



In the Matter of:

HUGH B. KAUFMAN,

ARB CASE NO. 10-018

COMPLAINANT,

ALJ CASE NO. 2002-CAA-022

v.

DATE: November 30, 2011

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Regina M. Markey, Esq., *Beins, Axelrod, P.C.*, Washington, District of Columbia

For the Respondent:

Charles G. Starrs, Esq., *U.S. Environmental Protection Agency, Office of General Counsel*, Washington, District of Columbia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

Hugh B. Kaufman filed complaints on April 3, 2001, and May 2, 2001, with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA). Kaufman

alleged that his employer, the U.S. Environmental Protection Agency (EPA), retaliated against him for engaging in protected activity when it prohibited him from performing any further duties related to the Ombudsman's office. Kaufman claims that the EPA's action violated the employee protection provisions of seven statutes.¹ After a hearing, a Labor Department Administrative Law Judge (ALJ) dismissed the complaints before him as they were not timely filed. Alternatively, the ALJ determined that the evidence does not establish causation on the merits of the case. Kaufman appealed. We agree with the ALJ that Kaufman's complaints were untimely filed. Therefore, we summarily affirm the ALJ's dismissal of Kaufman's complaints based on the ALJ's conclusion that they were untimely filed.

JURISDICTION AND STANDARD OF REVIEW

The statutes under which Kaufman filed his whistleblower complaint authorize the Secretary of Labor to hear complaints of alleged retaliation against an employee who engages in protected activity and, upon finding a violation, to order abatement and other remedies. The Secretary has delegated authority for review of an ALJ's initial decision to the Board.² "The ARB will review the factual findings of the ALJ under the substantial evidence standard."³ The Board engages in de novo review of the ALJ's legal conclusions.⁴

DISCUSSION

Kaufman's appeal from the ALJ's order of dismissal challenges the ALJ's determination that his complaints were not timely filed. All of the five statutes under which the ALJ

¹ Section 322 of the Clean Air Act, 42 U.S.C.A. § 7622 (Thomson/West 2003) (CAA); Section 110 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.A. § 9610 (Thomson/West 2005); Section 507 of the Federal Water Pollution Control Act of 1972, 33 U.S.C.A. § 1367 (West 2001); Section 1450 of the Safe Drinking Water Act of 1974, 42 U.S.C.A. § 300j-9(I) (Thomson/West 2003) ; Section 7001 of the Solid Waste Disposal Act of 1976, 42 U.S.C.A. § 6971 (Thomson/West 2003); Section 23 of the Toxic Substances Control Act of 1976 , 15 U.S.C.A. § 2622 (Thomson/Reuters 2009) (TSCA); and the Energy Reorganization Act of 1974, 42 U.S.C.A. § 5851 (West 2003 & Supp. 2011) (ERA). The ALJ dismissed Kaufman's claims under the TSCA and the ERA on federal sovereign immunity grounds. ALJ's Order Granting Partial Summary Decision dated September 30, 2002.

² 29 C.F.R. § 24.110 (2011). *See also* Secretary's Order No. 1-2010, 75 Fed. Reg. 3924, 3925 (Jan. 25, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.100(a)).

³ 29 C.F.R. § 24.110(b).

⁴ *See* 5 U.S.C.A. § 557(b) (West 1996); *Minthorne v. Commonwealth of Va.*, ARB No. 09-098, ALJ Nos. 2009-CAA-004, -006 (ARB July 19, 2011).

considered the timeliness issue have a 30-day limitations period.⁵ Kaufman filed his complaints on April 3, 2001, and May 2, 2001. The ALJ determined that to have been timely, “a violation of the employee protection provisions of these statutes must have arose [sic] on or after March 5, 2001.”⁶ Kaufman claims that he suffered retaliation when his Ombudsman-related duties were removed. After an extensive hearing on the merits, the ALJ determined that the EPA expressly removed Kaufman’s Ombudsman-related duties pursuant to a December 14, 2000 Memorandum from EPA Assistant Administrator Timothy J. Fields. The ALJ’s finding is supported by substantial evidence in the record and is in accordance with law. The 30-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation.⁷ The ALJ determined that on December 14, 2000, Kaufman had “unambiguous” notice of the adverse action Fields took to change Kaufman’s assigned duties, and that the minimal aberrations subsequent to this action did not evidence a change in the EPA’s decision on December 14, 2000, and were of no consequence to the issue of timeliness.⁸ Because Kaufman filed his complaints in April and May of 2001, more than 30 days after December 14, 2000, when Fields met with Kaufman and provided Kaufman with his memorandum, Kaufman’s complaints were not timely filed. Moreover, the ALJ’s determination that Kaufman has not shown that he is entitled to any equitable relief from the bar of the limitations period is supported by substantial evidence and is legally sound.

CONCLUSION

The ALJ’s determination that Kaufman’s complaints were not timely filed is supported by substantial evidence in the record and is consistent with applicable law. Accordingly, we

⁵ Section 322 of the CAA, 42 U.S.C.A. § 7622(b)(1); Section 110 of the CERCLA, 42 U.S.C.A. § 9610(b); Section 507 of the FWPCA, 42 U.S.C.A. § 1367(b); Section 1450 of the SDWA, 42 U.S.C.A. § 300j-9(I)(2)(A); Section 7001 of the SWDA, 42 U.S.C.A. § 6971(b). *See also* 29 C.F.R. § 24.103 (providing 30-day time period for complainant to file complaint under these Acts). We decide the timeliness issue based on the confines of the issue as the ALJ determined it, i.e., under these five statute-of-limitations provisions, which each include a 30-day limitations period. On appeal, Kaufman did not challenge the ALJ’s reliance on sovereign immunity grounds when the ALJ dismissed Kaufman’s ERA and TSCA claims; therefore, those whistleblower statutes are not part of our consideration.

⁶ ALJ’s Decision and Order dated October 20, 2009 (D. & O.) at 37.

⁷ *See Cante v. New York City Dept. of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004 (ARB July 31, 2009).

⁸ D. & O. at 37, 38.

AFFIRM the ALJ's dismissal of Kaufman's complaints based on the ALJ's conclusion that they were untimely filed. The EPA's Motion to Dismiss for Lack of Subject Matter Jurisdiction and to Suspend Further Briefing Pending Decision is rendered moot.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge