



Issue Date: 04 October 2011

CASE NO.: 2011-SWD-4

IN THE MATTER OF

RICK SOLIS,

Complainant

vs.

**HIGHLANDS COUNTY BOARD OF COUNTY
COMMISSIONERS,**

Respondent

**RULING ON MOTION FOR SUMMARY
DECISION**

Procedural Background

The procedural history of this case originated on 26 Oct 09 with the filing of a complaint by Complainant's Counsel with the Occupational Safety and Health Administration. The complaint alleges that Respondent wrongfully terminated Complainant from his employment after he communicated his concerns about the way it was removing, handling, and disposing of pipe containing asbestos. He cited the employee protection provisions of the Occupational Safety and Health Act (OSHA),¹ Surface Transportation Assistance Act (STAA),² Asbestos Hazard Emergency Response Act (AHERA),³ Pipeline Safety Improvement Act (PSIA),⁴ and Toxic Substances Control Act (TSCA).⁵

On 27 May 11, the Occupational Safety & Health Administration issued its dismissal of the complaint. The agency noted that it had also considered his complaint under the Solid Waste Disposal Act (SWDA).⁶ The dismissal noted the complaint was untimely under the SDWA, TSCA, and OSHA and that neither the STAA, AHERA, nor the PSIA applied to the Complainant or Respondent. On 27 Jun 11, Complainant filed his

¹ 29 U.S.C. § 651 *et seq.*

² 49 U.S.C. § 31105 *et seq.*

³ 15 U.S.C. § 2651 *et seq.*

⁴ 49 U.S.C. § 60129 *et seq.*

⁵ 15 U.S.C. § 2601 *et seq.*

⁶ 42 U.S.C. § 6901 *et seq.*

request for a de novo hearing before an Administrative Law Judge and specifically objected to the finding that his complaint was untimely.

Following a conference call with the parties, I set the case to be heard on 14 May 12 and set prehearing deadlines, including a requirement that Complainant file a complaint that clearly set forth the nature of each alleged violation. That complaint was filed on 25 Jul 11 and set forth two causes of action. The first cited a violation of the OSHA and the second a violation of the SWDA. The complaint also sought punitive damages.

On 17 Aug 11, Respondent filed a motion to dismiss on the pleadings. It argued that since it is a political subdivision of a state it is excluded from the definition of “employer” under the OSHA.⁷ It also argued that Complainant failed to file his initial complaint within 30 days as required by both Acts. Finally, it noted punitive damages are not authorized by the Act. In his reply, Complainant conceded the punitive damages issue and withdrew that part of his complaint, but insisted that the OSHA applies to governmental entities and that because Respondent refused to act on his grievance of the firing, as required, either his 30 day deadline was tolled or the refusal to act on his grievance constituted a new adverse action with a new deadline.

Factual Background⁸

Complainant was employed by Highland County in a highway construction project that involved the removal of old water pipes. These pipes contained 80% asbestos that would become airborne if broken or pulverized. He communicated that fact to his supervisors, who denied there was asbestos present, allowed untrained crews to remove the pipe with no protective equipment, and disposed of it in a landfill.

On 4 Sep 09, Respondent served Complainant a notice that he was being laid off with a last date of work of 1 Oct 09. Respondent’s regulations provided and the notice informed Complainant that he had seven days to grieve and appeal his termination. He filed that appeal on 9 Sep 09. Respondent did not act on his grievance and Complainant’s firing became effective on 1 Oct 09.

⁷ “The term ‘employer’ means a person engaged in a business affecting commerce who has employees, but does not include the United States...or any State or political subdivision of a State.” 29 U.S.C. § 652(5).

⁸ Neither party offered any supporting factual material or suggested that they required an opportunity to conduct discovery. Because the motion is based on the sufficiency of the pleadings, for the purposes of the motion only, I assume every factual allegation and reasonable inference there from in favor of the nonmoving party (Complainant) is true. FRCP 12(b)(6).

Law

The OSHA provides that:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.⁹

It also specifies the remedy:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.¹⁰

It does not create a private right of action.¹¹

The SWDA provides that:

[n]o 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.¹²

and that:

[a]ny employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination.¹³

⁹ 29 U.S.C. §660(c)(1).

¹⁰ 29 U.S.C. §660(c)(2).

¹¹ *Dortch v. Memorial Herman Healthcare System-Southwest*, 525 F.Supp.2d 849, 859 (S.D.Tex.2007); *Fletcher v. United Parcel Service, Local Union 705*, 155 F.Supp.2d 954, 957 (N.D. Ill. 2001).

¹² 42 U.S.C. § 6971(a).

¹³ *Id.* at § 6971(b).

The implementing regulation in effect at the time the initial complaint was filed provided that:

within 30 days after an alleged violation ... occurs (i.e., when the retaliatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been retaliated against in violation ... may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.¹⁴

1. The 30 days begin to run on the date the employee is notified of the adverse action¹⁵ and the filing deadline must be scrupulously observed even if it bars what may otherwise be a meritorious cause.¹⁶ It is not tolled by the exhaustion of local or state remedies¹⁷ or internal grievances.¹⁸ Some courts may find that a failure to process the grievance or civil service remedy may be a separate adverse action.¹⁹

Equitable tolling may apply if the employer actively misled the employee about the cause of action, the complainant in some extraordinary way was prevented from asserting his rights, or the complainant raised the precise statutory claim in issue but mistakenly did so in the wrong forum.²⁰

Discussion

Count I OSHA

Even though Respondent did not raise the issue, a threshold question is whether complaints based on the whistleblower protections of the OSHA are even properly brought before the Office of Administrative Law Judges. The statute indicates that a whistleblower under the OSHA must file his or her complaint with the Occupational Safety & Health Administration and then can only hope that the Secretary finds the complaint to be meritorious and seeks further enforcement action in federal district court.²¹ The case law fully clarifies that the Complainant has no independent cause of

¹⁴ 29 C.F.R. §24.103(d)(1).

¹⁵ *Roberts v. Tennessee Valley Authority*, 94-ERA-15 (Sec'y Aug. 18, 1995) (“[t]he time period for administrative filings begins running on the date that the employee is given *definite* notice of the challenged employment decision).

¹⁶ *Prybys v. Seminole Tribe of Florida*, 95-CAA-15 (ARB Nov. 27, 1996).

¹⁷ *Greenwald v. City of North Miami Beach, Fla.*, 587 F.2d 779, 781 (5th Cir., 1979).

¹⁸ *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-240 (1976); *School Dist. Of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3rd Cir., 1981); *English v. General Electric Co.*

¹⁹ *Abramson v. Univ. of Hawaii*, 594 F.2d 202 (9th Cir., 1979)(failure to follow internal regulations and reconsider denial of tenure decision held to be separate action from initial denial of tenure).

²⁰ *Marshall* 657 F.2d at 19-20.

²¹ 29 U.S.C. § 657(f)(1).

action under the OSHA.²² Therefore, I have no authority to adjudicate that count and it must be dismissed.

Count II SWDA

On 4 Sep 09, Respondent communicated to Complainant its intention to terminate his employment on 1 Oct 09. The personnel regulations allowed Complainant to file a grievance within seven days of the notice, which he did. However, Respondent failed to act on his grievance and Complainant simply ended work on 1 Oct 09.

The law is clear that the time period begins when the employee receives notice of the termination. Moreover, it is not tolled by the exercise of grievance or contractual appeal rights. Thus, it would appear that the time started on 4 Sep 09, making the initial complaint untimely. However, Complainant argues that the 30 days are tolled when Employer did not fully afford him his grievance and appellate rights. There is no case law specifically so holding and I decline to apply tolling on that principle.

Complainant also argues that Respondent's failure to ensure Complainant had the full benefit of his grievance rights would qualify as a discrete and separate adverse action. I disagree. Even if *Abramson* were binding precedent, the facts of this case are significantly distinguishable in that the period between the notice of firing and frustrated grievance process was short enough that the two events were effectively one.

However, even if I accepted Complainant's argument and found the denial of grievance to be such a discrete and separate act that it created its own cause of action and new filing deadline Complainant still had to file a timely OSHA complaint regarding that discrete adverse action. Even if the denial was viewed as a continuing action, it must have concluded by the date Complainant was actually terminated, 1 Oct 09. While Complainant filed his initial complaint with OSHA within 30 days of that date, it alleges only his termination and not wrongful refusal to act on his grievance. If those acts are sufficiently discrete to create different filing deadlines, they must also be specifically alleged. Complainant was clearly aware of the denial of a grievance process, but failed to file a complaint about it. Respondent did not actively mislead Complainant and he was not prevented in some extraordinary way from filing his complaint.

²² See *supra* Note 10.

As a result, even though there will be no opportunity for the record to be fully developed and a finding reached as to whether Complainant communicated his reasonable belief about the asbestos and whether he was fired because of that communications, his complaint must be dismissed.

In view of the foregoing, the hearing scheduled for 14 May 12 in Houston, Texas is hereby cancelled.

SO ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

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.