

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 13 August 2018**

ALJ NO.: 2018-FRS-00021

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*In the Matter of:*

JASON D. PRIVLER,  
*Complainant,*

v.

CSX TRANSPORTATION, INC.,  
*Respondent.*

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**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

This proceeding arises from a complaint of discrimination filed under the Federal Railroad Safety Act (the "FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the "9/11 Act"), Pub. L. 110-53, 121, Stat 266 (Aug. 3, 2007). On October 24, 2017, Jason Privler ("Complainant") filed a discrimination complaint alleging a violation of the FRSA against CSX Transportation, Inc. ("Respondent") with the Occupational Safety and Health Administration, U.S. Department of Labor ("OSHA"). Following OSHA's dismissal of the complaint as time barred on November 3, 2017, Complainant filed objections and a request for hearing with the Office of Administrative Law Judges ("OALJ"). This matter is set for hearing before the undersigned on September 18, 2018.

On May 10, 2018, Respondent filed a Motion to Dismiss on the basis of untimeliness ("Resp. Mot. Dismiss"), attaching Exhibits ("EX") A through C.<sup>1</sup> Respondent asserts Complainant's complaint should be dismissed with prejudice because it is barred by the statute of limitations set forth at 49 U.S.C. § 20109(d)(2)(A)(ii), which requires claims to be filed no later than 180 days after the date the alleged violation occurred. Resp. Mot. Dismiss at 2. The Respondent argues because Complainant filed his claim on October 24, 2017, which was 182 days from the date of his termination on April 25, 2017, his claim is untimely. *Id.*

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<sup>1</sup> EX A is Complainant's FRSA complaint, EX B is the Secretary of Labor's Findings, and EX C is Complainant's request for hearing before the OALJ (with attached documents). These three exhibits were already part of the record before me, and Respondent did not submit any new evidence with its motion.

On August 3, 2018, Complainant, acting as a self-represented litigant, filed a letter objecting to Respondent's Motion to Dismiss ("Cl. Obj.").<sup>2</sup> Complainant stated:

[W]hile filing separate but pertinent litigation before jointly the New York State Division of Human Rights and the Equal Employment Opportunity Commission, that clear indication of the charges presented relevant to this case had been at that time, brought forth and therein contained, and that at the request of one of those agencies, submittal of this OSHA case in question was inasmuch cause, slightly delayed. That this respondent was fully aware of the seriousness of these accusations and charges, certainly in general and as a whole at that time, when this aforementioned document was served upon them, and approximately three weeks before the osha whistleblowing deadline was to expire.

Cl. Obj.

Considering the arguments presented by the parties, and for the reasons addressed below, I find Complainant has failed to establish his FRSA claim was timely filed, and Respondent's Motion to Dismiss is granted.

### **BACKGROUND**

On October 24, 2017, Complainant filed a claim under the FRSA with OSHA, alleging Respondent terminated him on April 25, 2017, in retaliation for his "stated refusal to management to be trained by or work with individuals within their employ that had flagrantly and routinely violated Federal Railroad Administration rules and regulations in regards to safety and procedure." Resp. Mot. Dismiss EX A.

On November 3, 2017, OSHA found Complainant's FRSA complaint was untimely, as it was not filed within the 180-day statutory filing period, and Complainant did not present evidence that the complaint should be tolled. Resp. Mot. Dismiss EX B.

On December 30, 2017, Complainant filed objections to the Secretary of Labor's Findings and requested a formal hearing before OALJ. Resp. Mot. Dismiss EX C. Complainant stated he had ongoing claims with the New York State Division of Human Rights ("DHR") and the Equal Employment Opportunity Commission ("EEOC"), and these two agencies were aware of his allegations since "at least October 6." *Id.* He further stated that upon "specific requests made by representative of [DHR], the expedition of my current OHSA claim was at that time slightly delayed." *Id.* Complainant attached to his objections and request for hearing a letter from DHR, dated October 11, 2017, indicating that the agency filed his complaint on October 6, 2017, and that the complaint would also be sent to EEOC. *Id.* Complainant also attached a copy of the complaint filed with DHR and EEOC, signed by Complainant on October 6, 2017, alleging Respondent discriminated against him for religious reasons. *Id.*

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<sup>2</sup> Complainant was granted two extensions of time to file a response to the Motion to Dismiss, in order to afford him an opportunity to obtain counsel. Ultimately, counsel was not obtained, and per my orders dated June 18, 2018 and July 19, 2018, Complainant was directed to file a response to the Motion to Dismiss by August 3, 2018.

## I. Standard of Review

Pursuant to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. § 18.70(c), “[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as . . . untimeliness.” In reviewing a motion to dismiss, the court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in the complainant’s favor.<sup>3</sup> *Evans v. U.S. E.P.A.*, Arb No. 08-059, ALJ No. 2008-CAA-00003 (ARB July 31, 2012).

## II. Analysis

For a whistleblower complaint to be deemed timely filed under the FRSA, the complaint must be filed within 180 days after the 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 Railroad Passenger Corp.*, ARB No. 12-068, 2012-FRS-00016, slip op. at 5 (ARB Dec. 19, 2013) (*quoting Cante v. New York City Dep’t of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-0004, slip op. at 10 (ARB July 31, 2009)). “The 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 will be considered the date of filing.” 29 C.F.R. § 1982.103(d).

Under certain circumstances, the time for filing a complaint may be tolled. 29 C.F.R. § 1982.103(d). The Board has recognized four primary “situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” *Williams*, ARB No. 12-068 at 5; *see also* 29 C.F.R. § 1982.103(d). Equitable relief from the limitation period is “typically extended . . . only sparingly” and does not extend to “garden variety claim[s] of excusable neglect.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990); *see also Bohanon v. Grand Trunk Western Railroad*, ARB No. 16-048, ALJ No. 2014-FRS-00003, slip op. at 3 (ARB Apr. 27, 2016). The party seeking to be relieved from the tolling bar bears the burden of justifying the application of equitable modification principles. *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-00009, PDF at 8 (ARB Dec. 10, 2012).

Complainant filed an online complaint with OSHA on October 24, 2017. Resp. Mot. Dismiss EX A & EX B. The complaint with OSHA alleged Respondent terminated Complainant’s employment on April 25, 2017. Resp. Mot. Dismiss EX A. The time period

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<sup>3</sup> Employer submitted three exhibits with its Motion to Dismiss. As a general rule, if parties present, and the court considers, matters outside of the pleadings, a motion to dismiss should be converted to a motion for summary judgment. *See Evans v. U.S.E.P.A.*, ARB No. 08-059, ALJ No. 2008-CAA-003, PDF at 10 (ARB July 31, 2012). However, because the documents attached to the Respondent’s Motion to Dismiss were documents already contained in the record before me, and do not contradict the complaint, I do not find a conversion to a motion for summary decision to be necessary. *See Missouri ex rel. Nixon v. Coeur D’Alene Tribe*, 164 F.3d 1102, 1107 (8th Cir. 1999).

between Complainant's alleged adverse action, namely his termination on April 25, 2017, and the filing of his complaint with OSHA on October 24, 2017, is 182 days. As this exceeds the 180-day statutory period, the complaint on its face is untimely under Section 20109(d)(2)(A)(ii). Therefore, Complainant's complaint is time-barred unless he can establish the existence of circumstances warranting equitable tolling.

Complainant acknowledged his FRSA claim was "slightly delayed," but appears to argue equitable tolling should apply because he filed a complaint with the DHR and the EEOC on October 6, 2017, which was within the 180-day statutory period under the FRSA. Resp. Mot. Dismiss EX C; Cl. Obj. However, the complaint filed with DHR and EEOC did not allege a violation of the FRSA and only pertained to a claim of religious discrimination. Thus, Complainant is not entitled to equitable tolling based on the theory that he raised "the precise statutory claim in issue but has done so in the wrong forum."<sup>4</sup> See *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002/063/067/068, ALJ Nos. 1998- CAA-10/11, 1999-CAA-1/4 /6, PDF at 10-11 (ARB Oct. 31, 2000).

Complainant additionally asserts Employer was aware of his allegations through his complaint filed with DHR and the EEOC on October 6, 2017. Cl. Obj. However, as discussed above, his complaint with DHR and EEOC did not put Employer on notice of a claim under the FRSA, as the complaint only alleged religious discrimination. Furthermore, a lack of prejudice to the Respondent does not in and of itself warrant equitable tolling, and is only considered after Complainant has established tolling is otherwise justified. See *Woods*, ARB No. 11-067 at 10.

Lastly, Complainant states the filing of his FRSA claim with OSHA was delayed because a representative of DHR told him to hold off on filing his claim with OSHA, and he referred to language in his complaint filed with DHR and EEOC, which stated "I have not commenced any other civil action, nor do I have an action pending before any administrative agency, under any state or local law, based on upon this same unlawful discriminatory practice." While not entirely clear from Complainant's filings, he appears to be alleging he was directed not to file his FRSA claim with OSHA until after his complaint with DHR and EEOC was filed. Even if a representative of DHR informed Complainant to refrain from filing his claim with OSHA until his complaint was filed with DHR and EEOC, the DHR and EEOC complaint was signed by Complainant and filed on October 6, 2017, and Complainant did not explain why he waited over two weeks to then file his FRSA complaint with OSHA. Therefore, I find Complainant has not established extraordinary circumstances that prevented him from filing a timely FRSA claim.

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<sup>4</sup> Complainant alleged in his complaint with DHR and EEOC that Respondent's trainers and employees "violate[d] Federal Railroad Administration rules and regulations in regards to safety and procedure" and that he was "instructed to disregard and violate these aforementioned rules and regulations." Resp. Mot. Dismiss EX C (Complaint at p.5). He also alleged that he raised these violations with Respondent's management "in vain." *Id.* Critically, however, he did not allege he was terminated for reporting violations of the Federal Railroad Administration rules and regulations. Instead, he asserted he was terminated because of his religious beliefs. *Id.* (Complaint at p.6). While there is some overlap of facts in the EEOC and DHR complaint with the FRSA complaint, this overlap is not sufficient to establish that the Complainant attempted to file the precise complaint under the FRSA in the EEOC and DHR forums. See *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-00009 (ARB Dec. 10, 2012) (citing *Lewis v. McKenzie Tank Lines, Inc.*, ALJ No. 1992-STA-020 (Sec'y Nov. 24, 1992) ("Even though the complainant's EEOC complaint referenced a protected activity . . . and an adverse action . . ., the Secretary held that the complainant had not filed his STAA complaint in the wrong forum.")).

*See Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (“Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.”).

As Complainant is self-represented in this matter, I am mindful that his complaint must be construed “liberally in deference to his lack of training in the law’ and with a degree of adjudicative latitude.” *Trachman v. Orkin Exterminating Co.*, ARB No. 01067, ALJ No. 2000-TSC-00003, at 6 (ARB Apr. 25, 2003) (internal citations omitted), *quoted in Dewolfe*, 2012-ACA-00003 at 12; *see also Pik v. Credit Suisse AG*, ARB No. 11-034, ALJ No. 2011-SOX-2006, PDF at 4-5 (ARB May 31, 2012); *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-00003 (ARB Jan. 30, 2004). However, viewing all facts in favor of Complainant and construing his arguments liberally, I find he still has failed to establish his claim under the FRSA was timely filed.

Accordingly, Respondent’s Motion to Dismiss is **GRANTED** and Complainant’s FRSA claim is **DISMISSED WITH PREJUDICE**.

**SO ORDERED.**

**COLLEEN A. GERAGHTY**  
Administrative Law Judge

Boston, Massachusetts

**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 issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(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, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points

and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).