U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)

Issue Date: 05 August 2005

Case No: 2005-SDW-00007

In the Matter of:

WARREN HIGGINS,
Complainant
v.

GLEN RAVEN MILLS, INC.,
Respondent

Appearances:
Erin Dunnuck, Esq., for Claimant
Theodore C. Edwards, II, Esq., for Employer
J. Christopher Jackson, Esq. for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION TO DISMISS

The above referenced matter arises upon a complaint filed with the State of North Carolina Department of Labor on August 6, 2004, by Warren Higgins, Complainant, versus Glen Raven Mills, Inc. (hereinafter "Glen Raven" or "Respondent"). The Complainant asserts that he was fired from employment on July 2, 2004, as a result of engaging in activities which are protected pursuant to the *Safe Drinking Water Act* ("SDWA"), 42 USC §300j-9(i); *Solid Waste Disposal Act*, 42 USC § 6971 (a/k/a *Resource Conservation & Recovery Act*) ("RCRA"); *Federal Water Pollution Control Act* ("WPC"), 33 USC § 1367; 29 CFR Part 24.

Per Complainant's Response to the Order to Show Cause, dated April 28, 2005, Complainant was employed by Respondent for almost twenty-five years. Complainant held the position of Plant Engineer, and was informed in April of 2004 that he would be undertaking the additional responsibility of environmental reporting and record keeping. Complainant alleges that his new responsibilities included falsifying reports to state environmental agencies and covering up releases. After consulting an attorney, David Craft, Complainant alleges that he informed Respondent that he would not disobey the environmental regulations and threatened to report Respondent's violations. Complainant alleges that this action resulted in his termination on July 2, 2004.

Complainant contacted Craft, his attorney, the same day he was fired, July 2, 2004. Craft then contacted the North Carolina Department of Environment and Natural Resources (NCDENR) and faxed information regarding falsified reports on July 7, 2004. Complainant asserts that he regularly checked with his attorney concerning the progress of his case, and eventually asked if something should be filed with the North Carolina Department of Labor (NCDOL). Craft agreed with this suggestion, but advised that it would be less costly for Complainant to contact the agency himself. Accordingly, Complainant called the NCDOL on July 28, 2004.

Complainant asserts that the NCDOL Discrimination Office has a policy of listening to the potential complainants on the phone and "weeding out" claims lacking merit. For all others, the NCDOL employee records the name of the potential complainant in the Complaint Phone and Mailing Log and sends that person an official complaint form. Complainant personally signed and dated the State of North Carolina complaint form on August 6, 2004.

The complaint was investigated by the State of North Carolina, and was dismissed on August 19, 2004. A subsequent complaint was filed by Complainant with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) on February 11, 2005. The complaint was investigated by OSHA, which issued a determination on March 15, 2005. The determination found that the complaint was not timely filed within 30 days of his July 2, 2004 firing, as required by the above statutes and regulations. In so finding, OSHA correctly determined that the date of filing of the complaint with the State of North Carolina should be used as the date for purposes of considering timeliness in this matter.

The federal regulation applicable to this matter at 29 CFR §24.3(b) provides that any complaint shall be filed within 30 days after the occurrence of the alleged violation. It is well settled that complaints filed under the environmental employee protection provisions of the statutes applicable to this matter are subject to brief 30-day statutory limitations, and that such must be scrupulously observed. See, *Prybys v. Seminole Tribe of Florida*, 95-CAA-15 (ARB Nov. 27, 1996); *English v. Whitfield,* 858 F.2d 957 (4th Cir. 1988). The Court's initial review of this matter indicated that the Complainant unequivocally stated that he was fired on July 2, 2004. The State of North Carolina complaint form is signed and dated by the Complainant personally on August 6, 2004. Based upon these facts, it appeared that a period of 35 days elapsed between Complainant's firing and the date he signed the complaint.

Therefore, an order was issued on March 30, 2005, requiring the Complainant to show cause as to why his complaint should not be dismissed as not having been timely filed. The Complainant, by Counsel, filed a response on April 28, 2005. On May 9, 2004, the Respondent filed a reply by Counsel arguing that the complaint should be dismissed as untimely filed. Because the Respondent's reply sought dismissal of the complaint, the Respondent's reply was treated as a motion for summary decision. As such, an Order requiring further response from the Complainant was issued on May 19, 2005. The Complainant filed "Complainant's Response to Respondent's Reply to Complainant's Response to Order to Show Cause" on May 31, 2005.

On June 2, 2005, an Order was issued denying summary dismissal of this complaint (as untimely). Complainant had alleged that his former attorney, David Craft, had contacted

NCDENR on July 7, 2004, and had submitted nine pages of information by facsimile transmission (hereinafter the "Fax"), which Claimant had asserted contained information regarding alleged falsified reports. Without a copy of the Fax for review, and pursuant to the applicable summary decision standard, a factual inference was drawn in favor of Complainant, whereby the Fax could constitute the filing of a written complaint. Therefore, a genuine issue of material fact remained as to whether the Fax sent to NCDENR could invoke equitable tolling of Complainant's complaint, as it reasonably could have mistakenly raised Complainant's precise statutory claim in the wrong forum.

Following the issuance of the June 2, 2005 order, the Complainant's new attorney, Erin F. Dunnuck, submitted a copy of the Fax sent by Attorney Craft to the NCEDNR on July 7, 2004. Because this evidence in now available, the parties were informed during a June 2, 2005 telephone conference that the issue of summary decision would be reconsidered prior to scheduling a formal hearing. An order was issued summarizing the telephone conference on June 14, 2005. Thereafter, Complainant submitted a Memorandum in Opposition to Summary Dismissal on June 29, 2005. Respondent submitted a Response in Support of Summary Dismissal on July 11, 2005.

The documents contained in the Fax include :

(1) A facsimile cover page from Craft to Kay Dechart dated July 7, 2004, which includes only a comment that it is "Re: Glen Raven Mills";
(2) A letter dated June 16, 2000 from Kay Laws, Glen Raven Mills, to Wanda Frazier, NCDENR, regarding a self-reported incident of noncompliance with a stormwater permit concerning a broken sewer line, and detailing repairs that were made;
(3) A letter dated June 15, 2000, from Bensinger & Garrison Environmental, Inc. to Kay Laws informing her of her duty to report the sewage release within five days of the incident;
(4) A letter dated November 6, 2000, from Four Seasons Environmental, Inc. to Kay Laws, concerning a proposal for sludge removal services related to a Glen Raven septic system, including a pricing summary for the procedure;
(5) A "Certificate of Analysis" from Chem-Bac Laboratories, Inc., to Glen Raven Mills from the year 2000; and
(6) A "Safety and Environmental Audit" dated August 9 – 11, 1999, which contains some handwritten notes.

Respondent argues that, on its face, the Fax provides no evidence of wrongdoing by Respondent and no factual allegations of a violation of any whistleblower or other environmental statute related to Complainant. Respondent asserts that the Fax evidences that Respondent self-reported a sewage spill to NCDENR and took appropriate steps to remedy the problem, including consulting with an environmental engineering firm to insure compliance with applicable laws. Respondent alleges that the other documents in the Fax indicate that Respondent was diligent in its efforts to maintain environmental standards.

To the contrary, Complainant argues that the Fax constitutes a valid complaint. Complainant alleges that the fax contained the falsified reports that Respondent sent to NCDENR, which Complainant discovered after he took over environmental recoding and record keeping. Complainant further notes that the Fax was sent by his former attorney to NCDENR within days of Complainant's termination. Complainant asserts that because the Fax contains information relating to Respondent's environmental violations and the pertinent dates of these violations, this Fax should constitute a valid complaint.[1]

The regulations guiding consideration of this complaint provide that, although no particular form of the complaint is required, it must be in writing and should include a full statement of the acts and omissions, with pertinent dates, *which are believed to constitute the violation.* 29CFR 24.3(c) (emphasis added). Even if Complainant's argument that the Fax

[1] However, Complainant's argument neglects to consider every element required for whistleblower protection. While this information relating to Respondent's environmental violations may be relevant in determining whether Complainant engaged in protected activity, it fails to raise any issue of whether Complainant suffered retaliation by Respondent because of his protected activity. Notably, all three acts under which this complaint was filed contain whistleblower provisions. For instance, the Safe Drinking Water Act's whistleblower provision states specifically that:

> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--
> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
> (B) testified or is about to testify in any such proceeding, or
> (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C. § 300j-9 (i).

Additionally, the whistleblower protections of the Solid Waste Disposal Act mandates that:

> 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 under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. § 6971(a).

Finally, the Federal Water Pollution Control Act's whistleblower provisions directs that:

> 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).

evidences Respondent's environmental violations is accepted as true, the Fax still does not constitute a valid complaint because it fails to detail any act or omission that is believed to constitute a violation. Specifically, the Fax lacks either a direct or an inferential allegation concerning a material element of a whistleblower complaint: that the Respondent discriminated against Complainant with respect to the compensation, terms, conditions, or privileges of employment.

Therefore, I find that the Fax failed to comply with the requirements of 29 C.F.R. §24.3(c), which provides that the complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation. The Fax fails to meet this basic requirement, and it thus fails to constitute a valid complaint.

In the alternative, Complainant asserts that if the Fax does not constitute a valid complaint, the doctrine of equitable tolling should be invoked. Respondent counters that there is no basis for the equitable tolling of the 30-day statute of limitation in the present case. As previously discussed in the June 2, 2005 Order, no other evidence has been offered sufficient to warrant equitable tolling of this complaint.

Complaints filed under the environmental employee protection provisions of the statutes applicable to this matter are subject to brief 30-day statutory limitations, and generally must be scrupulously observed. See, *Prybys*, 95-CAA-15; *English,* 858 F.2d 957. However, the Secretary has held that the limitations periods provided by the environmental acts and analogous employee protection legislation are subject to equitable modification. *See, e.g., Tracy v. Consolidated Edison Co. of New York,* Case No. 89-CAA-1, Sec. Dec., July 8, 1992, slip op. at 3-8 and cases cited therein; *Doyle v. Alabama Power Co.,* Case No. 87- ERA-43, Sec. Dec., Sept. 29, 1989, *aff'd sub nom. Doyle v. Sec'y of Labor,* 949 F. 2d 1161 (11th Cir. 1991).

In *School District of City of Allentown v. Marshall,* 657 F.2d 16 (3rd Cir. 1981), a case involving the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629, the court summarized the situations in which equitable tolling is applicable. The following three situations were presented by the court as the "principal situations where tolling is appropriate":

> (1) the defendant has actively misled the plaintiff respecting the cause of action,
>
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
>
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

657 F.2d at 19-20 (quoting *Smith v. American President Lines, Ltd.,* 571 F.2d 102, 109 (2d Cir. 1978)). In *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991), a case involving the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, the court delineated five factors to be considered

in determining whether equitable tolling of a limitations period was appropriate. Those factors are:

(1) whether the plaintiff lacked actual notice of the filing requirements;

(2) whether the plaintiff lacked constructive notice, i.e., his attorney should have known;

(3) the diligence with which the plaintiff pursued his rights;

(4) whether there would be prejudice to the defendant if the statute were tolled; and

(5) the reasonableness of the plaintiff remaining ignorant of his rights.

945 F.2d at 1335 (citing *Wright v. State of Tenn.,* 628 F.2d 949, 953 (6th Cir. 1980)(en banc)). As previously noted by the Secretary, the doctrine of equitable tolling focuses on the question of whether a duly diligent complainant was excusably ignorant of his rights, whereas the principle of equitable estoppel focuses on the issue of whether the employer misled the complainant and thus caused the delay in filing the complaint. *Tracy,* slip op. at 7; *see Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 450-52 (7th Cir. 1990).

In the instant case, it is readily apparent that Complainant was diligent in pursuing his rights. There is evidence that he remained in constant contact with his attorney throughout the process, and he promptly returned the complaint form to NCDOL shortly after receiving it in the mail. However, Complainant has alleged no facts that would support the conclusion that he was induced or misled by the Respondent into delaying pursuit of a complaint under the environmental protection acts.[2] In fact, Complainant contacted his attorney immediately upon his termination to assumedly seek retribution for what he perceived as a wrong. There is also no evidence the Complainant has in some extraordinary way been prevented from asserting his rights.[3]

Furthermore, the Complainant has shown no basis for extending the filing period based on excusable ignorance of his rights under the statute. Though the Complainant signed and filed

---

[2] The elements that must be shown to prove fraudulent concealment to establish equitable tolling of the time limit for filing a complaint in the environmental whistleblower statutes are: (1) wrongful concealment of its action by the respondent, (2) failure of the complainant to discover the operative facts that are the basis of the cause of action within the limitations period, and (3) the complainant's due diligence until discovery of the facts. *Hill v. TVA,* 87-ERA- 23 and 24 (Sec'y Apr. 21, 1994) (*citing Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389, 394 (6th Cir. 1975)).

[3] The ARB appears to insist that the means keeping a complainant from asserting his rights be truly extraordinary. For instance, in *Hall v. EG&G Defense Materials, Inc.*, 1997-SDW-9 (ARB Sept. 30, 1998), a complainant sought to invoke equitable tolling of the time period for filing his environmental whistleblower complaints based on a claim that prior to and continuing through the filing period he suffered from severe depression. The ARB recognized that arguably this ground fits the "in some extraordinary way prevented from asserting rights" ground for equitable tolling, *see School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981), but held that Complainant must make a particularly strong showing that the illness *in fact* prevents the sufferer from managing his affairs, understanding his or her legal rights, and acting on them or, under an even more stringent test, that the sufferer has been adjudged mentally incompetent or was institutionalized during the filing period.

his own complaint on August 6, 2004, he, by his own admission, had the assistance of counsel both before and after his termination of employment under Respondent. The Complainant acknowledges that his attorney, David Craft, advised that it would be more cost-efficient for him to file his own complaint with the NCDOL. The Complainant alleges that Craft failed to inform him of the thirty-day filing requirement. However, this ignorance does not constitute a reason to equitably toll the thirty-day filing requirement. See, *e.g., Mitchell v. EG&G*, 87-ERA-22 (Sec'y July 22, 1993) quoting *Hay v. Wells Cargo, Inc.*, 596 F. Supp. 635, 640 (D. Nev. 1984), aff'd, 796 F.2d 478 (9th Cir. 1986) ("Equitable tolling is inappropriate when plaintiff has consulted counsel during the statutory period. Counsel is presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is imputed to [complainant].").

This finding is not changed by the fact that the Complainant filed his actual complaint on his own, without the assistance of counsel. It is well settled that ignorance of the filing period alone is not sufficient to warrant equitable tolling. *See Rose*, 945 F.2d at 1335; *English*, 858 F.2d at 963; *Marshall*, 657 F.2d at 21; *Hancock v. Nuclear Assurance Corp*., 91-ERA-33 (Sec'y Nov. 2, 1992), slip op. at n3.

No evidence has been presented that raises a genuine issue of material fact that supports equitable tolling in the present case. Therefore, I find as a matter of law that the period of 35 days that elapsed between Complainant's firing and the date he signed the complaint, is inexcusably in excess of the 30-day statutory limitations. For these reasons and the reasoning in the June 2, 2005 order, this complaint is dismissed as having been untimely filed.

ORDER

It is, accordingly, Ordered that:

1. The Motion for Summary Decision by Respondent, Glen Raven Mills, Inc., is granted, and this complaint is dismissed with prejudice.

2. **NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.

A

RICHARD E. HUDDLESTON
Administrative Law Judge