



Issue Date: 29 October 2021

OALJ Case No.: 2021-STA-00065
OSHA No.: 4-3750-21-105

In the Matter of:

PATRICK ALSTON,
Complainant,

v.

HH XPRESS LLC,
Respondent.

ORDER DISMISSING COMPLAINT AS UNTIMELY

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105, as amended (STAA), and the regulations published at 29 C.F.R. Part 1978. Specifically, under 20 C.F.R. § 1978.102(a), no person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment.

Respondent HH Xpress, LLC (Employer) fired Patrick Alston (Mr. Alston or Complainant) on or about November 12, 2020. Over seven months later, on July 1, 2021, Mr. Alston filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging he was terminated for reporting violations of the Federal Motor Carrier Safety Regulations. OSHA issued a determination letter on July 21, 2021 dismissing the complaint as untimely. Proceeding *pro se*, Mr. Alston appeals the dismissal.¹ The Office of Administrative Law Judges (OALJ) docketed the above referenced case on August 21, 2021.

On September 22, 2021, I ordered Mr. Alston to submit a written response addressing why this matter should not be dismissed as untimely. Mr. Alston filed Complainant's Motion to Show Cause to Grant Equitable Tolling/Estoppel (Response) on October 12, 2021. In short, Mr. Alston argues that he was misled about his termination and that the 180-day filing deadlines should be equitably tolled due to the coronavirus pandemic. Employer did not file a reply.

¹ When a complainant is *pro se*, the administrative law judge must construe complaints and other documents filed liberally in deference of their lack of training in the law and with a degree of adjudicative latitude. *Wyatt v. Hunt Transport*, ARB No. 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012).

For the reasons discussed herein, I find that Mr. Alston's July 1, 2021 complaint is untimely under the STAA and dismiss this matter.

LEGAL STANDARDS AND ANALYSIS

A. Claim Must Be Filed Within 180 Days of Alleged Violation

To be timely, a complainant must file a STAA retaliation claim within 180 days after an alleged violation occurs or after the date on which the employee became aware of the alleged violation. 49 U.S.C. § 31105(b)(1); 29 C.F.R. § 1978.103(d). The employee has the burden of showing that his complaint was timely filed or, in the absence of timely filing, that equitable tolling of the applicable time limitation provision should occur. 49 U.S.C. §§ 31105(b)(1), 42121(b)(2).

In whistleblower cases, statutes of limitation run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *See, e.g., Rollins v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007 (re-issued)); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 36 (ARB Apr. 30, 2001) (date employer communicates to employee its intent to implement adverse employment decision marks occurrence of violation rather than date employee experiences consequences of decision).

Final and definitive notice is a communication that is decisive or conclusive, *i.e.*, leaving no further chance for action, discussion, or change. *See Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 13-14 (ARB Feb. 28, 2003). Unequivocal notice means the communication is free of misleading possibilities. *Larry v. The Detroit Edison Co.*, 1986-ERA-032, slip op. at 14 (Sec'y Jun. 28, 1991). Subsequent entertaining of a grievance by the employer does not suggest that the earlier decision was in any respect tentative and thereby toll the limitations period, even if the employer expresses willingness to change its prior decision if the grievance is found to be meritorious. *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980).

Mr. Alston worked for Employer as a truck driver, driving a truck provided by Employer. (Response at 2). In his online complaint to OSHA, Mr. Alston alleges that he was terminated on November 12, 2020. Although he argues that he was actively misled regarding future work possibilities, Mr. Alston concedes in his Response that he last worked for Employer on November 12, 2020. (Response at 5). It was on this date that Mr. Alston was ordered to return the commercial vehicle he was driving to Employer.

Mr. Alston attaches to his Response a complaint apparently filed with the National Consumer Complaint Database. (Response at 9). In this complaint, Mr. Alston also asserts that his last day of work for Employer was November 12, 2020. Nowhere does Mr. Alston suggest that his termination became final, definitive, and unequivocal on some later date.

I find that Mr. Alston had final and definitive notice of the alleged discriminatory act on November 12, 2020. On this date, he was terminated by Employer. Multiple filings by Mr. Alston exhibit an awareness of the fact that this was the date of the adverse action allegedly taken against him. Even if there were a suggestion by Employer of potential future employment, I find that this does not undermine the fact that Mr. Alston was unequivocally terminated on November 12, 2020.

As I find that the alleged retaliatory conduct occurred on November 12, 2020, to be timely Mr. Alston's STAA complaint was due May 11, 2021. Mr. Alston filed his complaint with OSHA on July 1, 2021. Therefore, Mr. Alston's complaint is untimely unless equitable tolling applies to extend the 180-day statutory filing deadline.

B. Equitable Tolling

In determining whether the statute of limitations for a whistleblower claim should be extended, the Administrative Review Board has recognized four situations in which equitable tolling applies: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-00010, slip op. at 3-4 (ARB Jan. 28, 2011). The Administrative Review Board has not found these situations to be exclusive, and an inability to satisfy one or more of the four prongs is not necessarily fatal. *Id.* at 4. However, the "restrictions on equitable tolling must be scrupulously observed." *School Dist. Of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).

In analyzing whether or not Employer "actively misled" Complainant, the proper focus is on the actions of Employer and not solely on an interpretation of those actions by Complainant. This is both a subjective and objective inquiry. Thus, to meet this standard for equitable tolling, Employer must have acted or communicated in such a way as to be objectively misleading. *See, e.g., Moldauer v. Canandaigua Wine Co.*, ARB Case No. 04-022, ALJ Case No. 03-SOX-026, 2005 DOL Ad. Rev. Bd. LEXIS 136 (Dec. 30, 2005) (employer does not actively mislead by remaining silent in a severance agreement regarding its position on potential whistleblower claims).

Mr. Alston claims that Employer misled him by suggesting that future employment would be available to him in his hometown area. (Response at 3). However, Mr. Alston does not substantiate this claim with any description or documentation of Employer's communications about the future job opening, stating only that management led him "to believe that they were a compromising company" and provided "false hopes ... about work availability and employment status." (Response at 3, 5).

While Mr. Alston argues that Employer led him to expect future employment with the company, he has not shown that he was unaware of the adverse conduct he complains of on November 12, 2020. Even accepting Mr. Alston's unsubstantiated claims that Employer

represented to him a possibility of future employment, these representations do not rise to the level of objectively misleading conduct with regards to Mr. Alston's termination on November 12, 2020. Nonspecific suggestions of a future position do not affect the cause of action at issue here, namely, Mr. Alston's termination as alleged retaliation for complaints of safety violations and refusal to partake in unsafe work practices.

Mr. Alston next argues that the global Covid-19 pandemic created extraordinary circumstances beyond his control which prevented timely filing. He claims that state and federal shutdowns and restrictions slowed agency response times; that the pandemic caused him to suffer economic and emotional setbacks; and that he faced limited access to Wi-Fi. (Response at 4, 5). In his letter to OALJ requesting a hearing, Mr. Alston also stated that he was restrained from obtaining resources to complete his filings.

While I am sympathetic to the effects of the pandemic, I do not find that the pandemic contributed to Mr. Alston's late filing such that equitable tolling is warranted. I take judicial notice of the fact that the national emergency related to the control of the COVID-19 coronavirus was declared on March 13, 2020. (Presidential Proclamation 9994 of March 13, 2020). Mr. Alston's own submissions show that he submitted a safety complaint to a different governmental agency after this date. In his Response, for example, Mr. Alston includes a complaint that he filed with the Federal Motor Carrier Safety Administration (FMCSA) against a presumably unrelated employer (name is redacted) on September 14, 2020. (Response at 17). This complaint was filed well after the national emergency was declared. The FMCSA complaint demonstrates that Mr. Alston was aware of his options for filing complaints with governmental agencies, *and* was capable of doing so even during the pandemic.² I further am not persuaded by Mr. Alston's argument that the untimely responses by various other agencies related to complaints he filed supports tolling of the statute of limitations here. Thus, in Mr. Alston's case, I do not find that the pandemic created extraordinary circumstances beyond his control to warrant equitable tolling.³

Mr. Alston does not argue that he timely filed his complaint in the wrong forum. Thus, his final argument is that Employer has continued to engage in misconduct by failing to provide rate confirmations for work performed and hours worked. (Response at 5). Mr. Alston attaches a July 9, 2021 letter requesting the load rate confirmations. (Response at 14). It is unclear how information requested *after* his complaint was filed serves to provide the basis for tolling the statute of limitations. Further, it is unclear that Employer had any obligation to supply this information to Mr. Alston. Finally, I do not find Employer's failure to respond to requests for

² To the extent Mr. Alston argues that he was unaware of his rights, the December 13, 2020 acknowledgement letter from FMCSA's Division Administrator advised him (*albeit* in a different matter) of his right to file a complaint with OSHA under the STAA. (Response at 17).

³ To be clear, I acknowledge that in some circumstances it may be appropriate to consider the effects of the pandemic in an analysis of equitable tolling. Here, however, Mr. Alston exhibited an ability to properly file complaints in other jurisdictions during the same time period that he alleges he was precluded from filing a complaint with OSHA. Thus, I find his argument that circumstances related to the pandemic precluded his timely filing disingenuous.

information (either during or after the limitations period) supports a finding that Mr. Alston was lulled into foregoing his right to file a whistleblower complaint.

CONCLUSION

I have considered Mr. Alston's argument and the documents he submitted in their entirety. Even construing the record "liberally in deference" to his unrepresented status, Mr. Alston has not established that equitable tolling should apply. Accordingly, I find that Mr. Alston's complaint was not timely filed. This matter is therefore **DISMISSED**.

SO ORDERED.

JODEEN M. HOBBS
Administrative Law Judge
Washington, DC

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 the administrative law judge's decision.

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. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

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).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/>.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>. If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.