



Issue Date: 17 May 2019

CASE NO: 2019-STA-00027

In the Matter of:

LESLEY DUKE,
Complainant,

v.

XYLEM TREE EXPERTS, INC.,
Respondent.

ORDER OF DISMISSAL

This matter arises from a complaint filed under the provisions of the Surface Transportation Assistance Act of 1982, U.S. Code Title 49, Section 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (“STAA”), and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978. Pursuant to 29 C.F.R. § 1978.107, this proceeding is subject to the procedural rules set forth at 29 C.F.R. Part 18, Subpart A (29 C.F.R. § 18.10 to § 18.95).

Procedural History

Complainant Lesley Duke filed a complaint with the U.S. Department of Labor against Respondent Xylem Tree Experts, Inc., on May 2, 2018, alleging that he was subjected to adverse employment action on May 1, 2018, in retaliation for protected activity. The OSHA Regional Supervisory Investigator issued the Secretary’s Findings on December 7, 2018, finding that there was no reasonable cause to believe that Respondent violated the STAA and dismissing the complaint. The letter advised Complainant that he could file objections and request a hearing before an Administrative Law Judge (ALJ) within 30 calendar days. The letter stated that objections must be filed in writing with the Chief Administrative Law Judge at the USDOL Office of Administrative Law Judges, and provided the address, telephone number, and fax number. The letter further advised that if no objections were filed, the Findings would become final and not subject to court review.

On March 18, 2019, the U.S. Department of Labor’s Office of Administrative Law Judges received a packet of papers from the Complainant that included, among several other letters to other entities and documents from other matters,¹ a letter objecting to the Secretary’s

¹ Some of these papers were typed letters from Mr. Duke to various offices and agencies (including Attorney General Barr, the Criminal Division of the IRS, the Commonwealth Attorney, and the Judge and Clerk of Court in case number GV18015146-00); some were copies of documents from DOL or other agencies with handwritten notes

Findings. I note that Complainant's letter was written by Complainant himself² (not counsel³), as were several other letters included in the packet of documents, and it is directed at the OSHA investigator, not OALJ.⁴ The letter does not request a hearing; instead, it is written directly to the Regional Supervisory Investigator, using the second person to accuse the investigator of various errors and failures (e.g., "If this is any reflection of how you handle your investigations I can understand why you are getting F's."; "It appears to me that you have done no investigation"; "[I]t appears that you are trying to keep yourself from looking bad. I will make sure Congress and the Judge see just how you screwed it up."; "You failed to investigate correctly to make sure all of your T's and I's were dotted, you failed to question all parties under Oath, and the Due Process of Law was not properly given, and the last thing you said on your letter that the complaint is dismissed. That's pretty damn good, you notified me almost a month after the 30 days started on December 7th, 2018."). Nevertheless, this letter does challenge the Secretary's Findings, and it was treated as a request for review and the case was docketed with OALJ on March 18, 2019.

As the Secretary's Findings were issued on December 7, 2018, and Complainant's objections were untimely, I issued an *Order to Show Cause* why the case should not be dismissed. Complainant filed a response through counsel on April 12, 2019, and Respondent filed a reply on April 19, 2019.

Complainant's counsel asserted that the federal government "shutdown" from December 22, 2018 through January 25, 2019 "garnered significant media coverage and was known to Mr. Duke," and the shutdown period "encompassed Mr. Duke's thirty-day deadline of January 6, 2019." Counsel contended: "Mr. Duke believed that due to the shutdown as he understood it, he could not submit his objections and hearing request" until the shutdown ended.

Counsel also argued that after the shutdown ended, "Mr. Duke attempted to submit his objections and hearing request," but "mistakenly filed with the North Carolina Office of Administrative Hearings, which opened a case." The North Carolina case was dismissed on February 27, 2019 for lack of jurisdiction. Subsequent to that dismissal, Complainant filed his objections with OALJ on March 18, 2019. Counsel argued that this shows Mr. Duke was attempting to file his objections to the Secretary's Findings in January but "was mistaken as to the appropriate entity and filed them with the State of North Carolina instead of the Department of Labor."

made on them; and one page was a copy of a business card from an HR manager at the Virginia Department of Transportation and a business card from the Virginia Department of Taxation, with handwritten notes detailing Mr. Duke's meetings with those offices.

² Some of Complainant's letters explain that they were typed by his common law wife, and the letters often refer to Mr. Duke in the third person.

³ In the response to the *Order to Show Cause* dated April 12, 2019, Complainant's counsel stated that he had been "recently retained."

⁴ The salutation reads: "To the United States Congress Christine for Mathew E. Robinson regional supervisor investigator and chief administrative law judge usdol, Federal Motor Carrier Safety Administration." Other than the reference to the U.S. Congress, this appears to copy the signature block and cc lines of the December 7, 2018 letter with the Secretary's Findings.

Counsel noted that Complainant’s physician provided a letter stating that Mr. Duke has a “mild cognitive impairment” which may impair his performance in court, and he was acting without counsel. For all of these reasons, Complainant asked that his case not be dismissed.

Respondent replied that it sent an inquiry to OSHA on January 14, 2019, asking whether Complainant filed an appeal of the Secretary’s Findings, and Regional Investigator William Peterson responded via email the same day. Mr. Peterson reported:

Mr. Duke received the determination on 12/17/2018. I do not show a filed appeal to date in the data base. However, on 12/23/2018, he emailed that he had filed. I do not receive a copy of the appeal and am not involved in that process. He is required to send you a copy of any filed appeal.

(Exhibit A to Respondent’s Reply.) Respondent argued that Complainant’s objection, filed “ninety days after he received the Secretary’s Findings, and ninety-nine days after the findings were issued,” is untimely and should be dismissed. Respondent also argued that Complainant claimed in his February 4, 2019 letter that he had just received the Secretary’s Findings that day, which is “clearly at odds” with Mr. Peterson’s correspondence; and that Complainant also claimed in the same letter that he received the Secretary’s Findings “almost a month after the 30 days starts on December 7th, 2018.”

Respondent noted that Complainant’s letter stating objections to the OSHA investigator’s findings is dated February 4, 2019, and the North Carolina case was still pending at that time—creating an inconsistency with his claim that he believed the North Carolina filing *was* his request for review of the Secretary’s Findings (but mistakenly filed in the wrong forum).

Respondent also argued that Complainant corresponded with a federal agency—through his email with Mr. Peterson—during the government shutdown, “in stark contradiction to the facts alleged in his response.”

Respondent further argued that it was not served with a copy of Complainant’s objection letter, providing additional grounds upon which dismissal is warranted. (Citing *Knoke v. Ferraro Foods of North Carolina, LLC*, 2018-FDA-00001 (ALJ Mar. 1, 2018)).

Regarding Complainant’s mild cognitive impairment as stated in the physician’s letter, Respondent noted that the letter made no reference to the nature of the impairment or its duration, and did not explain that the mild impairment would relate to Complainant’s non-compliance with express rules, deadlines, and procedures in this matter.

Governing Statute and Regulation

The STAA provides that after receiving a complaint of retaliation, the Secretary of Labor must conduct an investigation, determine whether the complaint has merit, and notify the complainant and the employer in writing of the findings. 49 U.S.C. § 31105(b)(2)(A). It further provides:

Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings ... and request a hearing on the record.... 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 (“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”; “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.”).

Thus, both the STAA and its implementing regulations provide that if objections are not filed within 30 days, the Secretary’s Findings become final and not subject to review.

Discussion

There is no dispute that Complainant’s objections to the Secretary’s Findings were not timely. The letter setting forth the Secretary’s Findings issued on December 7, 2018. OALJ received Complainant’s objections on March 18, 2019—more than three months after the letter issued and well beyond the 30-day period for objections and a request for a hearing under the STAA.

The issue in this case is whether the 30-day deadline for objections should be waived. Complainant requests waiver of the deadline pursuant to 29 C.F.R. § 1978.115. That regulation provides that “[i]n special circumstances not contemplated by the provisions of these rules, or for good cause shown,” an ALJ may “waive any rule ... as justice or the administration of STAA requires.”

The ARB has held that the statutory limitations period is not jurisdictional, and is subject to equitable modification (tolling or estoppel). *Elias v. Celadon Trucking Services, Inc.*, 2012 WL 6066530, ARB No. 12-032, ALJ No. 2011-STA-028 (ARB Nov. 21, 2012) (citing *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010)). In *Elias*, the ARB stated that it follows the three tolling principles set forth in *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981), plus a fourth equitable principle recognized in *Hyman*, in determining whether to toll the running of a statute of limitations period. Thus, equitable tolling may apply when:

- (1) the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights,
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum, or
- (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.

Elias, ARB No. 12-032 (citing *Allentown*, 657 F.2d at 20, and *Hyman*, ARB No. 09-076).

Complainant presents a two-part argument as to why the 30-day deadline should be waived in his case. He asserts that he believed the government shutdown from December 22, 2018 through January 25, 2019 meant that he could not submit his objections and hearing request until the shutdown ended. He further asserts that his January 29, 2019 filing with the North Carolina Office of Administrative Hearings was an attempt to request a hearing with DOL's Office of Administrative Law Judges, but was mistakenly filed in the wrong forum. Because Complainant's North Carolina filing itself fell outside the 30-day period, his "wrong forum" argument depends on him first prevailing on his contention that he believed he could not file with OALJ until the government shutdown ended.

As a preliminary matter, I note that the government "shutdown" due to a lapse in funding in December 2018 affected only some agencies and departments within the federal government, as several departments (including the Department of Labor) were already funded for the full fiscal year and did not have a lapse in appropriations or shut down operations. Media coverage of the shutdown often referred to it as a *partial* government shutdown, affecting some but not all agencies and employees. See <https://www.cnn.com/2018/12/23/politics/government-shutdown-impact-negotiations/index.html> ("A *partial* government shutdown remains in effect after funding expired for roughly a quarter of the federal government when the clock struck midnight on Saturday -- and it is not clear when it will end." (emphasis added)); <https://www.usatoday.com/story/news/politics/2018/12/19/government-shutdown-what-and-wont-close/2349369002/> (noting that six federal Departments would not be affected by the lapse in appropriations, but for nine Departments—"Agriculture, Commerce, Justice, Homeland Security, Interior, State, Transportation, Treasury and Housing and Urban Development, as well as several smaller agencies"—"all but essential operations in those departments will be closed and some 800,000 federal employees will be furloughed or forced to work without pay until the standoff is resolved."). Media coverage of the shutdown did not state that every agency or Department of the federal government was closed, or that mail could not be sent to or received by government agencies.

As to whether Complainant nevertheless *believed* he could not send his objections to OALJ until the shutdown ended, I find that Complainant is not credible and his claim is contradicted by other evidence before me, and I therefore reject this contention.

Complainant made several contradictory claims regarding when he received the December 7, 2018 letter with the Secretary's Findings. In his letter dated February 4, 2019, stating his objections to the Secretary's Findings, Complainant alleged he had just received the letter: "I received your letter dated December 7, 2018 it is now 2/4/2019 almost 2 months late."; "Now I would like for you to get the date right on your letter and not make it look like it was on December 7th, 2018. But on your green return card signed and dated by Leslie Duke on 2-4-19 so don't make it look like you sent it out on Dec 7th, 2018 it appears that you are trying to keep yourself from looking bad."⁵ Later in the same February 4, 2019 letter, Complainant challenged

⁵ Of course, if Complainant had just received the Secretary's Findings on February 4, 2019, then his January 29, 2019 filing in the North Carolina Office of Administrative Hearings could not have been an attempt to file objections and a request for a hearing regarding the Secretary's Findings.

the quality of the investigation and the dismissal of his complaint in the Secretary's Findings, and stated: "That's pretty damn good, you notified me almost a month after the 30 days started on December 7th, 2018. You failed again at that also." This allegation that Complainant received the December 7 letter "almost a month" after it issued is at odds with his earlier claim that he had just received the letter on February 4, 2019. In addition, OSHA Regional Investigator William Peterson stated in an email to Respondent, regarding whether an appeal had been initiated, that Complainant had received the determination on December 17, 2018, and that Complainant had emailed him on December 23, 2018, stating that he had filed an appeal. Complainant's actual receipt of the Secretary's Findings on December 17, 2018 contradicts his later claims regarding when he received the letter, and his email to Mr. Peterson on December 23, 2018, stating that he had filed an appeal of the Secretary's Findings, also contradicts his later claims about the timing of his receipt of the letter. For these reasons, I find that Complainant is not credible.

The only evidence of Complainant's claimed belief that he could not file objections during the shutdown period is his word, and I find he is not credible and do not take him at his word. Further, Complainant's email to Mr. Peterson on December 23, 2018, also contradicts his claimed belief that he could not file documents with the government during the shutdown period. First, Complainant stated he *had filed* an appeal, not that he intended to file an appeal.⁶ He did not say he wanted to appeal but had to wait out the shutdown, or that he was going to appeal as soon as the shutdown was over. Instead, in an email sent on the first day of the shutdown, Complainant made no mention of the shutdown and no claim that it would affect his ability to file objections. Second, Complainant's email shows he was sending correspondence to a DOL employee *during* the partial government shutdown, contradicting his present contention that he believed he could not send documents to DOL during the shutdown. I also note that Complainant wrote to the "Criminal Division of the IRS" on December 30, 2018 (i.e., during the shutdown period), regarding his allegation that Respondent had "cheated the Federal Government" by understating its number of drivers, units, and mileage. Considering these factors, combined with Complainant's lack of credibility, I find that Complainant's contention that he believed he could not file his objections during the shutdown is not true, and was created after the fact in an attempt to excuse an untimely filing, rather than representing his state of mind at the time the objections were due.

In sum, I find that Complainant is not credible, and that his claim of a mistaken belief that he could not file objections with DOL during the shutdown period is not true. Accordingly, I find that Complainant has not shown a basis to waive or toll the 30-day time limit.

Specifically, I find that Complainant has not established grounds for equitable tolling of the 30-day period. Complainant has not alleged that Respondent actively misled him or committed acts or omissions that lulled him into foregoing a timely request for review. Complainant's claim of a mistaken belief that he could not file during the partial government shutdown is not credible, and does not establish that Complainant was "in some extraordinary way ... prevented from asserting his rights" to a hearing before OALJ on his objections. Complainant's claim that he mistakenly filed his objections and request for review in the wrong

⁶ Moreover, as Complainant *had not* filed an appeal as of December 23, 2018, this statement was not true, and further demonstrates Complainant's willingness to make untrue statements, including to DOL.

forum cannot prevail, because his filing in North Carolina was made on January 29, 2019—53 days after the Secretary’s Findings issued. Therefore, even if I found that Complainant’s “wrong forum” claim was credible—a determination I do not make here⁷—that filing itself was untimely, and the untimeliness is not excused for the reasons set forth above. Thus, Complainant does not meet any of the grounds for equitable tolling. I further find that Complainant has not established “special circumstances” or “good cause” to waive the 30-day limit under 29 C.F.R. § 1978.115, as his explanation for the untimely filing of his objections is not credible and is contradicted by other evidence.

Lastly, Complainant has not established that his mild cognitive impairment explains or excuses his failure to timely file his objections. As Respondent argued, Complainant presented very sparse information about the impairment. His physician described the impairment as mild, and noted only that it *may* impair his performance *in court*. The letter gave no indication that Complainant’s impairment affects his ability to read or follow directions, and the letter setting forth the Secretary’s Findings provided express instructions on how to request a hearing on objections to the findings, including the exact address to which to mail the request. Complainant has presented no evidence that he was incapable of reading the letter or following its express instructions, and thus I find that Complainant has not shown special circumstances or good cause for waiving the 30-day deadline based on his mild impairment.

Additionally, Complainant had the assistance of his common law wife throughout the relevant time period, during which they prepared multiple letters to various agencies stating complaints and allegations against Respondent. Complainant’s wife typed his letters and in some cases, wrote her own supporting letters. There is no indication she was unable to read and understand the instructions set forth in the Secretary’s Findings for how to file objections and a request for a hearing, and I find this further defeats any claim of special circumstances or good cause for not complying with the statutory and regulatory timelines for seeking review of the Secretary’s Findings.

Therefore, as set forth above, I find that Complainant’s objections to the Secretary’s Findings are untimely, and that no grounds exist to waive or toll the 30-day time limit for filing objections. Consequently, this case must be dismissed.

⁷ Because I do not reach the second part of Complainant’s argument (that his January 29, 2019 filing in North Carolina was a mistaken attempt to file objections with DOL’s OALJ), I do not address Respondent’s alternative request for an extension of time to investigate Complainant’s petition filed in North Carolina and his full correspondence with Mr. Peterson. I acknowledge, however, Respondent’s argument that Complainant’s February 4, 2019 letter stating his objections to the Secretary’s Findings was written *before* the North Carolina DOL moved to dismiss Complainant’s petition in the North Carolina Office of Administrative Hearings on February 8, 2019, and before the Order of Dismissal issued on February 27, 2019, calling into question the veracity of Complainant’s claim that he believed he had filed objections with DOL’s OALJ through his January 29 North Carolina filing. Complainant did not submit his own petition filed in North Carolina in support of his “wrong forum” claim, and I would have allowed Respondent time to investigate that claim if the first part of Complainant’s argument (regarding untimeliness) had not been dispositive.

ORDER

For the reasons stated above, IT IS ORDERED that this matter is **DISMISSED** with prejudice and without costs or attorney's fees to either party.

MONICA MARKLEY
Administrative Law Judge

MM/jcb
Newport News, VA

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.

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).