

2020 DOL AD. REV. BD. LEXIS 54

United States Department of Labor Administrative Review Board

March 24, 2020

ARB CASE NO. 2018-0071; ALJ CASE NO. 2018-FRS-00021

Knowledger_Mosaic_POC

Reporter

2020 DOL AD. REV. BD. LEXIS 54

**In the Matter of: JASON D. PRIVLER, COMPLAINANT, v. CSX
TRANSPORATION, INC., RESPONDENT**

Core Terms

complaint, has, was, slip opinion, equitable tolling, limitations period, filing deadline, statutory claim, wrong forum, untimeliness, transmittal, equitable, terminate

Counsel

For the Complainant: Jason D. Privler; pro se; Albany, New York; For the Respondent: Joseph C. Devine, Esq.; Samuel E. Endicott, Esq.; Baker & Hostetler, LLP; Columbus, Ohio

Panel: Thomas H. Burrell; Heather C. Leslie; James D. McGinley

Opinion By: Thomas H. Burrell, Acting Chief Administrative Appeals Judge, Heather C. Leslie and James D. McGinley, Administrative Appeals Judges.

Opinion

DECISION AND ORDER

PER CURIAM. This case arises from a complaint of discrimination filed under the Federal Railroad Safety Act (FRSA). 49 U.S.C. § 20109 (2008), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. 100-53, and as implemented by 29 C.F.R. Part 1982 (2019) and 29 C.F.R. Part 18 (2019), Subpart A.

Jason Privler (Complainant) was employed by CSX Transportation, Inc. (CSX or Respondent). Complainant filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) on October 24, 2017. He alleged that the Respondent violated the FRSA by terminating him in retaliation for his stated refusal to be trained with other employees who had flagrantly and routinely violated Federal Railroad Administration rules and regulations in regards to safety and procedure. Following an investigation, OSHA dismissed the complaint as time barred on November 3, 2017. Complainant objected to OSHA's determination and requested a hearing with the Office of Administrative Law Judges (OALJ).

On May 10, 2018, Respondent filed a Motion to Dismiss, with exhibits, on the basis of untimeliness. Complainant filed objections to Respondent's Motion to Dismiss on August 3, 2018. After considering the Respondent's Motion to Dismiss and Complainant's objections, a Department of Labor Administrative Law Judge (ALJ) granted Respondent's Motion under 29 C.F.R. § 18.70(c) and dismissed the claim with prejudice. Order Granting Respondent's Motion to Dismiss (Aug. 13, 2018) (Order). Complainant appealed to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision pursuant to Secretary's Order No. 01-2020 (*Delegation of Authority and Assignment of Responsibility to the Administrative Review Board*), 85 Fed. Reg. 13, 186 (Mar. 6, 2020); 29 C.F.R. Part 1982.

DISCUSSION

We consider the threshold determination of timeliness based on the statutorily imposed limitations. An FRSA complaint must be filed within 180 days after an alleged violation of the FRSA occurred. 49 U.S.C. § 20109(d)(2)(A)(ii); see also 29 C.F.R. § 1982.103(d). The statutory limitations period begins to run when a "complainant has final, definitive, and unequivocal knowledge of a discrete adverse act." *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 2012-0068, 2012-FRS-00016, slip op. at 5 (ARB Dec. 19, 2013) (*quoting Cante v. New York City Dep't of Educ.*, ARB No. 2008-0012, ALJ No. 2007-CAA-00004, slip op. at 10 (ARB July 31, 2009)). The date of filing will be considered as "[t]he date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third party commercial carrier, or in person filing at an OSHA office." 29 C.F.R. § 1982.103(d).

Complainant filed his complaint with OSHA on October 24, 2017. Order at 3. The complaint alleged Respondent terminated Complainant's employment on April 25, 2017. *Id.* at 4. The time period between Complainant's alleged adverse action and the filing of his complaint was 182 days. As this exceeds the 180-day statutory period, the ALJ properly found that the application of the 180-day limitations period barred relief for the Complainant.

The ALJ also found that the application of equitable tolling was not appropriate on the facts of this case. The ALJ specifically indicated that: (1) Complainant was not entitled to equitable tolling based on the theory that he raised "the precise statutory claim but has done so in the wrong forum" because even though there was some overlap of facts in his Equal Employment Opportunity Commission (EEOC) and New York Department of Human Rights (DHR) complaint, the complaint only pertained to a claim of religious discrimination; (2) a lack of prejudice to the Respondent does not in and of itself warrant equitable tolling; and (3) while Complainant alleged that he was directed not to file his FRSA claim with OSHA until after he filed his EEOC and DHR complaint, he did not explain why he waited over two weeks to file his FRSA complaint. *Id.* In doing so, the ALJ construed the record liberally in deference to Complainant's unrepresented status and still found his arguments insufficient to avoid dismissal. *Id.* at 5. For the reasons set forth by the ALJ, we agree with the ALJ that the Complainant cannot avoid dismissal of his October 24, 2017 complaint because it is time-bared. We also note that Complainant presented new arguments before the ARB that he did not raise before the ALJ. Under our well-established precedent, we decline to consider arguments that a party raises for the first time on appeal. *Carter v. Champion Bus, Inc.*, ARB No. 2005-0076, ALJ No. 2005-SOX-00023, slip op. at 7 (ARB Sept. 29, 2006).

When determining whether the Board should permit the adjudication of an otherwise untimely complaint, the Board has recognized four principal situations in which equitable modification of filing deadlines may apply: (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. *See Brown v. Synovus Fin. Corp.*, ARB No. 2017-0037, ALJ No. 2015-SOX-00018, slip op. at 1 (ARB May 17, 2017). Our review of the record discloses that none of these situations apply here. Accordingly, we agree with the ALJ's conclusion that there are no grounds for an equitable extension of the statutory filing deadline of 180 days, 29 C.F.R. § 18.70(c).

We **AFFIRM** the ALJ's decision and order and the Complainant's complaint is hereby **DISMISSED WITH PREJUDICE**.

SO ORDERED.

Knowledger_Mosaic_POC

End of Document