U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 11 October 2011

CASE NO: 2011-SWD-00003

In the Matter of:

MOHAMMED TAISSIR ALNOURI

Complainant,

v.

QUEST DIAGNOSTICS,

Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This complaint arises under the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971 and the Toxic Substance Control Act ("TSCA"), 15 U.S.C. § 2622. On March 3, 2011, Mohammed Taissir-Alnoir ("Complainant") filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") against Quest Diagnostics ("Respondent") alleging blacklisting and retaliation for making complaints about Respondent's purportedly improper disposal of chemical waste. Following an investigation, the Secretary dismissed the complaint on June 2, 2011. Complainant timely appealed the dismissal.

Procedural History

Complainant filed his pretrial statement ("Compl.") and exhibits on July 11, 2011. The hearing in this case was originally set for July 18, 2011. On July 11, 2011, Respondent requested a postponement of the hearing. The undersigned granted Respondent's request and rescheduled the hearing to September 22, 2011. On September 14, 2011, Respondent filed a Motion to Dismiss and a Motion for Continuance along with exhibits ("EX") A-C. On September 16, 2011, the undersigned issued an Order to Show Cause Why Respondent's Motion to Dismiss Should Not Be Granted and advised Complainant of his right to oppose Respondent's motion by filing an answer along with additional exhibits and affidavits. On September 29, 2011, Complainant filed a Response ("Resp.") with the court. After considering all of the evidence, the undersigned grants Respondent's Motion to Dismiss.

Facts

Complainant began working in Respondent's Toxicology Department around mid April 2007. Compl. at 1. He was responsible for evaluating Vitamin B-1 essays which involved working with sodium hydroxide, hydrochloric acid and aluminum foil. *Id*. Because Respondent's laboratories contained only one type of biohazardous waste container, Complainant had to dispose of these ingredients in one location. *Id*. According to Complainant, this created a safety hazard because sodium hydroxide reagent reacts exothermically with aluminum foil and produces heat along with a highly combustible hydrogen gas. *Id*. In September of 2007, Complainant burned his fingers trying to retrieve a hot piece of foil from the biohazardous trash container. *Id*. After this incident, Complainant made various internal and external complaints about the dangers of disposing incompatible chemicals in a single container.[1] He notified his supervisor that it was essential to separate various incompatible chemicals into different containers. *Id*. at 1-2. In the summer of 2007, the Director of the Toxicology Department, Dr. Shen, and Respondent's Safety Officer investigated Complainant's allegations and performed a live demonstration in an attempt to show him that disposing of various biohazardous materials in one container did not pose a safety risk. *Id*. at 2. Around the same time Complainant also had a discussion about the issue with manager Kevin Russell. *Id*. According to Complainant, although his concerns were passed along to higher management, the company did not implement any changes to its waste management policies. *Id*. at 2.

Complainant resigned from his position around November of 2007. *Id*. Complainant alleges that he was forced to resign from his job and subsequently blacklisted by Respondent. Resp. at 1. From 2008 to 2011, he unsuccessfully tried to find another job. Compl. at 2. Complainant's exhibits demonstrate that he has been submitting on-line applications for various positions with Respondent since 2009.[2] Sometime in 2009, Complainant also contacted his acquaintance, Dr. Terry Robin, who worked for Specialty Laboratories in Valencia to apply for a job. Complainant previously worked for Specialty Laboratories under Dr. Robin's supervision between 1997 and 2004. *Id*. at 3. After Complainant left the company, Specialty Laboratories was bought out by Respondent and renamed Quest Diagnostics Nicholas Institute of Valencia. *Id*. at 2. Allegedly, Dr. Robin told Complainant that the company will not hire him because of his previous complaints against Respondent. *Id*. at 2; Resp. at 2.

On February 22, 2011, Complainant filed a complaint with the Division of Occupational Safety and Health ("Cal/OSHA") stating that Respondent allows disposal of incompatible

[1] Complainant made complaints to the following individuals: Laure Tiageser, his supervisor; the Toxicology Department manager, Kevin Russell; Respondent's Safety Officer; and the Human Resources Department. Complainant also left tips on Respondent's anonymous online safety hotline. Coml. at 2.

[2] In 2009, Complainant submitted applications for various positions (including Lab Associate I and II, Technician I, Sales Support Coordinator, Account Executive, Phlebotomy Services Rep., Specimen Preparation Assistant, CLS III Group Lead, Teleinterviewer, Lab Associate SJC, Lab II Associate). In 2010, Complainant reapplied to some of these positions and also submitted applications for the positions of Protein Chemist, Production Technician and Student Intern. *See* Complainant's Quest Job Application Exhibits. Complainant subsequently also applied for nine positions on 7/06/2011 and one position on 7/05/2011.

materials in one container. [3] *See* OSHA Letter 3/22/2011. As a result of the complaint, Respondent's Toxicology department designated a specific container to collect all aluminum foil being discarded in the laboratory. *See* Quest Diagnostics Letter to OSHA 3/17/2011.

Complainant telephoned Dr. Robin again on March 2, 2011, in order to ask for his job back. *See* OSHA Letter 06/02/2011. Dr. Robin did not answer the phone, and Complainant left a voicemail. Resp. at 2. According to Complainant, around this time the online application system stopped logging him in to file applications. *Id*. It appears that in the original OSHA complaint, Complainant alleged that Dr. Robin picked up the phone and rejected his request for employment. The Secretary found that this rejection was not actionable because Complainant informally asked for his job back and did not file a job application with Respondent. The Secretary also concluded that Complainant's attempts to apply on-line with Respondent did not constitute a job denial because Complainant never actually applied for a particular position.[4] *Id*.

Complainant's Argument

Complainant argues that he was forced to resign from his job with Respondent in 2007 and subsequently blacklisted because of his protected activities. Complainant alleges that in 2009 he was informed that Respondent's Human Resources department had instructions not to rehire him. According to Complainant, between 2009 and 2011, he submitted 30 on-line applications, called Respondent's HR offices in California and New Jersey, and worked with many government agencies to expose Respondent's improper waste management policies.

Respondent's Argument

Respondent argues that all of Complainant's claims, except for the March 2, 2011 allegation, are time barred. First, according to Respondent, Complainant's March 2, 2011, conversation with Dr. Robin did not constitute a formal employment application. Accordingly, Complainant never could have been subject to an adverse action when the Respondent failed to rehire him. Second, Respondent argues that even if Complainant had submitted an application for employment, there is no evidence of retaliation or blacklisting.

[3] Respondent's Environmental Health and Safety Manager, William Maxfield, submitted a response letter to OSHA stating that "sodium hydroxide solutions of various concentrations are used in several of the test methods performed in Toxicology, but these solutions should not contact aluminum foil under normal procedures and conditions. It is possible that an employee may inadvertently discard sodium hydroxide solution in a container already containing aluminum foil, but this is a violation of our Hazardous Waste Management Program." *See* Quest Diagnostics Letter to OSHA 3/17/2011.

[4] In order to establish that an adverse action occurred in a case of failure to hire or failure to rehire, the complainant must show that he was qualified for the position, that he applied for it or that the employer was otherwise obligated to consider him, and that the employer hired another individual not protected by the acts or that the position remained vacant after the application was rejected. *Holtzclaw v. Commonwealth of Kentucky Natural Res. and Envtl. Prot. Cabinet*, 95-CAA-7 (ARB Feb. 13, 1997) (citing to *Loyd v. Phillips Bros.*, 25 F.3d 518, 523 (7th Cir. 1994). The undersigned does not address the merits of this particular OSHA finding because Complainant's claim is time barred even assuming that his on-line submissions constitute valid employment applications.

Motion to Dismiss

Dismissal of a complaint is appropriate if the facts in the case fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A short and plain statement is sufficient if it gives the defendants fair notice of what the claim is and the grounds upon which it rests. *Bolding v. Holshouser*, 575 F.2d 461 (4th Cir. 1978). In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that the complaint must contain "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of illegality. 550 U.S. 544 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940-41 (2009). Nevertheless, dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense such as noncompliance with the statute of limitations. *Omar ex rel. Cannon v. Lindsey*, 243 F. Supp. 2d 1339 (M.D. Fla. 2003), *aff'd*, 334 F.3d 1246 (11th Cir. 2003).

Under the SWDA and the TSCA, an individual has thirty days from the time of the discriminatory action to file a complaint. *Erickson v. U.S. Envtl. Prot. Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001) (citing 29 C.F.R. § 24.3(b)); *see McGough v. United States Navy, ROIC*, 86-ERA-18 (Sec'y June 30, 1988) (commencement date of the limitations period is the date when a similarly situated reasonable person would have been aware of the adverse action). The complaint must be in writing and include a "full statement of acts and omissions with pertinent dates, which are believed to constitute the violation." 29 C.F.R. §24.3(c). Any complaint not filed within thirty days is time-barred. *See Greenwald v. City of North Miami Beach*, 587 F.2d 779 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979). Thus, in order to survive a motion to dismiss, the complainant must plead that the respondent engaged in adverse actions during the 30 day period before the complaint was filed. It is the employer's burden to raise the time bar as an affirmative defense. *See Hood v. Sears Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999).

Courts generally recognize an equitable exception to statutory limitations periods for continuing violations "[w]here the unlawful employment practice manifests itself over time, rather than as series of discrete acts." *McCuistion v. Tennessee Valley Auth.*, 89-ERA-6 (Sec'y Nov. 13, 1991); *Simmons v. Florida Power Corp*., 89-ERA-28 and 29 (ALJ Dec. 13, 1989). Where there is a continuing violation, a complainant is not required to file suit when the first discriminatory act takes place; rather, timeliness is measured from the last occurrence of discrimination.[5] *See Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 724 (D.C. Cir. 1978). Blacklisting can constitute a continuing violation if it is based on the employees protected activity under the statute. *See Egenrieder v. Metro. Edison Co.*, 85-ERA-23 (Sec'y Apr. 20, 1987) (noting that because blacklisting sometimes cannot be easily discerned there may be a considerable lapse of

[5] The Secretary of Labor utilizes a three factor test to evaluate whether particular alleged acts of discrimination constitute "a course of related discriminatory conduct" under the continuing violation theory: 1) whether the alleged acts involve the same subject matter, 2) whether the alleged acts are recurring or more in the nature of isolated decisions, and 3) the degree of permanence. *Thomas v. Arizona Pub. Serv.Co*., Case No. 88-ERA-212 (citing *Berry v. Bd. of Supervisors of L.S.U*., 715 F.2d 971, 981 (5th Cir. 1983); *Webb v. Carolina Power & Light Co.*, ARB No. 96-176, ALJ 93-ERA-42 (Aug. 26, 1997).

time before a blacklisted employee has any basis for believing he is the subject of discrimination).[6]

Nevertheless, courts will not reset the statute of limitations based on the continuing violations theory where the complainant was aware of the blacklisting activity but failed to exercise his statutory rights. *See Pickett v. Tennessee Valley Auth.*, ARB No. 00- 076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003) (the statute of limitations begins to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights); *Holden v. Gulf States Util.*, 92-ERA-44 (ALJ Apr. 22, 1993) (where there was an instance of alleged blacklisting within 30 days prior to the filing of the complaint, but the complainant had knowledge of earlier instances of blacklisting, the complaint was not timely). For example, in *Pickett*, the ARB held that the complaint was barred by the statue of limitations because an adverse course of conduct undertaken by respondent against complainant was apparent long before complainant filed his complaint. *Pickett*, slip op. at 5-6. The ARB noted that even if one assumes, for the purpose of argument that the employer engaged in blacklisting, the complainant should reasonably have suspected any such alleged blacklisting before June 1999. *Id*. According to the ARB, complainant "received notice as the result of confluence of events" when his employer made him a series of allegedly unsuitable job offers, when he became aware of the employer's OIG investigation, and when he was terminated from employment and the employer refused to reinstate him because of alleged downsizing. *Id*. The ARB pointed out that complainant's communications also showed that he suspected "stonewalling" by Respondent. *Id*.

The ARB adhered to this line of reasoning in *Johnsen v. Houston Nana Inc., JV & Alyeska Pipeline Serv. Co.*, ARB No. 00-064, ALJ No. 99-TSC-4, 2003 WL 244812 (Jan. 27, 2003). In that case, the whistleblower was an electrical worker who was terminated from his position with employer on December 10, 1998. *Id*. at 1. In conjunction with the termination, the employer completed an employment termination report indicating that complainant was not eligible for rehire. *Id*. at 1-2. In late May of 1999, the union referred complainant for a job with the employer. *Id*. The employer rejected complainant's employment bid and notified the union that he was not eligible for rehire. A month later complainant filed a whistleblower complaint with OSHA, which was subsequently dismissed by the ALJ and the ARB for untimeliness. *Id*. The ARB rejected complainant's argument that employer's refusal to hire him in May 1999 constituted a separate discriminatory act which restarted the statute of limitations under the continuing violation exception. It explained that because complainant received "definitive, final and unequivocal notice that adverse action had been taken against him" in 1998, he had thirty days from the date of the "no-hire" decision to initiate any complaints. *Id*. at 4. It explained that complainant was not subject to an adverse action since December 10, 1998, and cannot "extend the limitations period by repeatedly renewing [his] demand for reinstatement and then counting [his] time to file from each denial." *Id*. (citing *Mitilinakis v. Chicago*, 735 F. Supp. 839 (N.D. Ill.

[6] Some earlier decisions took a different approach. S*ee Garn v. Benchmark Tech*., 88-ERA-21, slip op. at 9-11 (Sept. 25, 1990) (holding that where the complainant alleged that up until and during the thirty day period prior to filing of his complaint, the respondent, in retaliation for the complainant's protected activity, maintained his name on a "denied access" list which prevented his future employment at the plant, the complainant has alleged an independent violation of blacklisting within the meaning of 29 C.F.R. § 24.2(b)); *see also Simmons v. Arizona Pub. Serv. Co*., 93-ERA 5 (ALJ Apr. 15, 1993).

1990)). The ARB further held that complainant's blacklisting allegation was also untimely because complainant knew about the "no-hire" decision at the time of his termination, and the May 1999 letter to the union was not an independent act of blacklisting because it did not mention or imply that complainant engaged in protected activity. *Id*.

However, under certain circumstances, complainant can still avoid dismissal if he demonstrates that the employer took a new adverse action within the requisite statutory period. In *Webb v. Carolina Power & Light Company*, a contract engineer who was laid off filed an ERA complaint alleging that he was not considered for rehire because of his whistleblowing activity. ARB No. 96-176, ALJ 93-ERA-42 (Aug. 26, 1997). The ARB held that the complaint was filed outside the statutory period because the statute of limitations for filing the complaint began on the date that complainant "strongly suspected" that his former employer was wrongly excluding him from consideration for employment. *Id*. at slip. op. 6. Nevertheless, it held that the claim was not barred under the continuing violation exception because complainant's former supervisor made a negative reference about his performance, which the ARB found to be motivated by discriminatory animus and made within 180 days of the filing complaint. *Id*. at slip. op. 7. It explained that "to the extent [the negative reference] is accepted as evidence of an ongoing decision to exclude [Complainant] from consideration for employment, [it] is sufficiently similar in nature to [Complainant's] other allegations as to constitute a continuing violation." *Id*.

Here, based on the facts alleged in the complaint, reasonable minds would not disagree that Complainant should have been aware of blacklisting/stonewalling by Respondent by the end of 2009. At that time, he unsuccessfully submitted numerous on-line applications for job openings with Respondent and had spoken to Dr. Terry Robin who informed him that Respondent was unwilling to re-hire him because of the alleged protected activity. Complainant describes the conversation with Dr. Robin as follows:

> In around 2009 I have spoken with Dr. Terry Robin and then he was working at Specialty laboratories, Valencia, California which was bought by Quest Diagnostics Inc. and renamed to Quest Diagnostics Nicholas Institute of Valencia; Dr. Terry Robin told me: 'we cannot hire you because of the complaint you have filed against Quest and that HR is not Specialty laboratories HR but Quest Diagnostics HR and they are refusing to hire you.' "

Compl. at 2. In his Response to Respondent's motion to dismiss, Complainant reiterates that in 2009, Respondent had instructions in place not to hire him. Resp. at 2. The facts of this case closely resemble *Johnsen v. Houston Nana* where the complainant was unequivocally informed that he was on the "no hire" list but nevertheless continued to reapply for jobs with the employer. Also, unlike the complainant in *Webb*, who "strongly suspected" that he was blacklisted but did not learn of the negative references from his supervisor until a later date, Complainant knew that his protected activity was the cause of blacklisting by Respondent since 2009. Because the "continuing violation" theory is designed "to protect an employee who has not learned of the blacklisting practice," the statute should not be tolled when the employee has knowledge of the alleged adverse act, but fails to file a claim. *Holden*, slip. op. at 3.

Because the facts in this case indicate that Complainant was aware of the alleged blacklisting more than thirty days prior to filing his complaint with OSHA, the undersigned must dismiss the complaint.

ORDER

Accordingly, the Complaint herein is hereby **DISMISSED**.

IT IS SO ORDERED.

A

Russell D. Pulver
Administrative Law Judge

San Francisco, California

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., 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 20001-8001, (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.

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 Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.