U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 July 2021

In the Matter of:

BARBARA R. CARLISLE,
Pro se Complainant,

v.

JB HUNT TRANSPORTATION,
Respondent.

Case No. 2021-STA-00040

ORDER GRANTING MOTION TO DISMISS

This proceeding arises under the employee-protection provisions of the Surface Transportation & Assistance Act (STAA), 49 U.S.C. § 31105, as amended, 1 and the regulations at 29 C.F.R. Part 1978. Barbara R. Carlisle ("Complainant") seeks damages from JB Hunt Transportation, Inc. ("Respondent") alleging that she was retaliated against in violation of STAA. Complainant filed a complaint alleging a violation of STAA on March 5, 2021 with the Occupational Safety and Health Administration ("OSHA"). On March 22, 2021, OSHA dismissed Complainant's complaint, stating is was untimely as it was filed outside of the 180-day statutory filing period. Complainant appealed to the Office of Administrative Law Judges ("OALJ")

For the reasons below, I grant the Respondent's Motion to Dismiss.

BACKGROUND[1]

Complainant was involved in a motor vehicle accident while employed with Respondent on or about July 15, 2018. Complainant was injured in the accident and sought treatment. Complainant subsequently filed a workers compensation claim in the state of New York and Washington, D.C.[2] The claim in the state of New York was denied and the case in Washington, D.C. is pending as of the date of this order.

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[1] For purposes of this motion, the background section is based on Complainant's pleadings. I accept all the facts as set forth above as true.

[2] There are references to other claims being file in other courts, including the New York State Division of Human Rights and the Department of Transportation, Federal Motor Carrier Safety Administration ("FMCSA").

In her pleading complaint, submitted via email on May 26, 2021, Complainant attached multiple exhibits.[3] Many exhibits pertain to workers' compensation cases filed in New York and Washington D.C. These documents outline Complainant's case against Respondent, including a strong dissatisfaction with Respondent's response to the truck accident, and the outcome of her New York workers' compensation claim, which ultimately was disallowed and appealed. Complainant also submitted various medical reports, pictures of her injuries, and other documentation. Many of these documents have handwriting on them, presumably from Complainant. Notable to the issue before me are the following:

- Exhibit A in her pleading complaint is a report, described by Complainant as a Tenstreet Search, indicating that Complainant was in a motor vehicle accident on July 15, 2018, but had subsequently resigned, was not terminated, and was eligible for rehire. Complainant first became aware of this report on October 9, 2020. According to a notation at the top of the page, there was an "end date of 3/20, driver is supposed to be getting corrected." In her response to the Motion, Claimant provided the Tenstreet Search, a February 4, 2021 screenshot. This document was submitted numerous times in various filings.
- An email chain indicating that a complaint with the FMCSA may have been filed on October 17, 2020.
- An email chain indicating that an OSHA complaint may have been filed on October 17, 2020.

PROCEDURAL BACKGROUND

On July 9, 2021, Respondent, through counsel, filed a Motion to Dismiss the Complaint as Untimely ("Motion") and a Motion to Stay Discovery Pending Ruling on Motion to Dismiss in the above matter. In support of its Motion, Respondent argued:

1. Complainant's complaint should be dismissed as untimely because it was not filed within the 180-day statute of limitations period; and,
2. Complainant's complaint should be dismissed because she has not alleged that she engaged in any cognizable protected activity.

On July 12, 2021, an Order to Show Cause was issued, directing Complainant to show cause why Respondent's Motion to Dismiss should not be granted by July 23, 2021.[4] Complainant responded on July 22, 2021, and attached numerous documents in support of her opposition to the Motion to Dismiss.

MOTION TO DISMISS

The regulations at 29 C.F.R. § 18.70(c), state, in relevant part:

[3] Complainant has also filed multiple documents and correspondence since her pleading. As Complainant is *pro se*, I have reviewed all of them while considering the Motion.

[4] Respondent's Motion to Stay Discovery was also granted pending disposition of the Motion to Dismiss.

> A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.

I am also cognizant of Complainant's *pro se* status. I am mindful of the duty to remain impartial and refrain from becoming an advocate for a *pro se* litigant.[5] I am equally mindful that "we construe complaints and papers filed by *pro se* [complainants] liberally in deference to their lack of training in the law and with a degree of adjudicative latitude."[6] An ALJ "has a responsibility to assist *pro se* litigants by liberally interpreting their complaints and holding them to lesser standards than legal counsel in procedural matters."[7]

DISCUSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[8]

Under the regulations implementing the STAA, found at 29 C.F.R. Part 1978, a person alleging discrimination must file a complaint with OSHA not later than 180 days after any alleged adverse action.[9] Because a major purpose of the 180-day period is to allow the Secretary to decline to entertain complaints that have become stale, complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely.[10] However, the STAA limitation period for filing an administrative complaint may be subject to equitable tolling.[11] Recognized bases for equitable tolling include: (1) respondent has actively misled the complainant regarding the cause of action; (2) complainant has in some extraordinary way been prevented from filing his or her action; (3) complainant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) respondent's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his or her rights.[12]

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[5] *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-16 (ARB May 8, 2017).
[6] *Ubinger,* ARB No. 07-083, ALJ No. 2007-SOX-36.
[7] *Zavaleta*, *supra*. In consideration of Complainant's pro se status, I have also considered all of the documents outside of the pleadings submitted by Complainant when analyzing the Motion.
[8] 49 U.S.C.A. § 31105(a).
[9] 29 C.F.R. § 1978.103(d).
[10] *Wyatt v. J.B. Hunt Transport, Inc.*, ARB No. 11-039, OALJ No. 2010-STA-069 (September 21, 2012).
[11] 29 C.F.R. § 1978.103(d); see *Hicks v. Colonial Motor Freight Lines*, 84-STA-20 (Sec'y Dec. 10, 1985), slip op. at 7-8; cf. *Larry v. The Detroit Edison Co., Inc.*, 86-ETA-32 (Sec'y June 29, 1991), slip op. at 11-19, aff'd, No. 91-3737 (6th Cir. Apr. 17, 1992).
[12] *Turin v. AmTrust Financial Services, Inc.*, ARB No. 11-062, ALJ No. 2010-SOX-00018, slip op. at 8 (March 29, 2013).

Turning first to the issue of whether equitable tolling applies to the case before me Complainant makes no cognizable argument for equitable tolling and I am unable to find one independently. As there is no argument that Respondent actively misled Complainant and I can find no evidence to support this, I do not find equitable tolling is warranted under this recognized basis. I am aware, and Complainant has made this point very clear, she is very unsatisfied with Respondent's response to her July 2018 motor vehicle accident and subsequent handling of her workers compensation claim. However, I can ascertain no argument or evidence that Respondent actively misled Complainant from pursuing a whistleblower complaint.

Further, it cannot be said that Complainant has been prevented from filing his or her action; Complainant has pursued her case in several different courts from the beginning, focusing first on pursuing a workers compensation claim in New York and then in Washington, D.C. as well as other courts and agencies. A review of the documents submitted in Complainant's pleading complaint and other filings, shows that Complainant has not raised the precise statutory claim at issue before the undersigned, but instead pursued primarily workers' compensation benefits. Finally, Complainant does not argue that she has been lulled into foregoing attempts to vindicate her rights. As stated previously, Complainant has diligently pursued several actions. Thus, there is no basis for equitable tolling before the undersigned.

It is uncontested that Complainant filed an action with OSHA on March 5, 2021, alleging Respondent retaliated against her in violation of STA. Respondent, in argument, states:

> Ms. Carlisle filed her Complaint with OSHA on March 5, 2021, which means that to be timely, all of the alleged adverse employment actions had to have occurred on or after September 6, 2020. In reviewing both the May 26, 2021 "Pleading Complaint" email in combination with the summary of Ms. Carlisle's allegations as provided by the OHSA investigator in its March 5, 2021 letter dismissing her claim, all of the alleged adverse actions occurred long before Ms. Carlisle filed her Complaint. Specifically: (1) April 15, 2019 when JB Hunt purportedly denied Ms. Carlisle's workers' compensation benefits, (2) on March 20, 2020, when JB Hunt purportedly terminated Ms. Carlisle's employment, and (3) March 2020 when JB Hunt purportedly submitted fraudulent and incorrect information about Complainant's employment history to the FMCSA. Because all 5 of these alleged wrongful acts occurred well before September 6, 2020, Complainant's March 5, 2021 Complaint to OSHA is untimely and this action should be dismissed in its entirety.

Respondent's Motion at 4-5.

I agree with Respondent. Pertaining to the March 5, 2021 OSHA filing, after reviewing the arguments, and taking the pleadings, evidence and statements made by Complainant in a light most favorable to her, I conclude that the March 5, 2021 claim is untimely. The accident occurred in 2018 and Complainant ceased being employed in March of 2020. Complainant filed her OSHA action approximately one year later, on March 5, 2021. Even if I assume, for purposes of this motion, that Respondent retaliated against Complainant in or around the accident, in April of 2019

when Respondent denied Complainant's workers' compensation benefits, and in March of 2020 when Complainant's employment ceased with Respondent, Complainant's complaint is untimely.

I turn next to the October 17, 2020 FMCSA and OSHA filing submitted in response to Respondent's Motion. First, I do not have any authority over the FMCSA and cannot comment on the allegations submitted. Moreover, I note before me is the appeal of the OSHA determination which arose out of Complainant's March 5, 2021 complaint. I am unware of the outcome of the October 17, 2021 filing, and I cannot ascertain if there has been an OSHA investigation or that is has been properly appealed.

I will, however, address whether the October 9, 2020 discovery of the Tenstreet report, and the content of that report, render her complaint timely. In her pleadings, and in particular with the Tenstreet report, Complainant takes issue with the explanation of her separation with Employer, which occurred sometime in March 2020. Complainant argues that she was retaliated against, did not leave voluntarily, and that the information in Tenstreet is wrong. As to Complainant's separation, the Tenstreet report indicates that the Complainant resigned and was not terminated. However, this discovery is not a retaliatory act by itself, or stated another way, the information on the Tenstreet report, even if taken in a light most favorable to the Complainant, is not an adverse action which would make the March 5, 2021 filing timely. Indeed, there is nothing negative, in the report, even if it is mistaken in the description of the separation as voluntary. Moreover, the ARB has noted that the retention of prior information by Tenstreet does not create a continuing violation.[13]

Taking into consideration the pleadings and documents submitted, even taking the facts and evidence in a light most favorable to the Complainant, her claim was untimely filed.

CONCLUSION

For the foregoing reasons, Respondents Motion to Dismiss is GRANTED.

SO ORDERED.

HEATHER C. LESLIE
Administrative Law Judge
Washington, DC

[13] *Budri v. Firstfleet, Inc*., ARB No. 2018-0055, OALJ No. 2018-STA-71 (25 Mar 19), citing *Eubanks v. A.M. Express, Inc*., ARB Case No.08-138 (Sep.24, 2009) (As explained by the ALJ in her R. D. & O., "the last discriminatory act alleged occurred outside of the limitations period, and [the] Complainant's attempt to rely upon potential present effects from that past violation is of no avail.")

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within forty (40) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 6.34. The Petition must refer to the specific findings of fact, conclusions of law, or order at issue. *See* 29 C.F.R. § 6.34.

When a Petition is timely filed with the Board, the administrative law judge's decision is inoperative until the Board either (1) declines to review the administrative law judge's decision, or (2) issues an order affirming the decision. *See* 29 C.F.R. § 6.33(b)(1).

At the time you file the Petition with the Board, you must serve it on the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. *See* 29 C.F.R. § 6.34.

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.

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. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) 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.