



Issue Date: 13 October 2009

Case No.: 2009-WPC-00003

In the Matter of

PIERRE FALGOUT

Complainant

v.

BNSF RAILWAY COMPANY

Respondent

RECOMMENDED ORDER DISMISSING CASE
BASED ON FAILURE TO FILE A TIMELY COMPLAINT

This matter arises under the Federal Water Pollution Control Act, 33 U.S.C. § 1367, (“the Act”), as implemented by regulations at 29 C.F.R. part 24 (2008).

Procedural History

Pierre Falgout (hereafter, “Complainant”), who is not represented by counsel, asserts that BNSF Railway Company, his employer (hereafter, “Respondent”), violated the Act. The Respondent dismissed the Complainant from employment on May 29, 2009. By letter dated August 6, 2009, the Complainant filed an initial complaint with the Occupational Safety and Health Administration, (hereafter, “OSHA”).¹ By letter to the Complainant dated August 12, 2009, the OSHA Area Director acknowledged the receipt of the complaint. However, the Area Director denied the Complainant’s complaint as untimely, because it was submitted more than 30 days after the Complainant’s termination from employment.

By letter dated August 18, 2009, received at the Office of Administrative Law Judges on August 21, 2009, the Complainant appealed the OSHA denial of his complaint.² On August 27, 2009, upon my assignment as the administrative law judge presiding in this matter, I issued an Order to the parties “To File Submissions on the Issue of Whether the Limitations Period Should

¹ The Complainant’s letter was addressed to “Mr. Matt Robinson.” Because the Area Director of OSHA acknowledged receipt of the Complainant’s complaint, I presume that Mr. Robinson is an official at OSHA, and therefore the complaint submitted to him meets the requirements under the regulation at 29 C.F.R. § 24.103.

² The Area Director’s letter informed the Complainant that his request for a hearing must be submitted within 5 business days. However, under 29 C.F.R. § 24.106(a), a request for a hearing may be filed within 30 days of receipt of the OSHA Findings. I find, therefore, that the Complainant’s request for a hearing was timely filed.

be Tolloed in this Case.” In my Order, I noted that, in his appeal of the OSHA denial, the Complainant had conceded that his initial complaint to OSHA was untimely, but also offered facts that, in his opinion, justified a waiver of the timeliness requirement.

The parties responded as directed in my Order. Their submissions are discussed in greater detail below.

The Act and its Timeliness Requirement

The purpose of the governing statute, the Federal Water Pollution Control Act, is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C. § 1251. Under the statute, Congress has implemented an extremely complex system of regulations which requires, among other things, permits for dredged or fill material into navigable waterways and wetlands. See, e.g., 33 U.S.C. § 1344.

The employee protection provision of the Act states as follows:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. § 1367(a).

This same statutory provision explicitly states that an employee who “believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination.” 33 U.S.C. § 1367(b).

Complaints that are not timely filed may be dismissed for failure to adhere to the statutory requirements. Jenkins v. EPA, Case No. 98-146 (ARB: Feb. 28, 2003), slip op. at 12-13. The Administrative Review Board has held that the requirement that a complaint must be filed within 30 days is a limitations period, which may be waived (or “tolled”), based on equitable considerations. Prybys v. Seminole Tribe of Florida, Case No. 96-064 (ARB: Nov. 27, 1996), slip op. at 3-5; see also Whitaker v. CTI-Alaska, Inc., Case No. 98-036 (ARB: May 28, 1999), slip op. at 8. It is the burden of the party seeking tolling to establish the basis for such action.³ Higgins v. Glen Raven Mills, Inc., Case No. 05-143 (ARB: Sep. 29, 2006), slip op at 8;

³ A related concept to equitable tolling is “equitable estoppel.” Under this principle, an employer who induced or deliberately misled an employee into neglecting to file promptly may be barred (“estopped”) from asserting the limitations period in defense of the claim. See Cante v. New York City Dept. of Educ., Case No. 08-012 (ARB: July 31, 2009), slip op. at 5-6. Based on the record before me, I find no evidence suggesting that the Respondents engaged in any behavior that may have misled or induced the Complainant into failing to file promptly. Thus, I find that equitable estoppel does not apply in this matter.

Scharfermeyer v. Blue Grass Army Depot, Case No. 07-082 (ARB: Sept. 30, 2008), slip op. at 10.

For the purposes of this Recommended Order, I will presume that the Complainant's actions are covered under the Act.

Administrative Law Judge's Role

An administrative law judge may, after notice to the parties, issue a Recommended Decision and Order dismissing a whistleblower case based on lack of timeliness. Corbett v. Energy East Corp., Case No 07-044 (ARB: Dec. 31, 2008), slip op. at 2 (SOX case); Ilgenfritz v. U.S. Coast Guard Academy, Case No. 99-066 (ARB: Aug. 28, 2001), slip op. at 4-5. When no genuine issue of material fact is raised, an administrative law judge may take such action without holding a hearing. See 29 C.F.R. § 18.41(a). In general, summary decision is appropriate if no genuine issue of material fact is present. A genuine issue of material fact exists when resolution "could establish an element of a claim or defense and, therefore, affect the outcome of the action." Higgins, slip op at 6, quoting Bobreski v. United States EPA, 284 F. Supp 67, 72-73 (D.D.C. 2003), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In adjudicating a motion for summary decision, a court "must take the facts in the light most favorable to the nonmoving party...and draw all reasonable inferences in [that party's] favor." Bowers v. National Collegiate Athletic Association, 475 F.3d 534, 535 (3d Cir. 2007). See also Witter v. Delta Air Lines, Inc., 138 F.3d 1366, 1369 (11th Cir. 1998); McDonnell v. Brown, 392 F.3d 1283, 1288-89 (11th Cir. 2004).

A party opposing the motion may not rest upon the mere allegations or denials of the pleading. "Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). As the regulation states, an administrative law judge may enter summary decision if "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d).

The Parties' Submissions

My Order of August 27, 2009, listed the items that had, to date, been included in the record. As noted above, in my Order I commented that the Complainant had conceded that his initial request for investigation was made after the 30-day deadline in the statute. The Complainant stated that several investigations against him had been ongoing, as a result of his protected activity. In addition to the investigation that ended in his dismissal from employment, the Complainant averred, a second investigation was initiated on June 17, 2009. The Complainant stated: "In early July I began to think that my dismissal from BNSF was due to my cooperation with the EPA in their investigation" and he considered his case to have been filed "in early July" when he first telephoned the Atlanta office of OSHA. Lastly, the Complainant stated BNSF's further investigation, in addition to his dismissal, constituted grounds for tolling of the limitations period, as such actions showed that BNSF was concealing or misleading him as to the reason for his termination from employment.

In response to my Order of August 27, 2009, the Complainant submitted a one-page response with attachments, including a two-page “OSHA Fact Sheet” dated November 2007 (11/2007), titled “Whistleblower Protection for Railroad Employees.” In his response, the Complainant stated that, based on the Fact Sheet, he initially believed that he had 180 days to file his complaint, because he is a railroad employee. However, he stated, upon further research he discovered the filing deadline was only 30 days. The Complainant also stated that the Respondents’ second investigation is relevant to his case “because it was this second investigation which made me realize that BNSF was terminating and targeting me for my compliance with the EPA investigation.”

The Respondent submitted a Brief, with attachments, including the Declaration of Newton Brown, Director of Administration for BNSF’s Springfield Division, dated September 9, 2009 (Exhibit B). Appended to this Declaration were several documents relating to the Respondent’s investigation of the Complainant. In its brief, the Respondent opposed any tolling of the limitations period, and also averred that its subsequent investigation of the Complainant related to alleged misconduct of the Complainant, unrelated to the cause for his termination from employment. The Declaration, and the associated documents, asserted that the post-termination investigation “could provide an independent basis for dismissal or other discipline” in the event the Complainant successfully sought and obtained reinstatement into his job, under procedures set out in a collective bargaining agreement.

Discussion

Under the Act, a complaint must be filed within 30 days of the employer’s alleged retaliatory action. 33 U.S.C. § 1367(b); see also 29 C.F.R. § 24.103(d). Presuming the alleged retaliatory action to be the employer’s dismissal of the Complainant, which occurred on May 29, 2009, the complaint must have been filed by June 29, 2009, to be timely.⁴ There is no question that the Complainant’s act in filing a complaint with OSHA missed the statutory deadline. Indeed, the Complainant has conceded that he was unaware of a potential remedy until after the deadline had passed. In his appeal to the Office of Administrative Law Judges, the Complainant said that “in early July” he began to think that his dismissal from employment was linked to his cooperation with the EPA. By that time, the statutory deadline had passed.

In his response to my Show Cause Order, the Complainant attempted to explain his failure to timely file a complaint by citing the Federal Rail Safety Act, which has a period of 180 days for making reports. See 49 U.S.C. § 20109. Although it is true that the Complainant is a railway employee, I find this explanation is not credible, because it conflicts with the Complainant’s earlier statement that he did not discern that his dismissal and his protected activity were linked until July. If, indeed, the Complainant were confused about the applicable statute, and missed the deadline because of such confusion, I find it likely that he would have initially cited that reason for his dereliction. However, the Complainant did not do anything of

⁴ June 28, 2009, the 30th day after the Complainant’s dismissal, was Sunday, so the next business day was June 29, 2009.

the kind. Instead, the Complainant initially averred that he was not aware that he had any remedy until July.⁵

In his appeal to the Office of Administrative Law Judges, the Complainant also averred that the Respondent continued to investigate his activities, and its investigation commenced on June 17, 2009. I find the Complainant's initial complaint to OSHA mentioned "several investigations by BNSF," and I presume, therefore, that the matter of the post-dismissal investigation was raised to OSHA. However, the attachments to the Respondent's Declaration indicate that the investigation into the Complainant's alleged misconduct was initiated not later than June 2, 2009, and not June 17, as the Complainant alleged.⁶ According to the Complainant's submissions, this investigation was prompted by the retaliatory animus of the individual against whom he complained to the EPA. Presuming that the Complainant's complaint encompassed the Respondent's post-dismissal investigation as an additional adverse action, as I must in a summary decision proceeding, I find that the investigation commenced more than 30 days prior to the Complainant's complaint to OSHA.

The Complainant has also stated he considered his "case filed in early July" when he first telephoned the Atlanta office of the EPA. With the burden on the Complainant to establish that his complaint was timely, I find that his vague statement that he telephoned the EPA "in early July" is insufficient to establish that a timely complaint. Moreover, as the regulation requires that complaints be communicated in writing, a telephone call is an insufficient mechanism for instituting a complaint. 29 C.F.R. § 24.103(b).

⁵ Upon review of the Complainant's initial complaint to OSHA, I find that it does not refer to any specific whistleblower statute. I have considered whether the Complainant's complaint does in fact meet the requirements for a complaint under the Federal Rail Safety Act. 49 U.S.C. § 20109. However, I find it does not, for the following reasons: first, under the Rail Safety Act, a complaint must relate to "safety" or "security." The Complainant's complaint does not relate to either subject, but rather, according to the Complainant's OSHA complaint, discusses "dumping coal, coke, iron ore and coal dust into a wetland area" which the Complainant was concerned "would get into the water system." Second, the Complainant's complaint averred that he was terminated in retaliation for making a report to "the EPA"[Environmental Protection Agency]. The Environmental Protection Agency is the appropriate agency to deal with issues pertaining to water pollution or contamination, and thus I find that the Complainant's complaint correctly was classified as a complaint under an environmental protection statute. Under 29 C.F.R. § 24.103, all of the environmental protection statutes, except the Energy Reorganization Act, have 30-day filing requirements. The Energy Reorganization Act deals principally with complaints implicating power generation, and is not at issue in this case.

⁶ These documents indicate the Complainant was directed to attend an investigation on June 2, 2009, and that this matter was postponed to June 17, 2009, and then was later postponed to June 23, 2009. The limitations period begins to run when the complainant is notified of the adverse action, not when it actually takes effect. Devine v. Blue Star Enter., Case No. 04-109 (ARB: Aug. 31, 2006), slip op. at 5. Therefore, presuming that the investigation is an adverse action, the limitations period began when the Complainant was notified of the investigation, which according to the record before me was not later than June 2, 2009.

Based on the record before me, as summarized above, and assuming arguendo that the Complainant's complaint included an allegation that the Respondents' post-termination investigation constituted an additional adverse action, I find that the Complainant's initial complaint to OSHA was not timely.

The issue of whether the limitations period should be tolled remains, and requires additional discussion. In Prybys, a case involving the whistleblower protection provisions of the environmental protection statutes, including the Act at issue in this case, the Administrative Review Board noted the following as "the principal situations where tolling is appropriate": the defendant has actively misled the plaintiff respecting the cause of action; the plaintiff has in some extraordinary way been prevented from asserting his rights; or the plaintiff has raised the precise statutory claim, but has done so mistakenly in the wrong forum. Prybys, slip op. at 4, quoting School District of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981).⁷ The Board also noted that courts have stated that equitable tolling does not permit "disregard [of the] limitations periods simply because they bar what may be an otherwise meritorious case." Prybys slip op. at 8; quoting Allentown, 657 F.2d at 20; accord Rose, 945 F.2d at 1336.

In recent cases under the environmental whistleblower protection statutes, the Board has reiterated its reliance on the principles set out in the Allentown case. Higgins v. Glen Raven Mills, Inc., Case No. 05-143 (ARB: Sept. 29, 2006), slip op at 8; Scharfermeyer v. Blue Grass Army Depot, Case No. 07-082 (ARB: Sept. 30, 2008), slip op. at 9.⁸ The Board has also stated, as the Allentown court held, that ignorance of the applicable law generally will not support entitlement of equitable tolling.⁹ Higgins, slip op. at 8.

In essence, the Complainant urges that the statutory 30-day requirement for filing his OSHA claim be tolled because he was not aware that his protected activity played a role in any adverse action until after the 30 day period had already passed; or he was confused as to whether the 30-day requirement applied in his case, because he was a railroad employee. Presuming the former to be true, there is no evidence that the Respondent misled the Complainant in any way regarding any adverse action, or about his remedies. There is also no evidence that the Complainant was prevented in any way from asserting his rights. Lastly, there is no evidence that the Complainant pursued any action in a "wrong forum."

⁷ The Board also cited additional factors, as set forth by the Sixth Circuit in Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir. 1991), that may be considered in determining whether equitable tolling was appropriate. These are as follows: whether the plaintiff lacked actual notice of the filing requirements; whether the plaintiff lacked constructive notice (i.e., plaintiff's attorney should have known); the diligence with which plaintiff pursued his rights; whether there would be prejudice to the defendant if the statute were tolled; and the reasonableness of the plaintiff remaining ignorant of his rights.

⁸ The Higgins case involved the Water Pollution Control Act, 33 U.S.C. § 1367, as well as other environmental statutes (e.g., Solid Waste Disposal Act, 42 U.S.C. § 6971). Scharfermeyer involved the Solid Waste Disposal Act and the Clean Air Act, 42 U.S.C. § 7622.

⁹ Although the Complainant in Higgins was represented by counsel (and in fact argued that equitable tolling should apply due to his counsel's ineffective assistance), this principle is not limited to situations where an individual has attorney representation.

As set forth above, I have found that the Complainant's second rationale to support his contention that tolling is appropriate is not credible. However, even if I presume it to be true, there is no evidence that any of the Allentown factors were present. Specifically, there is no evidence (or even any allegation) that the Respondent misled the Complainant or suggested to him that the Rail Safety Act, with its longer limitations period, applied to his complaint. There also is no evidence that the Complainant ever attempted to file a complaint under that statute.

Conclusion

Based on the foregoing, where the Complainant's complaint to OSHA was untimely, and he has not submitted any facts to form a basis for a conclusion that equitable tolling is appropriate, as set forth in School District of Allentown v. Marshall, 657 F.2d 16 (3d Cir. 1981), I find that his complaint should be dismissed, due to lack of timely filing. Therefore, I recommend dismissal of this matter. See 29 C.F.R. § 24.109.

SO ORDERED.

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ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board (“the Board”) **within 10 business days of the date of this decision.** The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., N.W., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).