

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, DC

Issue Date: 06 November 2023

OALJ Case No: 2023-STA-00090

OSHA Case No.: 3-0480-19-007

In the Matter of:

GREGORY LEE WHITTINGTON,

Complainant,

v.

SYNERGY SAND,

Respondent.

ORDER DISMISSING APPEAL FOR FAILURE TO PROSECUTE

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (“STAA”), 49 U.S.C. § 31105, and the regulations promulgated at 29 C.F.R. Part 1978.

On or about December 14, 2018, Complainant filed a complaint with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) alleging Respondent terminated his employment on or about December 12, 2018 after he reported that drivers were being forced to operate unsafe tractor trailers. Without an explanation for the delay, an OSHA assistant regional administrator dismissed the complaint by letter dated April 26, 2023.

On behalf of the Complainant, Kirk Auvil, Esq. of The Employment Law Center, PLLC, appealed the dismissal and the Office of Administrative Law Judges (“OALJ”) docketed the case on May 26, 2023.¹ It is not yet scheduled for hearing.

¹ Complainant also alleged Respondent violated his rights under Section 11(c) of the Occupational Safety and Health (“OSH”) Act. The OSH Act does not create any private right of action and there is no provision in the OSH Act or its implementing regulations for a hearing on a Section 11(c) complaint before an administrative law judge. *See Taylor v. Brighton Corp.*, 616 F.2d 256, 260-64 (6th Cir. 1980) (noting that the Senate abandoned an earlier version of the OSH Act, which would have provided a Section 11(c) complainant with a right to an administrative hearing similar to that provided under Sarbanes-Oxley, in favor of the final version which vests the Secretary of Labor with exclusive authority to determine whether to prosecute a complaint of discrimination prohibited by the OSH Act). Instead, Employee complaints of discrimination under Section 11(c) are filed with the Secretary of Labor who may then bring an action in a United States district court. *See* 29 U.S.C.A. §

On October 13, 2023, Attorney Auvil filed *Motion To Withdraw As Counsel* (“Motion to Withdraw”), requesting to withdraw as Complainant’s counsel because Complainant has been uncooperative and not responded to numerous attempts to discuss the case since the appeal was filed.²

Given that no hearing had been scheduled and the parties have apparently not yet engaged in discovery, and that Complainant had been informed of the Motion, I found that the withdrawal of Attorney Auvil as Complainant’s counsel would not cause undue delay or prejudice the rights of any party. For this reason, I found that withdrawal was appropriate under 29 C.F.R. § 18.22(e). Accordingly, on October 19, 2023, I issued *Order Granting Motion To Withdraw* (“Order”), excusing Kirk Auvil and The Employment Law Center, PLLC as counsel of record for the Complainant in this matter.³

The October 19, 2023 Order also gave Mr. Whittington ten (10) calendar days from the date of this Order to notify the tribunal of the status of his complaint, to include whether he was now representing himself in this matter, or if he had or was seeking a new attorney to represent him, and, if seeking a new representative, what steps he had undertaken to obtain such counsel.⁴ Any newly retained counsel was instructed to file a Notice of Appearance within thirty (30) days of this Order. The Order also advised Complainant that a failure to respond may result in his hearing request being dismissed for a failure to prosecute, without additional notice.

The October 29, 2023 deadline for responding to the Tribunal’s October 19, 2023 Order has expired. No attorney has entered an appearance on behalf of Complainant and Complainant has not filed a response to the Order, asked for an extension of time to do so, or otherwise requested appropriate relief.⁵ At this time, it appears Complainant does not want to proceed with his case.

660(c)(2); *Reich v. Cambridgeport Air Sys.*, 26 F.3d 1187 (1st Cir. 1994). Since alleged violations of the OSH Act’s anti-discrimination provisions are not subject to an administrative hearing, OALJ has no authority to review a Section 11(c) claim and declined to docket that part of Complainant’s appeal.

² As the service sheet did not reflect that the *Motion To Withdraw* was sent to Complainant, a member of my staff contacted Attorney Auvil, who confirmed it was mailed to Complainant on October 16, 2023.

³ The Order was served on Complainant at the email address used by Complainant to file his initial complaint with OSHA.

⁴ Given the difficulties in receiving mail at OALJ’s offices, Mr. Whittington was advised to file documents with the undersigned using the email address: OALJ-Headquarters-DC@dol.gov serving a copy on counsel for the Respondent. Questions could be directed to law clerk Tessa Zavislan at Zavislan.tessa.m@dol.gov.

⁵ 29 C.F.R. § 18.33(d).

Discussion

Neither the STAA nor its implementing regulations specifically address a party's failure to prosecute its case. However, the OALJ Rules of Practice and Procedure grant the tribunal "all powers necessary to conduct fair and impartial proceedings" including the power to "[t]erminate proceedings through dismissal or remand when not inconsistent with statute, regulation, or executive order." 29 C.F.R. § 18.12(b)(7).

When determining whether dismissal is warranted, there are several factors the ALJ may consider, including: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a sanction for failure to cooperate or non-compliance, and (5) whether the efficacy of lesser sanctions were considered. *See Ho v. Air Wisconsin Airlines*, ARB No. 2020-0027, ALJ No. 2019-AIR-00009, slip op. at 4 (ARB June 30, 2021) (citing *Howick v. Campbell-Ewald Co.*, ARB No. 2004-0065, ALJ No. 2004-STA-00007, slip op. at 8 (Nov. 30, 2004)). I now consider each of the *Ho* factors.

Prejudice to the Other Party

Complainant's apparent refusal to communicate with his then retained counsel and participate in discovery has prejudiced Respondent, who appears not to have received even the most basic discovery responses or any documents from Complainant, to include initial disclosures required by 29 C.F.R. § 18.50(c)(1). This factor weighs in favor of dismissal.

The Amount of Interference with the Judicial Process

The public's interest in expeditious resolution of litigation always favors dismissal. *Sec. & Exch. Comm'n v. Wu*, No. 11-CV-04988-JSW, 2016 WL 4943000, slip op. at 5 (citing *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002); *see generally* 29 C.F.R. § 18.10 ("[OALJ procedural rules] should be construed to secure the just, speedy, and inexpensive determination of every proceeding."). When a tribunal's order is ignored, the public's interest in expeditious resolution of litigation and the tribunal's need to manage its docket favors default. *Wu*, No. 11-CV-04988-JSW, 2016 WL 4943000, slip op. at 7 (citing *Adrianna Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990)).

Complainant was to respond in writing to the Tribunal's October 19, 2023 by October 29, 2023. He has not. Litigants must comply with a presiding judge's orders and cooperate in the pre-hearing process so that cases can move forward expeditiously and efficiently. That has not happened here, and this factor weighs heavily in favor of dismissal.

The Culpability, Willfulness, Bad Faith or Fault of the Litigant

Disobedient conduct “not outside the control of the litigant” is sufficient to show willfulness, bad faith, or fault warranting default. *Wu*, No. 11-CV-04988-JSW, 2016 WL 4943000, slip op. at 8 (citing *Stars’ Desert Inn Hotel & Country Club v. Hwang*, 105 F.3d 521, 525 (9th Cir. 1997)). To date, Complainant has not provided an explanation either for his failure to communicate with his then retained counsel or respond to the Tribunal’s order, weighing in favor of dismissal.

Whether the Party Was Warned in Advance That Dismissal of the Action Could Be a Sanction for Failure to Cooperate or Non-Compliance

As detailed above, Complainant was specifically warned that failure to comply with my order could result in the dismissal of his claim. This factor weighs heavily in favor of dismissal.

Whether the Efficacy of Lesser Sanctions Was Considered

I have considered the lesser sanction of proceeding to hearing but with limitations on the evidence Complainant could introduce. However, this would require Respondent to go to hearing with incomplete information through no fault of their own, which would not further the “just, speedy, and inexpensive determination of [this] proceeding.” 29 C.F.R. § 18.10(a).

Additionally, it has been nearly five years since Complainant started this case by filing his OSHA complaint on December 14, 2018, and it would be unreasonable to delay the proceeding even further given Complainant’s failure to comply with the Tribunal’s Order.⁶ Having considered the lesser sanctions, I find nothing short of dismissal with prejudice is appropriate.

The Public Policy Favoring Disposition of Cases on Their Merits

This factor weighs against dismissal.

⁶ Although I have considered the availability of less drastic sanctions, at least one circuit court has implied that warning a party of the possibility of terminating the case for noncompliance with a court order can independently satisfy this requirement. *See Malone v. USPS*, 833 F.2d 128, 132 (9th Cir. 1987) (“[T]he case law suggests that warning a plaintiff that failure to obey a court order will result in dismissal can suffice to meet the “consideration of alternatives” requirement.”) (collecting cases) (interpreting Fed. R. Civ. P. 37(b)(2)(C)).

Order

The tribunal finds Complainant has failed to prosecute his case. Accordingly, pursuant to 29 C.F.R. §§ 18.12(b) and 18.57(b) and 29 C.F.R. § 1978.115, this matter is DISMISSED with prejudice.

SO ORDERED:

STEPHEN R. HENLEY
Chief 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 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).

FILING AND SERVICE OF AN APPEAL

1. Use of EFS System: The Board’s Electronic Filing and Service (EFS) system allows parties to initiate appeals electronically, file briefs and motions electronically, receive electronic service of Board issuances and documents filed by other parties, and check the status of appeals via an Internet-accessible interface. Use of the EFS system is free of charge to all users. To file an appeal using the EFS System go to <https://efile.dol.gov>. All filers are required to comply with the Board’s rules of practice and procedure found in 29 C.F.R. Part 26, which can be accessed at <https://www.ecfr.gov/current/title-29/subtitle-A/part-26>.

A. Attorneys and Lay Representatives: Use of the EFS system is **mandatory for all attorneys and lay representatives** for all filings and all service related to cases filed with the Board, absent an exemption granted in advance for good cause shown. 29 C.F.R. § 26.3(a)(1), (2).

B. Self-Represented Parties: Use of the EFS system is **strongly encouraged for all self-represented parties** with respect to all filings with the Board and service upon all other parties. Using the EFS system provides the benefit of built-in service on all other parties to the case. Without the use of EFS, a party is required to not only file its documents with the Board but also to serve copies of all filings on every other party. Using the EFS system saves litigants the time and expense of the required service step in the process, as the system completes all required service automatically. Upon a party’s proper use of the EFS system, no duplicate paper or fax filings are required.

Self-represented parties who choose not to use the EFS system must file by mail or by personal or commercial delivery all pleadings, including briefs, appendices, motions, and other supporting documentation, directed to:

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

2. EFS Registration and Duty to Designate E-mail Address for Service

To use the Board’s EFS system, a party must have a validated user account. To create a validated EFS user account, a party must register and designate a valid e-mail address by going to <https://efile.dol.gov>, select the button to “Create Account,” and proceed through the registration process. If the party already has an account, they may simply use the option to “Sign In.”

Once a valid EFS account and profile has been created, the party may file a petition for review through the EFS system by selecting “eFile & eService with the Administrative Review Board” from the main dashboard, and selecting the button “File a New Appeal - ARB.” In order for any other party (other than the EFS user who filed the appeal) to access the appeal, the party must submit an access request. To submit an access request, parties must log into the EFS System, select “eFile & eService with the Administrative Review Board,” select the button “Request Access to Appeals,” search for and select the appeal the party is requesting access to, answer the questions as prompted, and click the button “Submit to DOL.”

Additional information regarding registration for access to and use of the EFS system, including for parties responding to a filed appeal, as well as step-by-step User Guides, answers to frequently asked questions (FAQs), video tutorials and contact information for login.gov and EFS support can be found under the “Support” tab at <https://efile.dol.gov>.

3. Effective Time of Filings

Any electronic filing transmitted to the Board through the EFS e-File system or via an authorized designated e-Mail address by 11:59:59 Eastern Time shall be deemed to be filed on the date of transmission.

4. Service of Filings

A. Service by Parties

Service on Registered EFS Users: Service upon registered EFS users is accomplished automatically by the EFS system.

Service on Other Parties or Participants: Service upon a party that is not a registered EFS user must be accomplished through any other method of service authorized under applicable rule or law.

B. 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 (unless otherwise required by law). If a party unrepresented by counsel files their appeal by regular mail, that party will be served with Board-issued documents by regular mail. Any party may opt into e-service at any time by registering for an EFS account as directed above, even if they initially filed their appeal by regular mail or delivery.

5. Proof of Service

Every party is required to prepare and file a certificate of service with all filings. The certificate of service must identify what was served, upon whom, and manner of service. Although electronic filing of any document through the EFS system will constitute service of that document on all EFS-registered parties, electronic filing of a certificate of service through the EFS system is still required. **Non EFS-registered parties must be served using other means authorized by law or rule.**

6. Inquiries and Correspondence

After an appeal is filed, all inquiries and correspondence related to filings should be directed to the Office of the Clerk of the Appellate Boards by telephone at 202-693-6300 or by fax at 202-513-6832. Other inquiries or questions may be directed to the Board at (202) 693-6200 or ARB-Correspondence@dol.gov.