

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. §§ 1978.109(e) and 1978.110(b). 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. § 1978.110(b).