U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

MADHURI TRIVEDI,

COMPLAINANT

v.

GENERAL ELECTRIC and GE HEALTHCARE,

RESPONDENTS.

ARB CASE NO. 2022-0026

ALJ CASE NO. 2022-SOX-00005

DATE: August 24, 2022

Appearances:

For the Complainant:
Madhuri Trivedi; *pro se*; Boston, Massachusetts

For the Respondents:
Tomasita L. Sherer, Esq. and Cassandra Beckman Widay, Esq.; *Dentons US LLP*; New York, New York

Before: HARTHILL, Chief Administrative Appeals Judge, and BURRELL, and PUST, Administrative Appeal Judges

DECISION AND ORDER

PUST, Administrative Appeals Judge:

This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, its implementing regulations at 29 C.F.R. Part 1980, and the Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567. Madhuri Trivedi (Complainant) filed a whistleblower complaint against General Electric and GE Healthcare (Respondents) for alleged

retaliation. The Administrative Law Judge (ALJ) issued an Order Denying Complaint for Failure to Timely File (Order). Complainant appealed the ALJ's decision. We affirm.

BACKGROUND

Complainant worked as an engineer at GE Healthcare in Waukesha, Wisconsin, beginning in November 2011. On May 31, 2013, Respondent terminated Complainant's employment.[1]

On October 8, 2013, Complainant contacted the U.S. Citizenship and Immigration Services (USCIS) about her immigration status.[2] Although she described Respondents' workplace as a "hostile and unprofessional work environment," she did not make any SOX, CFPA, or other whistleblower retaliation allegations related to her termination in her communications with USCIS.[3]

On December 12, 2013, Complainant contacted the Food and Drug Administration (FDA) to raise concerns about Respondents' medical device software.[4] She reported that Respondents' Insite Exc (Insite Express Connect) product was defective with respect to "performance, maintainability, quality, security issues" and did not have "proper logging/audit trail/reporting" functionality, as allegedly required by the Health Insurance Portability and Accountability Act of 1996 (HIPPA).[5] Complainant's communications with FDA contained no allegations of whistleblower retaliation related to her termination.[6]

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1 Order at 2.

2 *See* Complainant's (Comp.) Motion to Compel Discovery (Jan. 23, 2021), electronic record at 442-44. Although the record below contains sufficient credible evidence that supports this finding, the ALJ included no record reference to this and many other determined facts in the Order. In instances wherein the ARB finds citation to record evidence necessary to a thorough review of the case and of value to the transparency of the Board's decision, the ARB has noted in this Decision and Order the appropriate citation to the electronic record before the ALJ. The ARB has not relied on any new evidence submitted as part of Complainant's briefing to the Board and not included in her filings below.

3 *See* Comp. Motion to Compel Discovery (Jan. 21, 2022), electronic record at 443-50.

4 *Id.*, electronic record at 459-60.

5 *Id.*

6 *Id.*; Order at 3.

While concurrently engaged in an arbitration of her termination-related claims,[7] on May 3, 2014, Complainant filed a *pro se*[8] whistleblower complaint with the Occupational Safety and Health Administration (OSHA) alleging her employment had been terminated due to "reporting errors in medical device software, HIPAA, nationality and gender."[9] In a letter dated June 14, 2014, OSHA informed Complainant that the agency lacked jurisdiction over her complaint and would take no further action.[10] OSHA's letter referred Complainant to the U.S. Equal Employment Opportunity Commission and the Department of Health and Human Services, Office of Civil Rights.[11]

Complainant then took her complaints to the federal courts.[12] In March 2016, Complainant brought claims against the U.S. Department of Homeland Security and USCIS, plus six individual government employees, regarding USCIS's denial of her I-140 immigration petition.[13] In May 2019, Complainant brought suit against

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[7] In American Arbitration Association (AAA) Arb No. 51 160 01260 13, filed on or about November 9, 2013, Complainant alleged that: (1) she was discharged "in violation of state and federal anti-discrimination laws" due to her national origin and/or gender; (2) Respondents failed to correct reported discrimination and hostile work environment conditions; and (3) Respondents retaliated against her for reporting this "discriminatory disparate treatment and working conditions." *See* Comp. Motion to Compel Discovery, electronic record at 446.

[8] Complainant was represented by various legal counsel when demanding employment reinstatement pending continued immigration status processing in 2013, during a mediation process with Respondents filed later in 2013, and in July 2014 when again demanding settlement discussions. *See* Respondent (Resp.) Exhibit (Ex.) A, electronic record at 93; Comp. email to OSHA (Sept. 10, 2021), electronic record at 826-32. During the same period and thereafter, Complainant proceeded *pro so* in her agency and court filings. *See* Self-Represented Party Notice of Appearance, electronic record at 50-51.

[9] Comp. Objections (Oct. 2021), electronic record at 359, 640, 791; Order at 2.

[10] *Id.*

[11] *Id.*

[12] Pursuant to Rule 201, Federal Rules of Evidence, the ARB takes judicial notice of the fact of these court filings and the content of judicial decisions related thereto, all adjudicatory facts not subject to reasonable dispute and able to be accurately and readily determined from a review of sources whose accuracy cannot reasonably be questioned, including the cited courts' published dockets.

[13] In *Trivedi v. U.S. Dep't of Homeland Sec.*, No. 16-CV-01122-JD, 2016 WL 10651086 (N.D. Cal. Nov. 21, 2016), the U.S. District Court for the Northern District of California dismissed Complainant's claims brought under: 8 U.S.C. § 1324b (unfair immigration-related employment practices); Health Insurance Portability & Accountability Act, citing 45 C.F.R. § 164.530(g)); 31 U.S.C. §§ 3729, 3802 (False Claims Act); 42 U.S.C. § 2000e-3a (Civil Rights Act of 1991); 18 U.S.C. §§ 1512, 1513, 1621 (witness tampering/retaliation and

Respondents and others in the U.S. District Court for the District of Columbia, then filed a notice of voluntary dismissal without prejudice in that suit when faced with a motion to dismiss.[14] In August 2019, Complainant filed a fifteen-count amended complaint against Respondents and others in the U.S. District Court for the District of Massachusetts.[15] The U.S. Magistrate Judge granted the defendants' motion to dismiss all claims, including her SOX and CFPA whistleblower claims, on August 11, 2020, which dismissal Complainant unsuccessfully appealed to the First Circuit Court of Appeals.[16]

On September 2, 2021, Complainant filed a second *pro se* complaint with OSHA alleging that Respondents wrongfully terminated her employment in 2013 in violation of the SOX and CFPA.[17] On September 17, 2021, OSHA dismissed the complaint as being untimely filed.[18]

Complainant then requested a hearing before an ALJ with the Office of Administrative Law Judges (OALJ). On January 6, 2022, the assigned ALJ held a preliminary conference call during which the ALJ raised the issue of whether Complainant's claim was untimely.[19] On January 7, 2022, the ALJ issued an Order to Show Cause as to why the case should not be dismissed for failure to timely file a complaint, advising the parties to respond by January 24, 2022.[20] On January 24, 2022, Complainant sent an email to the ALJ stating that "I am not going to reply to order to show ca[use]—until[] I get stay or another judge; or order that my motion

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perjury); intentional infliction of emotional distress; and a request for review of the I-140 petition denial. The Ninth Circuit Court of Appeals affirmed. *See Trivedi v. U.S. Dep't of Homeland Sec.*, 711 F. App'x 827 (9th Cir. 2017), cert. denied 138 S. Ct. 1293 (2018).

14 *See Trivedi v. Gen. Elec. Co.*, No. 19-CV-01479 (D.D.C. Sept. 4, 2019).

15 *Trivedi v. Gen. Elec. Co.* CV 19-11862-PBS, 2020 WL 9744753 (D. Mass. Aug. 11, 2020), report and rec. adopted, 2021 WL 2229088 (D. Mass. May 27, 2021), aff'd 2022 WL 1769136 (1st Cir. May 3, 2022).

16 *Trivedi v. Gen. Elec. Co.*, No. 21-1434, 2022 WL 1769136 (1st Cir. May 3, 2022). The First Circuit denied the petition for rehearing and the petition for rehearing *en banc* on August 8, 2022. Trivedi subsequently filed a notice requesting that the *en banc* panel reconsider and reverse its *en banc* decision and a motion and an amended motion to transfer the case. *See Trivedi*, No. 21-1434 (Docket August 8 and 9, 2022). Finally, the First Circuit issued a mandate on August 16, 2022, in accordance with the Judgment of May 3, 2022.

17 Order at 1.

18 *Id.*

19 *Id.*

20 *Id.* at 1-2.

to stay legal arguments meets timeliness requirement."[21] From January 7th to the 24th, Complainant had filed thirty-eight emails with OALJ, which the ALJ analyzed with the rest of the record to determine whether any evidence established that Complainant's OSHA filing was timely.[22]

On February 25, 2022, the ALJ denied the complaint with prejudice. The ALJ determined that Complainant filed her whistleblower complaint with OSHA 3,106 days after her termination date. After finding that the complaint was filed well beyond the 180-day limitation period and therefore both the SOX and CFPA[23] claims were untimely, the ALJ analyzed whether equitable tolling was applicable.[24]

First, the ALJ analyzed whether Complainant raised her precise statutory claims in the wrong forum. The ALJ determined that Complainant's filings with USCIS and FDA did not allege any claims of whistleblower retaliation or request Complainant's reinstatement to her former position due to protected whistleblowing activity. Thus, the ALJ concluded that Complainant did not raise the precise statutory claims at issue in this matter in the wrong forum.[25]

Next, the ALJ determined there was no evidence that Respondents misled Complaint or prevented her in any way from asserting her rights. The ALJ further opined that Complainant could not reasonably claim she was unaware of her right to file a whistleblower complaint because she had actively litigated against Respondents for years. Therefore, the ALJ concluded that equitable tolling was not warranted and dismissed the complaint with prejudice.[26]

Complainant timely appealed to the Administrative Review Board.

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21 *Id.* at 2 n.3

22 *Id.*

23 With regard to Complainant's CFPA claim, the ALJ also noted OSHA's determination, and that of the U.S. District Court for the District of Massachusetts, that Respondent is not a covered person or service provider within the meaning of 12 U.S.C. § 5567 and, therefore, Complainant is not an employee within the meaning of Section 5567 as required for complaints filed under the CFPA. *See* Order at n.1.

24 *Id.* at 3.

25 *Id.*

26 *Id.* at 3-4.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the SOX and CFPA as amended.[27] The ARB reviews an ALJ's grant of summary decision de novo.[28]

DISCUSSION

A SOX complaint must be filed no later than 180 days after the date of the alleged violation of the Act or after the date on which the employee became aware of the violation.[29] Likewise, a CFPA complaint must be filed no later than 180 days after the date an alleged violation occurs.[30]

The limitations period for filing a complaint is not jurisdictional and is subject to equitable modification.[31] Equitable tolling is granted sparingly and only upon a showing that extraordinary circumstances out of the complainant's control prevented a timely filing.[32]

The Board recognizes four principal situations in which a party may be entitled to equitable tolling: (1) respondent has actively misled the complainant regarding the cause of action; (2) complainant has in some extraordinary way been prevented from filing the action; (3) complainant has raised the precise statutory claim at issue but has done so in the wrong forum; and (4) respondent's own acts or omissions have lulled the complainant into forgoing prompt attempts to vindicate the rights at issue.[33]

To invoke equitable tolling, the claim must be brought within a reasonable time after the complainant "has obtained, or by due diligence could have obtained,

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[27] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[28] *Elias v. Celadon Trucking Servs., Inc.*, ARB No. 2012-0032, ALJ No. 2011-STA-00028, slip op. at 3 (ARB Nov. 21, 2012).

[29] 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

[30] 29 C.F.R. § 1985.103(d).

[31] *Id.*; 29 C.F.R. § 1980.103(d); *Swinney v. Fluor Corp.*, ARB No. 2015-0044, ALJ No. 2014-SOX-00041, slip op. at 2 (ARB June 11, 2015).

[32] *Katz v. Underwriters Lab'ys*, ARB No. 2021-0006, ALJ No. 2018-SOX-00030, slip op. at 4 (ARB Nov. 30, 2020).

[33] *See Brown v. Synovus Fin. Corp.*, ARB No. 2017-0037, ALJ No. 2015-SOX-00018, slip op. at 2 (ARB May 17, 2017).

the necessary information" giving rise to the claim.[34] Complainant bears the burden of justifying the application of equitable tolling.[35] Courts are generally "much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving [her] legal rights."[36] A complainant's "*pro se* status does not provide an independent basis for the Court to toll the statute of limitations."[37]

Complainant asserts that OSHA illegally closed her 2014 OSHA complaint.[38] Other than with unproven allegations of corruption and illegal conduct, Complainant has presented no convincing evidence in support of this claim. As noted in OSHA's September 17, 2021 determination letter, OSHA no longer maintains records relating to the 2014 closure of Complainant's case filing, having disposed of them in compliance with the agency's mandatory document retention schedule.[39] Fortunately, Complainant's Objections filed with the OALJ in this matter contain a copy of OSHA's July 14, 2014 administrative closure letter, which noted the untimely nature of her complaint and that OSHA would not take any further action on it. [40] Complainant has acknowledged her receipt of the OSHA letter.[41] Therefore, the record clearly establishes that the complaint was filed beyond the 180-day limitation period and was untimely under applicable law.

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[34] *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), *quoted with approval in Daryanani v. Royal & Sun Alliance, d/b/a Arrowpoint Capital Corp.*, ARB No. 2008-0106, ALJ No. 2007-SOX-00079, slip op. at 7 (ARB May 27, 2010).

[35] *See Jaludi v. Citigroup, Inc.*, ARB No. 2021-0053, ALJ No. 2021-SOX-00014, slip op. at 3 (ARB Aug. 25, 2021).

[36] *Lubary v. El Floridita*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 6 (ARB Apr. 30, 2012).

[37] *Correia v. Mass. Bay Commuter R.R.*, No. CIV.A 12-12048-DJC, 2013 WL 6383107, at *3 (D. Mass. Dec. 4, 2013), *aff'd*, No. 14-1020, 2014 WL 7506802 (1st Cir. Sept. 15, 2014) (quoting *Stonier v. United States*, No. 03–10146–JLT, 2011 WL 1877670, at *4 (D. Mass. Apr. 7, 2011) ("[I]t is well established that ignorance of the law, even for a[ ] ... pro se [plaintiff], generally does not excuse prompt filing.")).

[38] Comp. Brief (Br.) at 12.

[39] *See* Resp. Ex. A (OSHA's findings dated Sept. 17, 2021), electronic record at 92-94, n.2, 3.

[40] *See* Comp. Objections (OALJ Oct. 2021), electronic record at 359, 640, 791.

[41] Complainant's "Objections to OSHA dismissal of complaint (1) General Electric and GE Healthcare/Trivedi/5-3100-21-110; filed under SOX and CFPA" dated October 17, 2021, filed in electronic record at 110 and 163, included in Exs. C and D to Declaration of Tomasita Sherer in Support of GE's Response to the Order to Show Cause. *See also* Transcript of Judicial Conference Call held below on January 6, 2022, electronic record at 73 ("And when I filed in 2014, you have it in my objection what OSHA responded. OSHA responded in Milwaukee that it doesn't fit any of the 22 statutes that OSHA has. One of that was SOX, right, and I have even submitted in my objection.").

Complainant next contends that equitable tolling principles apply.[42] Complainant first asserts that she raised this precise statutory claim in the wrong forum when she contacted USCIS on October 8, 2013, and the FDA on December 12, 2013.[43] The record does not support this contention and in fact supports the opposite: Complainant did not include any allegations of SOX, CFPA, or other whistleblower retaliation related to her termination in these filings.[44] For the reasons stated by the ALJ, we agree that Complainant did not raise this precise statutory claim in the wrong forum.[45]

Second, Complainant argues that extraordinary circumstances warrant the application of equitable tolling.[46] Specifically, she contends that the attorneys who represented her in 2013 did not inform her of her ability to file an OSHA complaint, and she was not aware that she could file an OSHA claim until May 3, 2014.[47] Attorney error, standing alone, does not constitute an extraordinary factor that justifies equitable tolling of a filing deadline because "clients are accountable for the acts and omissions of their attorneys."[48] Further, "ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground establishing entitlement."[49]

Third, Complainant claims that mediation and arbitration delayed her from timely filing her complaint as those processes took from June 2013 until May 7, 2014.[50] Complainant has not explained why she could not file an OSHA complaint to preserve these claims while participating in these other proceedings. Further, being occupied with other matters does not excuse the failure to comply with filing deadlines.[51]

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42 Comp. Br. at 17. 21, and 24.

43 Comp. Reply Br. at 10.

44 *See* Comp. Motion to Compel Discovery (Jan. 23, 2021), electronic record at 442-44; 459-60.

45 Order at 3.

46 Comp. Br. at 24.

47 *Id.*

48 *Nevarez v. Werner Enter.*, ARB No. 2018-0005, ALJ No. 2013-STA-00012, slip op. at 3 (ARB Dec. 14, 2017) (citations omitted).

49 *Tardy v. Delta Air Lines*, ARB No. 2016-0077, ALJ No. 2015-AIR-00026, slip op. at 5 (ARB Oct. 5, 2017).

50 Comp. Br. at 24.

51 *Matthews v. Labarge, Inc.*, ARB No. 2008-0038, ALJ No. 2007-SOX-00056, slip op. at 2-3 (ARB Nov. 26, 2008).

Fourth, Complainant contends that the continuing violations doctrine applies. In support of this argument, Complainant alleges that Respondents engaged in ongoing fraud, and that OSHA and ALJ McGrath mismanaged her case.[52]

The continuing violations doctrine may allow an employee "who ordinarily would be unable to recover damages for discrete acts of discrimination falling outside the limitations period [to] avoid that bar if those acts are shown to be part of a pattern of discrimination anchored by acts that occurred within the limitations period."[53] The First Circuit has traditionally "recognized that '[c]ontinuing violations may be serial or systemic.'"[54] "'Systemic violations occur where an *employer* maintains a discriminatory policy, responsible for multiple discriminatory acts that fall outside the limitations period.'"[55] Conversely, a serial violation exists "'where the plaintiff experiences a number of discriminatory acts arising from the same discriminatory animus.'"[56]

In addition, it is "well established that the [continuing violation] doctrine does not apply to 'discrete acts' of alleged discrimination that occur on a 'particular day,' but only to discriminatory conduct that takes place 'over a series of days or perhaps years.'"[57] Discrete acts include "termination, failure to promote, denial of transfer, or refusal to hire."[58]

The continuing violation doctrine is generally applied in the context of hostile work environment and other employment claims.[59] "The statute of limitations

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[52] Comp. Br. at 25, 31-35, 46-53.

[53] *Kahriman v. Wal-Mart Stores, Inc.*, 115 F. Supp. 3d 153, 161 (D. Mass. 2015) (citing *Noviello v. City of Boston,* 398 F.3d 76, 86 (1st Cir. 2005)).

[54] *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 405 (1st Cir. 2002) (citing *Provencher v. CVS Pharmacy, Div. of Melville Corp.,* 145 F.3d 5, 14 (1st Cir.1998)); *Powell v. Alexander*, No. 18-CV-30146-MGM, 2020 WL 7706096, at *3 (D. Mass. Feb. 27, 2020), *R. and R. adopted sub nom. Powell v. City of Pittsfield,* No. CV 18-30146-MGM, 2020 WL 7334313, at *4 (D. Mass. Dec. 14, 2020).

[55] *Powell v. Alexander*, at *3 (citing *Rivera–Rodriguez v. Frito Lay Snacks Caribbean,* 265 F.3d 15, 21 (1st Cir. 2001) (emphasis added)).

[56] *Id.* (citing *Rivera–Rodriguez*, 265 F.3d at 22).

[57] *Tobin* v. *Liberty Mut. Ins. Co.*, 553 F.3d 121, 130 (1st Cir. 2009) (quoting *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 115 (2002)).

[58] *Morgan*, 536 U.S. at 114.

[59] *Id.* at 117; *Ayala-Sepúlveda v. Mun. of San Germán*, 671 F.3d 24, 30-31 (1st Cir. 2012) (applying the continuing violation doctrine to a hostile work environment claim).

begins to accrue at the time the Plaintiff knows or should have known of the harm suffered as a result of the employer's discriminatory [or retaliatory] conduct."[60]

Although Complainant accuses Respondents of ongoing securities and consumer fraud, she does not allege the type of discriminatory activity directed at her that would support application of the continuing violations doctrine. Respondent terminated her employment on May 31, 2013, which is alleged as a discrete act.

Complainant also alleges that OSHA and ALJ mismanaged her claim and that this supports her claim that the continuing violations doctrine should apply.[61] We do not find that either OSHA or the ALJ mismanaged this claim. However, even if we found such mismanagement, the continuing violations doctrine would not apply. As noted above, the continuing violations doctrine applies to acts by employers, not court claims.[62] Therefore, we conclude that the continuing violations doctrine does not apply.

In addition, Complainant has not demonstrated that she exercised due diligence to preserve her legal rights. Complainant waited nearly a year after her employment was terminated to file her first claim with OSHA regarding a potential whistleblower claim. She then waited more than seven years to file her present claim with OSHA. As such, Complainant has failed to exercise due diligence and thus has not established the type of extraordinary circumstances that justify extending the filing deadline in this case under equitable tolling principles.

For all of the reasons cited, we conclude that Complainant filed an untimely complaint and failed to establish any situation that would warrant an extension of the filing deadline under equitable tolling principles.

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60 *MacDonald v. Town of Upton*, 297 F. Supp. 3d 209, 212 (D. Mass. 2018) (citing *Ocean Spray Cranberries, Inc. v. Mass. Comm'n Against Discrimination*, 808 N.E.2d 257, 265-66 (Mass. 2004)).

61 Comp. Br. at 25, 31-35, 46-53.

62 *See Crowley*, 303 F.3d at 405.

CONCLUSION[63]

Accordingly, we **AFFIRM** the ALJ's Decision and Order dismissing the complaint as untimely filed.

SO ORDERED.

[redacted]

TAMMY L. PUST
Administrative Appeals Judge

[redacted]

SUSAN HARTHILL
Chief Administrative Appeals Judge

[redacted]

THOMAS H. BURRELL
Administrative Appeals Judge

[63] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.