



Issue Date: 23 October 2014 Case Nos.: 2014-CAA-4

2014-PSI-2

In the Matter of:
GREGORY KELLY,
Complainant,

v.

STATE OF ALABAMA
PUBLIC SERVICE COMMISSION,
Respondent.

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

This matter arises out of complaints filed by Gregory Kelly (“Complainant”) against the State of Alabama Public Service Commission (“Respondent”) under the Clean Air Act (“CAA”), 42 U.S.C. § 7622, and the provisions of the Pipeline Safety Improvement Act of 2002 (“PSI”), 49 U.S.C. § 60129. The applicable regulations are promulgated at 29 C.F.R. Part 1981.

The Complainant filed complaints with the Occupational Safety and Health Administration (“OSHA”) on March 28, 2014, and April 5, 2014. On April 10, 2014, OSHA issued the Secretary’s Findings, dismissing the complaints. OSHA found, in relevant part, that the Complainant’s employment was terminated on or about April 9, 2009, and that the complaints were not filed with the Secretary of Labor until April 5, 2014. As the complaints were not filed within 180 days of the adverse action alleged, the claims were dismissed as untimely. By correspondence dated May 6, 2014, and May 7, 2014, the Complainant expressed his disagreement with the Secretary’s Findings and consequently, the cases were consolidated before the Office of Administrative Law Judges.

Consistent with the time limits delineated by the Notice of Hearing, the Respondent moved to dismiss the complaints under the Rules of Practice and Procedure and the Federal Rules of Civil Procedure on October 6, 2014. (Mtn. to Dismiss at 1.) The Respondent argued that the instant claims were untimely under the limitations-provisions of the CAA and PSI, which bar claims filed after 30 and 180 days, respectively. (Mtn. to Dismiss at 5-6.) The Respondent argued that the alleged violation—the termination of the Complainant’s employment with the Respondent—occurred on April 9, 2009, approximately five years before the Claimant’s March 28, 2014, and April 5, 2014, filings. (*Id.*) Furthermore, the Respondent argued that, even

assuming that the Claimant's initial telephone communication with OSHA Area Director Clyde P. Payne on February 7, 2011, constituted an institution of proceedings against the Respondent, the claims would still violate the applicable limitations periods. (Mtn to Dismiss at 6.)

The Complainant filed a response on October 20, 2014. In his response, the Complainant acknowledged that he initially requested whistleblower-protection by letter dated April 5, 2014. (Response at 3.) He also confirmed that he discussed whistleblower statutes with a member of the OSHA staff on February 7, 2011. (Response at 8.) However, he argued that the applicable statute of limitations should not bar his claims because of his "timely claims and allegations of RICO conduct, RICO retaliation abuses[,] and RICO conspiracy acts." He further accused the Respondent of "criminal culpability and civil liability offenses." (Response at 5.) As support for his assertion, the complainant cited *U.S. v. Siegelman*, 640F.3d 1159 (11th Cir. 2011). According to the Complainant, the federal government in *Siegelman* was allowed to circumvent the statute of limitations by filing additional RICO charges. (Response at 5.)

Whistleblower statutes of limitations are not jurisdictional, but are subject to equitable modification, *i.e.*, equitable tolling and equitable estoppel. However, in order to justify the tolling of an applicable statute of limitations, a petitioner must act diligently, and it is his burden to show that the untimeliness of the filing is the result of circumstances beyond his control. *Reid v. Boeing Corp.*, ARB No. 10-110, ALJ No. 2009-SOX-27, at 2 (ARB Mar. 30, 2013); *Jose Romero v. Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-21, at 2 (ARB Sept. 30, 2010), accord *Wilson v. Secy. Dept. of Veteran Affairs*, 65 F.3d. 402, 404 (5th Cir. 1995) (ruling on a Title VII claim), quoting *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990).

The Administrative Review Board ("ARB") has specifically adopted equitable modification in environmental whistleblower cases. *See, e.g., Kelly v. U.S. Enrichment Co.*, ARB No. 13-063, ALJ No. 2012-ERA-15 (ARB Aug. 9, 2013). The Board has relied on *School District of Allentown v. Marshall*, 657 F. 2d 16 (3rd Cir. 1981) for guidance. *Marshall* sets out three principal situations in which equitable tolling 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; and (3) when the plaintiff has raised the precise statutory claim at issue but done so in the wrong forum. *Id.* at 20.

The ARB, like the federal courts of appeals, has recognized that equitable tolling is an extraordinary remedy which is "typically applied sparingly." *Romero*, ARB No. 10-095, at 4, citing *Drew v. Dept. of Correction*, 297 F. 3d 1298, 1286-87 (11th Cir. 2002). "Extraordinary circumstances" is a high standard. *Kelly*, ARB No. 13-063, at 2; *see, e.g., Stoll v. Runyon*, 165 F. 3d 1238, 1242 (9th Cir. 1999). In *Stoll*, the Court of Appeals for the Ninth Circuit held that equitable tolling required "complete psychiatric disability," in effect rendering the party seeking to make use of the remedy "unable to read, open mail, [and] function in society" for the entire limitations period.

Moreover, even where tolling may apply, a claimant must show that he exercised "due diligence in preserving his legal rights" and must still file within a reasonable time period. In other words, even where the remedy is invoked, equitable modification periods do not run indefinitely. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-79, at 5

(ARB May 27, 2010), *citing Wilson*, 65 F.3d. at 404 and *Irwin v. Dept. of Veteran Affairs*, 498 U.S. at 96. In addition, the ARB recently held that, absent extraordinary events preventing a claimant from asserting their rights, tolling the statute of limitations is improper. *Woods v. Boeing-South Carolina*, 2011-AIR-9, at 2-3 (ALJ Dec. 10, 2012).

As noted previously, the Complainant is in the unenviable position of proceeding *pro se*. It bears emphasis, therefore, that the ARB has stated that administrative law judges must “construe complaints and papers filed by *pro se* complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.” *Wyatt v. Hunt Transport*, ARB No. 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012), *quoting Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 6 (ARB Apr. 25, 2003).

Here, however, even construing the record “liberally in deference” to the Complainant, I find it uncontroverted that the Complainant was terminated on April 9, 2009. (Mtn. to Dismiss at 5; Response at 6.) Additionally, I find that the earliest possible communication of record regarding a potential whistleblower complaint or complaints which could even remotely be equitably construed as a claims-filing occurred on December 29, 2009, which is still beyond the applicable limitations periods. (Mtn. to Dismiss at Exhibit 2.)¹ The first correspondence with OSHA, on the other hand, occurred on February 7, 2011. (Mtn to Dismiss at 6; Response at 8.) I find that this period of inaction violates the applicable limitations periods of the CAA and PSI.² Furthermore, there is no evidence of record that during the 180 days following his termination, the Claimant was actively misled, was extraordinarily prevented, or filed elsewhere. Accordingly, there is no evidence of record to support equitable tolling of the statutes of limitation. Furthermore, although the Claimant alleged anxiety, depression, PTSD, and panic attacks in his May 6, 2014 and May 7, 2014, letters, and the undersigned is not unsympathetic to anyone suffering these debilitating conditions, no evidence of record establishes that these psychological disorders were of such severity as to prevent the Claimant from asserting his rights at a permissible time.

Lastly, I note that the Claimant’s accusations of ongoing misconduct by the Respondent are irrelevant to his own claims of whistleblower protection. In each of his claims, the limitations period is triggered by the date of his discharge, and he would not be entitled to whistleblower protection for any conduct by the Respondent which followed his discharge and no way influenced it. Accordingly, I find that the Respondent’s motion to dismiss the complaints which are the subject of this action is well-taken and should be **GRANTED**.

¹ It is noted that the December 29, 2009, list of the Claimant’s federal rights allegedly violated do not include those under the CAA or the PSI. Additionally, the correspondence was sent to the Alabama State Personnel Department, not the U.S. Department of Labor.

² See 42 U.S.C. §7622(b)(1) and 49 U.S.C. §1142(c)(1).

Accordingly, **IT IS HEREBY ORDERED** that the complaint in the above-captioned matter be, and the same hereby is, **DISMISSED** with prejudice.

JOHN P. SELLERS, III
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. *See* 29 C.F.R. §§ 1981.109(c) and 1981.110(a) and (b). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders to which you object. A failure to object to specific findings and/or conclusions of the administrative law judge shall generally be considered waived. Once an appeal is filed, inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties and 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. Copies of the Petition and briefs must also be served on the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1981.110(a).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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. §§ 1981.109(c) and 1981.110(b). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1981.110(b).