

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Newport News, VA

Issue Date: 19 April 2024

CASE NO.: 2023-STA-00072

OSHA CASE NO. 301019843

In the Matter of:

PATRICK ALSTON,
Complainant,

v.

TLC COMPANIES,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT WITH PREJUDICE
AS UNTIMELY FILED

This proceeding arises from a complaint filed under the provisions of Section 31105 of the Surface Transportation Assistance Act of 1982, U.S. Code, Title 49, §31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (“STAA”) and is governed by the implementing Regulations found in the Code of Federal Regulations, Title 29, Part 1978 and Part 18. The claim was referred to the Office of Administrative Law Judges for formal hearing upon appeal.

Issue

The issue before the court is whether Complainant timely filed his complaint within 180 days of the Respondent’s alleged adverse action.

Secretary’s Findings

On 7/26/2023, the Occupational Safety and Health Administration, Regional Administrator on behalf of the Secretary of Labor, issued a final determination letter, and served all parties.

In the Secretary’s Findings, OSHA determined that the Complaint was not timely filed. The Secretary found that based on the Complaint, Complainant was terminated on 6/1/2020 but filed his complaint on 7/20/2023, 3 years later. The Secretary’s Findings concluded that the Complaint was not filed within 180 days as required by the Surface Transportation Assistance Act.

In the Findings, the Secretary stated:

I. Jurisdiction

OSHA has completed its investigation of the above-referenced complaint filed by Patrick Alston (Complainant) against Transport Leasing Contract. (Respondent) under the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105, on July 20, 2023. The complaint alleges Complainant is an employee of Respondent, and Respondent retaliated against Complainant for protected whistleblower activity by termination on June 1, 2020. As the complaint was not filed within 180 days of the alleged adverse action, the complaint is untimely filed.

II. Secretary's Findings

To state a claim of retaliation for whistleblower activity, the evidence must establish each of the following prima facie elements:

1. Complainant is employed by the Respondent and Respondent is covered by the specific statute;
2. Complainant engaged in activity protected under the specific statute,
3. Respondent knew or suspected that Complainant engaged in the protected activity;
4. Complainant suffered an adverse action; and
5. There was a causal connection between the protected activity and the adverse action (a.k.a. nexus).

If the evidence establishes a prima facie claim of retaliation, the evidence must establish either that there is no legitimate, non-discriminatory reason for the adverse action or the Respondent's articulated reason is a pretext for retaliation.

Complainant was terminated on or about June 1, 2020. On July 20, 2023, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the STAA. The complaint was not timely filed within 180 days from the date of the adverse action. The evidence supports that Complainant was aware of his termination on June 1, 2020.

There may be circumstances that would justify tolling the 180-day period upon recognized equitable principles or because of strongly extenuating circumstances. Upon review of the evidence presented, this office did not find that these equitable principles or strongly extenuating circumstances applied in this case. Consequently, this complaint is dismissed.

For these reasons, OSHA does not have reasonable cause to believe Respondent violated STAA. Consequently, the complaint is dismissed.

Procedural History and Arguments of the Parties

On 8/25/2023, Complainant filed a letter with his objections and request for hearing to the Office of Administrative Law Judges, U. S. Department of Labor, in Washington, D. C. In

his letter, Complainant stated he submitted “this appeal of the Whistleblower Investigator’s (WI) findings on grounds of when the statute of limitations started running.” Complainant acknowledged that the complaint was filed 3 years after his “separation” from employment with Respondent, and that he filed for unemployment benefits on 6/26/2020. He stated that, “The fact that the misconducts that were reported to the Division in 2020 is still pending review [when he filed his Complaint] in 2023 because of national disasters, recession crisis, and deception is just cause for DOL to accept the complaint as timely submitted and or grounds for equitable tolling.”

This court issued a show cause order to state why this matter should not be dismissed as untimely filed. This court also issued an order for Respondent to respond.

Claimant responded and argued his complaint was timely filed, even though he acknowledged the alleged violation occurred in 2020 and he filed his complaint in 2023. He moved that the court not dismiss the complaint as untimely filed. Complainant stated he was aware of alleged concerns of “protected activity” in 2020, and he had “records to substantiate that due to Covid-19, unsafe working conditions, and unpaid wage concerns in 2020....”

Complainant stated:

The Assistant Secretary at OSHA merely dismissed the complaint as untimely based on the Complainant’s last date worked and the dates of the complaint filing without investigating the merits or taking account of the Complainant’s arguments. The Assistant Secretary ostracized and deprived the Complainant of an appeal of their decision in 2022. [sic]

Complainant argued that his claim was timely filed and disagreed with the Secretary’s findings. Complainant stated:

The following paragraph of the Secretary’s finding is prejudice due to the Assistant Secretary not investigating the merits of the case and the finding(s) is skewed. The Secretary’s finding which states that “The Secretary found Complainant was aware on 6/1/2020 when he was terminated but filed his Complaint 3 years later on 7/20/2023. The Secretary found this was not within the 180 days as required by the law and dismissed the Complaint as not timely filed.

In his initial letter objecting to the Secretary’s findings, Complainant moved that equitable tolling should be applied. He argued: “because of national disasters, recession crisis, and deception is just cause for DOL to accept the complaint as timely submitted and or grounds for equitable tolling.”

Complainant moved that the complaint was timely filed.

Respondent responded and moved the court to dismiss the complaint with prejudice (meaning a party is barred from filing again) as the complaint was untimely. Respondent stated:

The STAA, under which Complainant asserts his retaliation claim, provides a 180-day limitations period for filing complaints that allege violations of its whistleblower protections. 49 U.S.C. § 31105(b)(1). As previously mentioned, Complainant's last day of work was June 12, 2020. Complainant had unequivocal notice of his separation from Respondent after he failed to show up for work for multiple shifts and failed to contact Respondent to apprise them that he would not be able to work. Complainant also had unequivocal notice of his separation from his employment as early as June 15, 2020, when he failed to show for the next scheduled load after he dropped the load at the AY Logistics terminal. Accordingly, the STAA required that he file the instant complaint no later than December 12, 2020. That period expired well before Complainant filed his complaint with the Administration on July 26, 2023, over three years after the alleged adverse action. In his response to the Court's show cause order, Complainant admits that he filed the instant complaint three years after his last day of work. Accordingly, this Court should dismiss the complaint as untimely.

Respondent also argued that equitable tolling does not apply. Respondent argued, "Complainant Cannot Show any Extenuating Circumstances that Would Justify Tolling the STAA's 180 day Filing Period." Respondent stated:

Complainant claims that he was unable to file his complaint earlier because North Carolina was under a Shelter-in-Place order, so he was unable to return to work or file his instant complaint.

One of the several exceptions that were specified in Executive Order No. 121 included:

22. **Transportation.** Airlines, taxis, automobile dealers, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, trains, marinas, docks, boat storage, and other private, public, and commercial transportation and logistics providers, and public transportation necessary to access COVID-19 Essential Businesses and Operations. The "stay at home" order was set to expire on April 29, 2020, but was continued until North Carolina moved into the second stage under the Governor's reopening plan on May 20, 2020. See Exhibit 4 – Governor Executive Order No. 141. Nonetheless, the logistics work that Complainant completed with AY Logistics would have fallen under the above exception even during the "stay at home" period in North Carolina.

See Exhibit 3 – Governor Executive Order No. 121. Not only was AY Logistics exempted from North Carolina's stay at home order, but it was also considered an essential business as it delivered COVID-19 personal protection equipment.

Respondent argued that Covid did not prevent Complainant from timely filing his N. C. unemployment claim during this same time period.

Respondent further highlights that, despite Complainant alleging that the government shutdown and the coronavirus pandemic contributed to his untimely filing, Complainant was able to file his claim for unemployment benefits with the State of North Carolina on July 26, 2020, without issue, almost three years prior to his untimely filing of the instant complaint. Complainant has also since filed several appeals and a request for judicial review on the determination that he is not qualified for unemployment benefits without issue. His ability to follow through on his claim for unemployment benefits belies his claim that the pandemic prevented him from filing the instant complaint within the filing period of the STAA.

Respondent addressed Complainant's other reasons for equitable tolling and argued they did not apply here.

In his appeal of OSHA's determination, filed on August 25, 2023, Complainant accuses the North Carolina Division of Employment Security of intentionally concealing the whistleblower complaints that he served on the Division on June 29, 2023. See Exhibit 5 – Alston's OSHA Appeal. According to Complainant, he provided them with the information to pass onto OSHA, but the Division failed to do so. It is not the Division's responsibility or obligation to file an OSHA Whistleblower Complaint on behalf of Complainant. Complainant's filing his complaint before the incorrect agency does not create an extenuating circumstance sufficient to toll the STAA 180 day filing requirement. Even still, if the Court considers Complainant's misplaced argument, June 29, 2023 is more than three years after Complainant voluntarily abandoned his position and outside of the filing limitations under the STAA.

Respondent concluded:

There are no extenuating circumstances that would support tolling the 180-day period under the STAA. Indeed, Complainant has not identified any case law that supports his contention that the above would support tolling the statute of limitations. Complainant simply fails to demonstrate extraordinary circumstances that would warrant tolling of the filing deadline.

Law

The Administrative Review Board (the Board) has construed the time limits on filing a complaint, objections, or an appeal as non-jurisdictional, and therefore, subject to equitable tolling. However, the Board has stated that equitable tolling "is granted sparingly and only upon a showing that extraordinary circumstances out of the complainant's control prevented a timely filing." Truvedi v. General Electric, ARB No.

2022-0026, slip op. at 6 (Aug. 24, 2022); see also, Prince v. Westinghouse Savannah River, Co., ARB No. 2010-0079, slip op. at 5 (Nov. 17, 2010).

The party seeking equitable tolling must establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Menominee Indian Tribe v. United States, 577 U.S. 250, 255 (2016) (citing Holland v. Florida, 560 U.S. 631 (2010)).

Findings of Fact and Analysis

The court has reviewed the Act, Complainant’s complaint, the Secretary’s Findings, and the arguments of the Parties. The STAA requires that any Complaint be filed within 180 days of being aware of an alleged adverse action. Based on the evidence in the record, Complainant was aware on 6/1/2020 when he was terminated, yet filed his Complaint 3 years later on 7/20/2023. Based on the law and evidence in the record, this was not within the 180 days as required by the law.

The documents filed to date show that Complainant was separated from employment with Respondent in June 2020. He filed his complaint of discrimination with OSHA 7/20/2023, 3 years after his separation. Pursuant to the Surface Transportation Assistance Act, a complaint must be filed within 180 days. His complaint was, therefore, untimely.

Complainant’s reasons for why his objections were not timely filed and why his claim should not be dismissed are insufficient to justify equitable tolling. He did not show that he was “pursuing his rights diligently” during those 3 years or that “extraordinary circumstances” outside of his control prevented him from timely filing his complaint. Complainant stated in his initial letter that “national disasters, recession crisis, and deception is just cause for DOL to accept the complaint as timely submitted and or grounds for equitable tolling.” Based on Complainant’s statement, he was aware of his termination on 6/1/2020.

Regarding the 2 requirements set out by the ARB, first, Complainant was aware of the alleged adverse action on 6/1/2020, as evidenced when he filed for unemployment one month later in July 2020. Those alleged “national disasters, recession crisis, or deception” did not prevent Complainant from diligently pursuing N. C. unemployment. They did not prevent him from diligently pursuing his rights under this Act. Three years passed until he filed his complaint under the Act, which very specifically requires filing within 180 days of the alleged adverse action. Complainant did not present persuasive argument or facts that he diligently pursued his alleged retaliation claim in the 3 years following his 2020 termination and the time he filed his complaint in 2023. Second, “national disasters, recession crisis, and deception is just cause for DOL to accept the complaint as timely submitted and or grounds for equitable tolling” do not constitute circumstances that would prevent his timely filing here. There is no persuasive evidence that national disasters prevented him from filing. It is unclear how a national recession prevented him from filing. Alleged “national disasters, recession or deception” or “Covid” did not prevent him from timely filing for unemployment 1 month after termination. Alleged

“national disasters, recession or deception” or “Covid” are not extraordinary circumstances here that would excuse filing 3 years later. There is no persuasive evidence as to how those events were “extraordinary” to him, or outside his control to him, that would prevent him for 3 years from timely filing his complaint with OSHA. As the courts have stated, equitable tolling is to be applied sparingly. Complainant does not meet any of the 2 situations required by the courts and the Administrative Review Board.

Based on the evidence in the record, the statute, the law, and the requirements for equitable tolling, the doctrine of equitable tolling does not apply to the present case. Complainant did not file his complaint within 180 days of the alleged adverse action.

Therefore, equitable tolling of the filing deadline is not warranted.

Conclusion

For these reasons, Complainant’s complaint was not timely filed within 180 days as required by the Surface Transportation Act. Complainant did not establish that “extraordinary circumstances” stood in his way preventing him from timely filing his complaint. The Secretary’s Findings are final, and Complainant’s claim is hereby **DISMISSED** with prejudice.

ORDER

It is hereby **ORDERED** that:

1. Complainant’s complaint under the Surface Transportation Act was not timely filed within 180 days of the alleged adverse action.
2. Complainant did not meet the requirements for equitable tolling.
3. The Secretary’s Findings are final.
4. Complainant’s complaint under the Surface Transportation Act is **DISMISSED** with prejudice.

SO ORDERED.

DANA ROSEN
Administrative Law Judge