



Issue Date: 10 February 2020

CASE NO.: 2019-STA-41

In The Matter Of

MARIO JOHNSON,
Pro-se Complainant

v.

MAVERICK TRANSPORTATION, LLC,
Respondent

ORDER ON MOTION FOR SUMMARY DISMISSAL

This proceeding arises under the Surface Transportation Assistance Act¹ (the Act) and the implementing regulations.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

On 29 Apr 19, Complainant filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA) alleging Respondent retaliated against him for raising safety issues. OSHA conducted an investigation and dismissed the complaint, finding that Complainant had not engaged in any protected activity. After the case was referred to the Office of Administrative Law Judges for hearing, Complainant filed a bill of particulars alleging multiple protected activities and multiple adverse actions.

Respondent filed a Motion to Dismiss the complaint as untimely, failing to state any adverse action, failing to identify any link between protected activity and adverse action, and failing to comply with the prehearing order. Complainant eventually filed a response arguing that his complaint was not untimely because the period was tolled once Respondent filed a contract based lawsuit against him lawsuit on 26 Oct 16. Complainant also noted that entry of information on a DAC report can constitute adverse action and Respondent’s failure to accurately report his length of employment was a new adverse action.

¹ 49 U.S.C. § 31105.

² 29 C.F.R. § 1978.

I treated Respondent's motion as one for dismissal on the pleadings and therefore accepted as true all of Complainant's factual allegations. However, his initial filing remained untimely as to almost all of his alleged adverse actions. I therefore granted Respondent's motion and denied the claim as to all adverse actions except Complainant's allegation that Respondent supplied false or incomplete information for his DAC report. I noted that the 180 day time limit does not begin to run until Complainant was aware of that alleged adverse action and his complaint alleges that he did not learn of Respondent's action until after 28 Oct 18. Since the procedural setting required accepting that allegation as true, Respondent's motion as to that adverse action was denied.

Respondent then filed a Motion for Summary Decision as to the remaining adverse action. Respondent argued that there was no genuine issue of material fact which could allow a finding that it had provided anything but correct and favorable information to Complainant's DAC report and that therefore there was no adverse action. Respondent further argued that there was no genuine issue of material fact that would allow a finding that its actions were a consequence of any protected activity.

In support of its motion, Respondent submitted an affidavit from its vice president for driver recruiting. He stated that Respondent maintained accurate information in its database that was uploaded by third parties to produce Complainant's DAC report. He also indicated that while uploads to Complainant's record were done on 16 Jun 16 and 12 Aug 16 with no report of any error, it conducted an audit in April 2019 and discovered errors in one of the agencies information for Complainant. The report showed only Complainant's time of service as an independent contractor and was later corrected. In October 2019 Respondent discovered that all of Complainant's service was being reported as one continuous tenure as an employee. Respondent notified the third-party of the error and it was corrected. In November 2019, Respondent discovered that another third-party reporting agency was incorrectly showing Complainant to still be in Respondent's employ. The Vice President further emphasized that Respondent's records were accurate and it had no control over the manner in which third parties may have imported and transposed the data. However to the extent that respondent was aware of any incorrect information, it assisted the third-party reporting agencies in correcting those errors.

Complainant filed a response that once again alleged his protected activity. He then suggested that Respondent somehow dissuaded him from "participating in proceedings" by offering him an opportunity to work for it as a contractor. He also restated his position that Respondent supplied false or incomplete information to Complainant's DAC report. Complainant further suggested that Respondent was negligent in its actions in correcting the errors. In support of that argument, Complainant stated and cited a number of exhibits as evidence that he had attempted to call attention to the incorrect information and been in "direct contact" with Respondent and the third party responsible for the DAC report as early as 4 May 17. Complainant appeared to submit that Respondent's failure to correct the incorrect information constitutes negligence and adverse action.

In its reply, Respondent argues that Complainant's answer concedes that since it was at most negligent, any action would not have been intentional and therefore not caused by his protected activity. It further argues that it would not constitute adverse action, since the only affirmative action it took was to enter correct information into its system. It finally notes that even if its failure to take steps to correct any inaccurate data was deemed an adverse action, Complainant's answer establishes that he was aware of it no later than 4 May 17, and his OSHA filing as to that alleged protected activity is untimely.

Discussion

Under the Act, an employee subject to an 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. A reporting agency's retention of the same information does not create a continuous violation.⁴

The time for filing a complaint may be tolled for reasons warranted by applicable case law.⁵ 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.⁶

³ 49 U.S.C. § 31105 (2010).

⁴ Citing *Eubanks v. A.M. Express, Inc.*, ARB Case No.08-138 (Sep.24, 2009).

⁵ 29 C.F.R. § 1978.104.

⁶ *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).

The only remaining alleged adverse action in this case relates to the incorrect information in Complainant's DAC report.⁷ I denied Respondent's previous motion to dismiss as to that alleged protected activity because the Bill of Particulars indicated that he may not have been aware of the incorrect information until after 28 Oct 18. However, in his answer to Respondent's current motion, Complainant clearly represents that he was aware of the incorrect information as of 4 May 17, since he maintains that he brought it to Respondent's attention at that time. Given that an Employer's maintenance of the same information in its records does not constitute a continuing adverse action, Complainant was obligated to file his complaint within 180 days of his discovery. He did not do so and his complaint was untimely.⁸

Complainant's complaint is denied in its entirety.

ORDERED this 10th day of February, 2020 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.

⁷ My ruling on timeliness renders moot Respondent's arguments that its actions in regard to DAC information did not constitute protected activity and were not a consequence of any protected activity.

⁸ Complainant appears to suggest that his time period was tolled when Respondent offered to convert him from employee to contractor. However, to any extent that that may have tolled his time, the tolling would've ended when he discovered the illusory nature of that status, which according to his Bill of Particulars was no later than 7 Aug 16.

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, 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).

