

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

Issue Date: 09 February 2024

OALJ Case No: 2024-STA-00036
OSHA Case No.: 301001991

In the Matter of:

DAVID PAMPERIN,
Complainant,

v.

VALLEY EXPRESS LLC,
Respondent.

ORDER GRANTING REQUEST TO WITHDRAW APPEAL

On or about July 28, 2022, Complainant filed a complaint with the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) alleging he was terminated on July 21, 2022 after raising concerns about mechanical issues with trucks and employee safety, a violation of 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. OSHA dismissed the complaint by letter dated February 23, 2023. Complainant, representing himself, appealed the dismissal by requesting “to move forward with the STAA portion of my complaint” and the Office of Administrative Law Judges (“OALJ”) docketed the above-referenced case on February 24, 2023. However, due to a miscommunication among OALJ staff, a *Notice of Docketing* (“NOD”) was not issued until January 12, 2024.

As some eighteen months had elapsed since he filed his initial complaint with OSHA in July 2022, the NOD requested Complainant confirm whether he was still interested in pursuing the case. Accordingly, and given his self-represented status, the NOD included an *Order Requiring Mootness Certification* (“Order”), giving Complainant 10 days to notify the tribunal that he wanted to continue to prosecute his case.¹ Complainant was specifically advised that the tribunal would treat a

¹ See 29 C.F.R. § 1978.111(c).

failure to respond as a request to withdraw the appeal.² Complainant was served a copy of the NOD at the email address he used to initially file his appeal with OALJ.³

To date, Complainant has not filed a response to the Order or requested an extension of time to do so or communicated with the tribunal in any way. Accordingly, and consistent with the January 12, 2024 Order, the tribunal finds Complainant's failure to respond as a request to withdraw his objections to the OSHA findings.

Discussion

The rules governing withdrawal of STAA appeals provide that “[a]t any time before the . . . findings and/or preliminary order become final, a party may withdraw objections to the . . . findings and/or preliminary order by filing a written withdrawal” with the administrative law judge, who shall then determine whether to affirm any portion of the findings or preliminary order or approve the withdrawal. 29 C.F.R. § 1978.111(c).

As no final decision has been issued in this matter, Complainant's request to withdraw his objections is hereby approved.⁴ Consistent with the regulations, the

² Complainant was directed to file the mootness check with the tribunal by email at OALJ-Headquarters-DC@dol.gov and that questions could be directed to law clerk Tessa Zavislan at Zavislan.tessa.m@dol.gov.

³ To be clear, the directive was not predicated on the type of mandatory claims-processing rule discouraged by the ARB in *Moreb v. Kery, Inc.*, ARB No. 2023-00048 (ARB Dec. 14, 2023) but the tribunal's inherent authority to control and manage its own docket and preserve the efficiency of the judicial process. *See, e.g., G. Heilman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989).

⁴ As an alternative basis to dismiss, the tribunal finds Complainant has failed to prosecute his case. While the STAA nor its implementing regulations specifically address a party's failure to prosecute its case, 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. Given the delay in this case rests with OALJ, this factor weighs against dismissal.

February 23, 2023 Findings Determination becomes the final order of the Secretary. The above-captioned matter is hereby DISMISSED.

SO ORDERED.

STEPHEN R. HENLEY

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 January 12, 2024 by January 23, 2024. 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*, 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 the Tribunal 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. 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 eighteen months since Complainant started this case by filing his OSHA complaint on July 28, 2022, and it would be unreasonable to delay the proceeding even further given Complainant's failure to comply with the Tribunal's Order. 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.

Accordingly, if on appellate review, a court finds error in this tribunals' determination that Complainant has withdrawn his appeal, the tribunal further finds that Complainant has failed to prosecute his case and, 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.

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.