



Issue Date: 06 June 2019

Case Nos.: 2018-SOX-00035; 2018-SWD-00003
OSHA Nos.: 5-2330-18-004; 5-2330-18-006

In the Matter of:

PAUL SIMKUS,
Complainant,

v.

**UNITED AIRLINES, INC.,
AND A&E SERVICES,**
Respondents.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the Sarbanes-Oxley Act of 2002, as amended (“SOX”), codified at 18 U.S.C. § 1514A, and its implementing regulations at 29 C.F.R. Part 1980, and under the Solid Waste Disposal Act (“SWD”), codified at 42 U.S.C. § 6971, and its implementing regulations at 29 C.F.R. Part 24. Respondent United Airlines filed a Motion to Dismiss and Temporarily Stay Discovery (“Motion” or “Motion to Dismiss”) in this matter on the grounds that Complainant’s complaint was untimely filed.¹ Alternatively, Respondent United Airlines moved to dismiss the complaint as time-barred and precluded under the doctrine of collateral estoppel.

Procedural History

Mr. Simkus filed his complaint with the Occupational Safety and Health Administration (“OSHA”) on October 12, 2017. Secretary’s Findings.² On May 14, 2018, OSHA issued the Secretary’s Findings in this matter. *Id.* The Secretary’s Findings dismissed the complaint, explaining that Claimant did not raise a new claim of retaliation that had not already been addressed in his prior SOX complaints. The Secretary’s Findings notified the parties that they had “30 days from the receipt of these Findings to file objections for the SOX complaint and request a hearing before an Administrative Law Judge (ALJ).” *Id.*

¹ I granted Respondent United Airlines’ Motion to Stay Discovery in my October 16, 2018 Order. Accordingly, this Decision and Order addresses only the Motion to Dismiss.

² Pages unnumbered in original.

Discussion

A. Timeliness of Objection

Respondent United Airlines argues that Mr. Simkus's complaint should be dismissed as untimely. Motion at 1. When calculating timeliness, Respondent United Airlines appears to rely on the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges ("OALJ Rules"), codified at 29 C.F.R. Part 18. *See* Motion at 7 (noting the date that Mr. Simkus's appeal was docketed). Unlike the OALJ Rules, however, SOX specifies that "[t]he date of the postmark. . . is considered the date of filing [of the objection]." 29 C.F.R. § 1980.106(a). The OALJ rules apply only "in situations not addressed in the governing regulation." 29 C.F.R. § 18.10. Because the SOX regulation governs the method of filing an objection to Secretary's Findings with the OALJ, its provisions apply here.

Accordingly, I find that Mr. Simkus filed his Objection to Secretary's Findings & Request for a Hearing ("Objection") on June 19, 2018, based on its postmark date.³ *See* December 31, 2018 Complainant's Response and Motion to Dismiss Respondent's Motion to Dismiss ("Response") at Ex. A.

The regulation allows the parties "30 days of *receipt* of the [Secretary's Findings]" to file an objection or appeal with the OALJ. 29 C.F.R. § 1980.106(a) (emphasis added); *see* Secretary's Findings. Respondent United Airlines states that it holds a good faith belief that Mr. Simkus received the Secretary's Findings by email on May 14, 2018. Motion at 7, n. 7. In support of this belief, Respondent United Airlines states that it received the Secretary's Findings by email on May 14, 2018, and asserts that Mr. Simkus also "corresponded with OSHA and its investigators via e-mail during the course of the underlying investigation." *Id.*

Mr. Simkus states that he received the Secretary's Findings "on May 22, 2018" by Certified U.S. Mail. Response at 2. The parties do not dispute that Mr. Simkus received the Secretary's Findings by mail on that day. *See* Motion at 6; Response at 2. Nonetheless, Respondent United Airlines posits that Mr. Simkus "may well have received notice of the Secretary's dismissal via electronic mail on the same date as United, May 14, 2018." Motion at 7, n.7. The date on which Mr. Simkus first received the Secretary's Findings is outcome determinative as to the timeliness of this appeal.

If Mr. Simkus received the Secretary's Findings by email on May 14, 2018, a timely appeal must have been filed within 30 days thereafter, by June 13, 2018. If he did not receive the Secretary's Findings until May 22, 2018, a timely appeal must have been filed within 30 days

³ Respondent United Airlines notes that Mr. Simkus's Objection does "not indicate that [it was] even served upon the OALJ," and requests that Mr. Simkus "be required to provide proof of service upon the OALJ to establish the timeliness of his Complaints." Motion at 7, n.6. Although I find, as explained below, that Mr. Simkus failed to timely respond to the Motion to Dismiss, I note that his untimely Response provided evidence that he mailed his Objection to the OALJ on June 19, 2018. *See* Response at Ex. A. While as explained below I find Complainant's Response untimely and thus find Respondent United Airlines' Motion to Dismiss unopposed, under the circumstances, including the fact that Mr. Simkus is a self-represented litigant, I consider it appropriate to consider the evidence that Mr. Simkus mailed his Objection to the OALJ on June 19, 2018, for the limited purpose of determining whether his Objection was timely.

thereafter, by June 21, 2018.⁴ While I recognize the possibility that Mr. Simkus received the Secretary's Findings on May 14, 2018, on this record I have insufficient evidence to make such a finding. As there is no dispute that Mr. Simkus received the Secretary's Findings on May 22, 2018, I find that Mr. Simkus's June 19, 2018 filing of his Objection was timely.

B. Failure to Respond

As outlined above, I have found that Mr. Simkus timely filed his Objection of the Secretary's Findings. I nevertheless find good cause to grant Respondent United Airlines' Motion to Dismiss as unopposed because Mr. Simkus did not timely file a response to the Motion to Dismiss, despite having been given additional time to do so.

Respondent United Airlines filed its Motion to Dismiss on August 21, 2018. The OALJ Rules provide that:

[a] party to the proceeding may file an opposition or other response to the motion within 14 days after the motion is served. . . . *Failure to file an opposition or response within 14 days after the motion is served may result in the requested relief being granted.* Unless the judge directs otherwise, no further reply is permitted and no oral argument will be heard prior to hearing.

29 C.F.R. § 18.33(d) (emphasis added). As of October 16, 2018, 56 days after Respondent United Airlines first filed its Motion to Dismiss, Mr. Simkus had not filed any opposition or other response to Respondent's Motion. Accordingly, I issued an Order requiring, in part, that Mr. Simkus file a response to the Motion to Dismiss within 14 days, if at all. *See* October 16, 2018 Order Requesting Response from Complainant.

On November 1, 2018, Mr. Simkus filed a Motion to Request Additional Time to Respond ("Request for Extension"), in lieu of a response to the Motion to Dismiss. Mr. Simkus requested an additional 30 to 60 days "to file a proper response. . . ." Request for Extension at 2.

On November 27, 2018, I granted Mr. Simkus's request in part by allowing him an additional 14 days from November 27, 2018, to file a response to the Motion to Dismiss. Even if I extend that deadline by three days after service by mail, pursuant to 29 C.F.R. § 18.32(c), the deadline for Mr. Simkus to file his response to the Motion to Dismiss was no later than December 14, 2018, a full 115 days after Respondent United Airlines first filed its Motion to Dismiss.

Despite having been given additional time to respond to Respondent's Motion to Dismiss, Mr. Simkus failed to file a timely response. Moreover, Mr. Simkus submitted a Certificate of Service with his Response purporting that it was timely. The Certificate of

⁴ As the regulations are silent, the OALJ Rules guide the computation and extension of time in this matter for the filing of Complainant's Objection. Additionally, Complainant does not benefit from a three-day extension of time, because he was required to act within 30 days after *receipt* of the Secretary's Findings, not after its *service*. *See* 29 C.F.R. 18.32(c); *compare* 29 C.F.R. § 18.30(a)(2)(ii)(C),(E), *with* 29 C.F.R. § 1980.106(a).

Service, however, was contradicted by the postmark on the envelope in which his untimely response was received.⁵ Under the circumstances, I find good cause to grant Respondent's Motion to Dismiss as unopposed and to dismiss the complaint with prejudice.

ORDER

Based on the foregoing, Respondent United Airlines' Motion to Dismiss is **GRANTED** as unopposed. Accordingly, Mr. Simkus's complaint in this matter (2018-SOX-00035 and 2018-SWD-00003) is **DISMISSED WITH PREJUDICE**.⁶

SO ORDERED.

PAUL R. ALMANZA

Associate Chief Administrative Law Judge

⁵ I did not receive a filing from Mr. Simkus until December 31, 2018. *See* Complainant's Response and Motion to Dismiss Respondent's Motion to Dismiss Complainant's Appeal for a Hearing as Untimely Filed ("Response"). The Certificate of Service prepared by Mr. Simkus states that he served his Response "on or about December 14, 2018." Response at 4. I find this statement to be not credible and in contradiction with the postmark, dated December 29, 2018, and labelled "Mon – 31 Dec 10:30A Priority Overnight." *See* FedEx Envelope in which Response arrived at OALJ. Regardless of when Mr. Simkus mailed his Response, it was not received by the docket clerk, and thus not filed, until December 31, 2018.

⁶ While Respondent A&E Services did not make a filing concerning Respondent United Airlines' Motion to Dismiss, that Motion to Dismiss sought a dismissal of the entire complaint, in other words, a dismissal of the action against both Respondent United Airlines and Respondent A&E Services. Accordingly, this Decision and Order dismisses the entire complaint.