



Issue Date: 08 February 2012

CASE NO.: 2011-CAA-00007

In the Matter of:

MAE FUKUSHIMA,
Complainant,

vs.

UNITED AIR LINES,
Respondent.

**ORDER GRANTING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT
AND VACATING THE HEARING**

This case arises under the employee protection provisions of four environmental statutes: the Clean Air Act ("CAA"), 42 U.S.C. § 7622; Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367; Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9; and Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971. The enforcing regulations are at 29 C.F.R. Part 24.

For the reasons set forth below, the Complainant's complaint is DISMISSED and the hearing is VACATED.

PROCEDURAL BACKGROUND

The Complainant, Mae Fukushima, filed her complaint against the Respondent, United Air Lines, with the Occupational Safety and Health Administration (OSHA), on May 7, 2011,¹ pursuant to the whistleblower provisions of the four environmental statutes listed above. On June 8, 2011, the OSHA investigation was completed and the Regional Administrator issued a finding that the complaint should be dismissed as untimely.

On June 22, 2011, the Complainant appealed that decision to OALJ and asked for a *de novo* hearing. The notice of appeal asserted that "evidence of HIOSH² interference" might provide grounds for tolling the statute of limitations.

¹ OSHA found that the complaint was filed on May 9, 2011, but it is unclear from the evidence available why that later date was picked, as the complaint was dated May 7, 2011, and was received by OSHA on May 10, 2011. However, for the purposes of this motion for summary decision, I am interpreting all alleged facts in the light most favorable to the Complainant, who is the non-moving party.

² The State of Hawaii Occupational Safety and Health Division.

On July 20, 2011, I issued a notice of hearing and a pre-hearing schedule, setting the case for hearing on November 9, 2011, in Honolulu, Hawaii.

On August 1, 2011, the Complainant requested that the case be continued until January 10, 2012. This motion was unopposed, but was discussed during a telephone status conference on August 10, 2011, with counsel for both parties. Pursuant to those discussions, I granted the motion and the hearing was rescheduled to February 28, 2012. On September 13, 2011, I rescheduled the hearing to March 6, 2012.

In November of 2011, the Complainant provided notice of her substitution of counsel.

On January 5, 2012, I received from the Respondent a motion to dismiss and for a summary decision in this case. Pursuant to the schedule discussed during the August 10, 2011, telephone status conference, I issued an order on January 6, 2012, reminding the parties that the Complainant's response to this motion must be *received* by my office by January 26, 2012. Both this order and the Respondent's motion were served on the Complainant through service on her new counsel.

On January 30, 2012, I received the Complainant's opposition to the motion to dismiss and for summary decision. Despite being filed after the deadline, this response did not include any request to excuse the filing being late.

I nevertheless considered the material submitted by the Complainant. I found it to be totally nonresponsive.³ The section purporting to address the issue of timeliness was incomprehensible. To the extent that anything in that response was understandable, I have addressed it below.

On February 7, 2012, I received the Respondent's timely reply in support of its motion to dismiss and for summary decision, according to the schedule established by my January 6, 2012, order. On the same day, I received a motion from the Complainant asking that the hearing be continued because her new counsel needs additional time to conduct discovery. In light of my ruling on Respondent's motion for summary decision, the motion for a continuance is moot.

ANALYSIS AND FINDINGS

Legal Standard for Summary Decision

Under the Code of Federal Regulations and the Federal Rules of Civil Procedure, an administrative law judge ("ALJ") may grant a motion for summary decision if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact and that the moving party would win as a matter of law. 29 C.F.R. §§ 18.40-18.41; Fed. R. Civ. P. 56(c).

³ For instance, the Complainant's response includes exhibits the applicability of which I find it difficult to imagine and which the Complainant does not even appear to mention in her argument. These include a copy of Hawaii Revised Statutes §§ 378-62, 378-63. (Complainant's Response, Exhibit A.) While such statutes might form the basis for a claim in state court, they are entirely inapplicable to this case, which is filed in a federal administrative proceeding with limited jurisdiction.

Once the moving party meets its initial burden, a nonmoving party must go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, and come forth with specific facts to show the existence of a genuine issue of material fact and that a reasonable jury could return a verdict for the nonmoving party. *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996). The materiality of a fact is “determined by the substantive law governing the claim or defense.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). A fact is material if it is “relevant to an element of a claim or defense,” such that its existence might affect the outcome of the lawsuit. *Id.* If the non-moving party fails to show an element essential to his or her case, there is no genuine issue of any material fact because a complete failure of proof of an essential element of the non-moving party’s case renders all other facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Section 18.40(c) of the Rules of Practice and Procedure for the OALJ provides that “[w]hen a motion for summary decision is made and supported” by the appropriate evidence, the “party opposing the motion may not rest upon the mere allegations or denials of such pleading[, but] must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c). Furthermore, in reviewing a request for summary decision, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986). Finally, a complainant must do more than establish a *prima facie* case and deny the credibility of the defendant’s witnesses to defeat a motion for summary decision. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994).

Here, the Complainant’s belated response to the Respondent’s motion for summary decision – to the extent that that response was even intelligible – did not set forth any specific facts to show that the Complainant made a timely filing of her complaint.⁴ Therefore, if the Respondent’s motion establishes that there is no genuine issue about the timeliness of the Complainant’s filing of her complaint, and that, upon those uncontested facts, the Respondent wins as a matter of law, summary decision will be granted for the Respondent and this case dismissed. 29 C.F.R. §§ 18.40-18.41; Fed. R. Civ. P. 56(c).

Timeliness Requirement

Whistleblower claims under environmental statutes such as the Solid Waste Disposal Act (SWDA), the Federal Water Pollution Control Act (FWPCA), the Safe Drinking Water Act (SDWA), and the Clean Air Act (CAA), must be filed within 30 days of when the complainant becomes aware of the allegedly retaliatory adverse employment action against them. 29 C.F.R. § 24.103(d)(1).

Though the 30-day statutory limitations period for filing environmental employee protection complaints is “extremely brief,” that filing period was the mandate of Congress and an agency is not permitted “to disregard a limitations period merely because it bars what may otherwise be a meritorious cause.” *Prybys v. Seminole Tribe of Florida*, 1995-CAA-15 (ARB Nov. 27, 1996) (citing *School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir.

⁴ To be clear, the statute requires a timely filing of a “complaint,” meaning a legal claim that the Complainant suffered an adverse employment action in retaliation for protected activity. A “complaint,” in the colloquial sense of stating that you do not like something, that concerns only the environmental or workplace conditions without any allegation of retaliation, is not sufficient.

1981)). The Administrative Review Board (“ARB” or “Board”) has found that the time limits for filing whistleblower claims under these statutes must be “scrupulously observed.” *Id.*

Statutes of limitation run from the date an employee receives final, definitive and unequivocal notice of an adverse employment decision, or as the ARB applies the rule, “the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his or her rights.” *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001). Though this can mean that the time for filing may start to run before the actual date of dismissal,⁵ if the undisputed effective date of the complainant’s discharge falls outside of the statutory filing period, it is unnecessary to discern the actual date when the complainant was notified of the respondent’s decision to discharge. *Howard v. Tennessee Valley Auth.*, 90-ERA-24 (Sec’y July 3, 1991).⁶

Here, the Complainant was terminated in September of 2010,⁷ and was allegedly prevented by the Respondent from obtaining COBRA coverage, presumably within the 60 day period after her termination when such coverage is electable. *See* 29 U.S.C. § 1165. (Complaint, pp. 1, 7.) Yet she did not file her whistleblower complaint until May 7, 2011. Even if it were presumed that she was terminated on the very last day of September, this would mean that her complaint was filed 219 days after her termination and 159 days after the COBRA election period closed. Thus, on the face of the complaint, it appears that the Complainant failed to make a timely filing, as there are no facts suggesting this case was filed within 30 days of an alleged adverse employment action by the Respondent.

Equitable Modification of Time for Filing of Complaint

The time for filing a complaint may be modified for reasons warranted by applicable case law. 29 C.F.R. § 24.103(d)(1). Two general kinds of equitable modification have been recognized: equitable tolling and equitable estoppel, though the concepts often blend together. *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981).

In deference to the mandate of Congress however, environmental employee protection cases warrant only very narrow exceptions to the requirement of timeliness. *Prybys*, 1995-CAA-15. The ARB has generally recognized only three situations where equitable modification to the statute of limitations is available: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim at issue but has done so in the wrong forum. *Allentown*, 657 F.2d at 20.

⁵ Such as in the situation where the complainant is told that they will be dismissed at the end of the month or at some other date in the future.

⁶ If the complainant did not file within 30 days of their actual date of termination, logically they must have also failed to file within 30 days of when they were notified that they would be terminated, since that would have occurred at some earlier point.

⁷ No specific day was alleged, but for the purposes of summary decision, I will presume this took place on the last day in September, the interpretation most favorable to the Complainant.

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6, *slip op.* at 9 (ARB Oct. 31, 2000), the Board held that “[w]hen a complainant invokes equitable tolling of a statute of limitations, it is the complainant’s burden to demonstrate existence of circumstances that would support tolling.”

Ignorance of the law alone is not sufficient to warrant equitable tolling. *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991) (per curiam); *Allentown*, 657 F.2d 16; see *Lahoti v. Brown & Root*, 90-ERA-3 (Sec’y Oct. 26, 1992). Also, the complainant having knowledge of their rights or having the assistance of counsel who should have informed them of their rights, usually weighs strongly against equitable tolling and may preclude it entirely. *Kent v. Barton Protective Service*, 84-WPC-1 (Sec’y Sept. 28, 1990), *aff’d*, 946 F.2d 904 (11th Cir. 1991) (citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978)); see *Rose*, 945 F.2d 1331; *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-7 (ARB Sept. 29, 2006).

In addition, notifying a state or other agency about the complainant’s underlying health or safety complaints does not toll the statute of limitations for a whistleblower case. See *Roberts v. Battelle Memorial Institute*, 96-ERA-24 (ALJ Dec. 18, 1996). Though such a complaint may constitute the “protected activity” a whistleblower is protected from retaliation for engaging in, the safety violation report itself does not typically also allege retaliation, which is necessary for a whistleblower claim. *Id.* To toll the filing deadline, the claim in the “other forum”⁸ must be the “precise statutory claim [at] issue,” not just about a related issue. *Allentown*, 657 F.2d at 20. The Board has held that unless the actions of the state agency complained to “somehow prevented [the complainant] from exercising his right to file a [whistleblower] complaint, it would not equitably toll the limitations period.” *Foley v. Boston Edison Co.*, ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001) (complainant argued that if the state agency had promptly investigated his complaints it might have assisted him in filing a timely whistleblower claim, the Board ruled that was not grounds for tolling).

Equitable estoppel is a similar “means of avoiding the bar of untimely filing.” *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). Like equitable tolling, it “requires a showing that an employee’s failure to file in a timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his or her charge.” *Id.* Typically the employer needs to offer a quid-pro-quo promise in exchange for the employee not filing their claim or otherwise “induce or lull” the employee into not asserting their rights. *Id.*

Here, the Complainant has demonstrated no circumstances that would justify either estoppel or tolling of the statute of limitations. It was her burden to do as the non-movant for summary decision. *Rockefeller*, ARB Nos. 99-002, 99-063, 99-067, 99-068. The Complainant has alleged that the Respondent “fraudulently represent[ed] that she had no right to complain to governmental authorities,” about the safety issues in her workplace. (Complaint, p. 1.) This would not in any sense prevent her from filing a whistleblower claim for retaliation however. The complaint about workplace safety is a separate issue from a claim that a worker was retaliated against for making such a complaint. An employer attempting to prevent the employee

⁸ This is presuming that a state agency qualifies as “another forum” within the meaning of the regulations.

from engaging in protected activity might form the basis of a whistleblower claim, but it does not prevent the employee from filing that case.

Further, the complaint itself, also asserts that the Complainant knew she had the right to complain about conditions long before her termination. She stated in her complaint that she was aware of her whistleblower protection rights since May 1, 2010, before she was terminated. (Complaint, p. 2.) This admitted knowledge defeats any claim that the Respondent's alleged representation that she could not complain actually deceived the Complainant into not filing her claim in a timely manner.

There are also no facts alleged that the Complainant filed her whistleblower claim in another forum within the statutory time limitations or that extraordinary circumstances prevented her from making a timely claim. Nor has it been alleged that the Respondent offered any inducement to the Complainant not to file her suit. The Complainant has essentially given no explanation for why she delayed filing her claim until so long after she became aware of the alleged retaliation.

Further, the Respondent has presented evidence that there are multiple reasons why tolling would be inappropriate in this case. For instance, the Respondent points out that the Complainant herself asserted that she knew about her right to complain about the alleged violations and about her whistleblower protection from retaliation approximately four months before her termination. (Complaint, p. 2.) She had even retained an attorney specifically to pursue this claim as of February 17, 2011. (Respondent's Exhibit A to Motion for Summary Decision.) On these facts, no claim of being unaware of rights or unable to exercise them earlier can be made.

From the complaint and other documents provided, I find it difficult to determine what relation the allegations about the State of Hawaii Occupational Safety and Health Division ("HIOSH") have to the Complainant's claims. On the face of the pleadings, the allegation appears to be that HIOSH prevented employees *other* than the Complainant – namely those who did complain to HIOSH – from "seeking remedies" for their working conditions. (Complaint, p. 2.) However, even if the Complainant had alleged that she herself complained to HIOSH and was prevented from improving the safety of her workplace that is not an allegation that HIOSH prevented her from filing her retaliation complaint under the whistleblower provisions of these statutes. Again, the alleged safety violations and the alleged retaliation for making safety complaints are two separate legal issues, and the present case before OALJ is meant to adjudicate only the issue of retaliation.

Therefore, I see no circumstances in this case that warrant equitable relief from the statute of limitations. The Complainant was terminated from her employment in September of 2010. She had known of her rights under the statute since May 1, 2010. She had the assistance of counsel starting on February 17, 2011. Yet she did not file her complaint in this case until May 7, 2011, long after "facts which would support a discrimination complaint were apparent" to the Complainant and the 30-day period for filing her claim had expired. *Overall*, ARB No. 98-111. Thus, I find this complaint untimely, as no facts have been alleged that would justify estoppel or tolling of the statute of limitations.

A timely complaint is an essential element of the Complainant's case. Without it, her claim fails and the Respondent is entitled to judgment in its favor as a matter of law. In this case, the Respondent's motion for summary decision laid out facts establishing the Complainant's failure to file in time. The Complainant did not introduce any specific facts that could make timeliness a disputed issue in this case. Therefore, I find that it is undisputed that the Complainant's complaint was untimely, which entitles the Respondent to judgment as a matter of law and dismissal of the case against them.

Failure to State a Claim

Because I have found that the case should be dismissed due to untimely filing, I do not find it necessary to address the Respondent's assertion that the Complainant also failed to state a claim under Rule 12(b)(6).

CONCLUSION

For the reasons provided above, I find that the Respondent has presented undisputed facts showing that the complaint was untimely. Failure to file within the statute of limitations entitles the Respondent to judgment as a matter of law and dismissal of the case.

The Complainant's claims under the Clean Air Act, Federal Water Pollution Control Act, Safe Drinking Water Act, and Solid Waste Disposal Act are DISMISSED and the hearing scheduled for March 6, 2012, in Honolulu is VACATED.

SO ORDERED.

A

JENNIFER GEE
Administrative Law Judge