



Issue Date: 18 June 2012

Case Number: 2012-SDW-00001

In the Matter of:

RYAN H. WILKERSON,
Complainant,

v.

NOLA-B CORP.,
Respondent.

ORDER OF DISMISSAL

This proceeding arises under the Safe Drinking Water Act (SDWA), 42 USC § 300j-9(i), the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622, and the applicable regulations issued thereunder at 29 C.F.R. Part 24.¹ On April 17, 2012, I issued a Notice of Docketing and Order to Show Cause, notifying the parties that the above captioned case had been duly filed and docketed on April 16, 2012 and ordering the parties to show cause why the Complainant's complaint should not be dismissed as untimely filed. Complainant filed a timely response to this Order on May 22, 2012. Respondent did not file a response.

Procedural History

On February 29, 2012, Ryan H. Wilkerson (Complainant) filed a whistleblower complaint under provisions of the Safe Drinking Water Act (SDWA) and Toxic Substances Control Act (TSCA) with the Occupational Safety and Health Administration (OSHA) alleging that Respondent terminated his employment because he had reported to the Texas Railroad Commission (TRC) on December 7, 2011 the illegal dumping of oil contaminated drilling mud by Respondent.

On March 5, 2012, the OSHA Regional Administrator found that Complainant did not timely file his SDWA and TSCA complaint with OSHA and therefore dismissed the complaint as untimely. The Secretary's Findings note that Complainant alleged that his employment was terminated on or about December 8, 2011. The Secretary's Findings further note that the complaint filed with the Dallas Regional Office was received on

¹ Part 18 of 29 C.F.R. contains the general rules of practice and procedure applicable to proceedings before the Office of Administrative Law Judges. These rules apply unless inconsistent with a rule of special application. 29 C.F.R. § 18.1.

February 29, 2012, *i.e.*, 93 days after he was fired. On April 12, 2012, Complainant filed an objection to the Secretary's Findings and requested a hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 24.106(a).

On April 17, 2012, I issued a Notice of Docketing and Order To Show Cause directing the parties to explain why the complaint in this case should not be dismissed as untimely. On May 22, 2012, Complainant submitted his response to my show cause order. No response was submitted by Respondent.

Discussion

Under the statutes and applicable regulations, a whistleblower complaint under the SDWA and TSCA must be filed not later than 30 days after the date that an alleged violation of the Acts occurs, or after the date on which the employee became aware of the violation. 42 U.S.C. § 300j-9(i)(2)(A), 15 U.S.C. § 2622(b), 29 C.F.R. § 24.103(d). This time limit is in the nature of a statute of limitations, and the principle of equitable tolling applies. See School District of the City of Allentown v. Marshall, 657 F.2d 16, 19-21 (3d Cir. 1981). In Allentown, a case which arose under whistleblower provisions of the TSCA, the court articulated 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 in issue but has done so in the wrong forum." Allentown, 657 F.2d at 20 (internal quotations omitted). The timeliness of a claim may also be preserved under the "continuing violation" theory, where there is an allegation of a course of related discriminatory conduct and the charge is filed within thirty days of the last discriminatory act. Egenrieder v. Metropolitan Edison Co., 85-ERA-23 (Sec'y Apr. 20, 1987).

Complainant bears the burden of justifying the application of equitable modification principles. Accord Wilson v. Sec'y, Dep't of Veterans Affairs, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling, especially in a case in which a party is represented by counsel. Accord Wakefield v. Railroad Retirement Bd., 131 F.3d 967, 970 (11th Cir. 1997).

As noted above, Complainant's SDWA and TSCA complaint was filed 93 days after his employment with Respondent was terminated, a fact which Complainant does not dispute. In his response to the show cause order, Complainant simply alleges that his inability to find subsequent employment and his lack of knowledge about where to file his whistleblower complaint are the two reasons why he filed his complaint after the 30-day timeframe had expired. Complainant also states that when his employment was first terminated it did not seem important to file a whistleblower complaint because the company was a "bad place to work for many reasons" and he was "planning to quit anyways."

Conclusion

Construing the *pro se* response failed by Complainant as liberally as possible, I find that neither of the reasons he has provided for failing to file his complaint within the 30-day filing period justify the application of equitable tolling. Complainant has not demonstrated that Respondent misled him as to his cause of action or that he was prevented in some extraordinary way from timely filing his complaint under the SDWA and TSCA. Nor has he demonstrated that he timely filed the exact same claim at issue here, but did so in the wrong forum. While Complainant also states that he believes his former employer may have provided “false information” to prospective employers with which he submitted job applications, he has offered no proof to support these allegations other than the fact that he has not been hired since leaving his employment with Respondent. Complainant has not met his burden of justifying the application of equitable tolling in this case. Therefore, I find that Complainant’s whistleblower complaint must be DISMISSED as untimely.

SO ORDERED,

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STEPHEN L. PURCELL
Chief Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This Order of Dismissal 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., 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.

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 20001-8002, (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 Order of Dismissal.

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 a timely petition for review is not filed, or the Board denies review, this Order of Dismissal will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.