



In the Matter of:

BASSEY J. UDOFOT,

ARB CASE NO. 10-027

COMPLAINANT,

ALJ CASE NO. 2009-CAA-007

v.

DATE: December 20, 2011

NASA/GODDARD SPACE CENTER,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Bassey J. Udofot, *pro se*, Knoxville, Tennessee

For the Respondent:

Theresa M. Thompson, Esq.; NASA Goddard Space Center, Greenbelt, Maryland

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Bassey J. Udofot filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, NASA Goddard Space Flight Center (NASA), terminated his employment after he complained about work-safety conditions at NASA's Goddard Center. Udofot claims NASA's action violated the employee protection provisions of the Clean Air Act (CAA). 42 U.S.C.A. § 7622 (Thomson/West 2011);

29 C.F.R. Part 24 (2011). On summary decision, a Labor Department Administrative Law Judge (ALJ) dismissed Udofot's complaint because it was not timely filed. Udofot timely appealed to the Administrative Review Board. We affirm the ALJ's dismissal for the following reasons.

BACKGROUND

NASA hired Udofot on March 3, 2008, as an Aerospace Engineer in the Advanced Manufacturing Branch Plating Group at Goddard Space Flight Center. Udofot's work at NASA involved electroplating, surface finishing, and electroforming space components for space flight. Udofot's employment required a probationary period of one year.

In April 2008, Udofot witnessed an incident involving the release of chemicals from plating tanks housed in a large plating room. The plating process involves submerging the component into an aqueous solution of chemicals followed by several rinses and a drying stage. Udofot complained that employees working in the plating rooms were exposed to toxic chemicals. Udofot also complained that the push-pull air circulation in the plating room was not functioning properly. Following Udofot's complaint, the Industrial Hygiene Office conducted a quantitative and qualitative air-sampling test and reported its results on or about November 17, 2008.¹ According to NASA, the test indicated that there were no safety issues with NASA's electroplating process.

After the April incident and shortly into Udofot's probationary year, Udofot and NASA's relationship deteriorated. Udofot received a negative performance evaluation in his July 2008 performance review and received employee counseling on another matter. On November 24, 2008, Raymond Hinkle, Deputy Chief of Udofot's division, placed Udofot on administrative leave and notified him of his termination. Udofot's termination became effective on December 5, 2008. According to the termination letter, Hinkle was dissatisfied with Udofot's knowledge of the electroplating process and his interpersonal skills. NASA Br., Ex. 2. Hinkle's November 24 letter informed Udofot of his appeal rights with the Merit Systems Protection Board (MSPB) and the Equal Opportunity Office (EO or EEO).

1. Udofot's EO, MSPB, and OSC Complaints

On or about November 25, 2008, Udofot filed a complaint with the EO. In addition to allegations of age, disability, and national origin discrimination, Udofot claimed that

he was further discriminated against when he was targeted and victimized for speaking out (whistle blowing), disclosing of gross mismanagement of funds related to the government, gross waste,

¹ According to NASA, Udofot was included in a December 5, 2008 e-mail with the air-sampling report attached. Udofot counters that he was on administrative leave after November 24, 2008, and thus did not have access to the December 2008 e-mail sent to his work e-mail address. Udofot claims he did not receive notice of the report until February 2009 and did not receive the actual document until June 2009.

harassment of potential witness, harassment for political affiliation, and disclosure of what he believed to be reasonably dangerous [sic] to human health and safety.

NASA Br., Ex. 9A, at 2. NASA's EEO counselor indicated that this latter claim was outside of the the EEO's jurisdiction and should be handled by the MSPB. The age, disability, and national origin components of his grievance were docketed with the EEOC. Udofot expanded upon his verbal complaint with a written complaint in February 2009 explaining that employees were exposed to toxic chemicals and an acid mist that was dangerous to public health and safety. NASA Br. Ex. 9B, Ex. 10.

In mid-to-late December 2008, Udofot claims he notified the U.S. Office of Special Counsel (OSC) of several wrongdoings. Two different OSC branches (the prohibited practices and whistleblower retaliation offices) investigated Udofot's complaint. In addition to the EEO, MSPB, and OSC complaints, Udofot reported his grievance to the Inspector General's hotline (IG) on or about November 28, 2008.

2. Udofot's OSHA Complaint

Udofot filed a CAA whistleblower complaint with OSHA on or about February 19, 2009. In his OSHA complaint, Udofot claims that NASA terminated him for his disclosure that toxic chemicals were released into the air causing a public safety issue. On March 18, 2009, OSHA dismissed the case as untimely filed. Secretary Findings at 1. Udofot objected to OSHA's findings and requested a hearing before a Department of Labor ALJ.

3. Proceedings before the Office of Administrative Law Judges

During a conference call with the presiding ALJ, NASA raised the timeliness issue. Recommended Decision and Order (R. D. & O.) at 1. After receiving briefing on the timeliness issue, the ALJ found that Udofot's OSHA complaint was untimely and that Udofot's claim did not warrant equitable modification of the CAA's 30-day filing requirements. R. D. & O. at 1-3. Udofot appealed the ALJ's R. D. & O. to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the CAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board reviews an ALJ's recommended grant of summary judgment de novo. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006; ALJ Nos. 2006-SOX-037, -108; 2007-SOX-055; slip op. at 6 (ARB Apr. 30, 2008). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 3 (ARB Dec. 30, 2005). Thus, pursuant to 29 C.F.R. § 18.40(d) (2011), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by

discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”

DISCUSSION

To prevail on a CAA claim, Udofot must establish by a preponderance of the evidence that he engaged in a protected activity. He must also prove by a preponderance of evidence that NASA was aware of the protected activity, that he suffered an adverse employment action, and that protected activity was the reason for the adverse action. *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 5 (ARB May 28, 2004).

In Udofot’s case, however, we do not reach the primary merits of his complaint. As noted above, the ALJ’s disposition of this case considered solely the timeliness of Udofot’s complaint. The relevant date is when the employer communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer’s action. *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009). In whistleblower cases, statutes of limitation run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision. *See, e.g., Rollins, v. Am. Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2-3 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005). “Final” and “definitive” notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. “Unequivocal” notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Larry v. The Detroit Edison Co.*, ALJ No. 1986-ERA-032, slip op. at 8 (Sec’y June 28, 1991); *cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer’s intent to discharge complainant).

The CAA has a 30-day statute of limitations. 42 U.S.C.A. § 7622(b)(1). Hinkle’s November 24, 2008 letter informed Udofot that his termination would be effective on December 5 and thus constituted unequivocal notice of termination. NASA Br. Ex. 2. Udofot filed his complaint with OSHA on or about February 19, 2009. On its face, therefore, Udofot’s OSHA claim was untimely.

However, the fact that Udofot did not file his CAA complaint within the prescribed 30-day period does not end our analysis of whether his claim was timely filed. Similar to other whistleblower statutes, the CAA’s thirty-day filing period is not jurisdictional and therefore is subject to equitable modification, i.e., equitable tolling and equitable estoppel. *Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, ALJ No. 2007-CAA-001 (ARB Sept. 30, 2008); *cf. Halpern*, ARB No. 04-120, slip op. at 4. As we have said before, equitable tolling and equitable estoppel are different and distinct concepts in equity. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010). “Equitable tolling focuses on the plaintiff’s excusable ignorance of the employer’s discriminatory act. Equitable estoppel, in contrast, examines the defendant’s conduct and the extent to which the plaintiff has been induced to

refrain from exercising his rights.” *Hyman*, ARB No. 09-076, slip op. at 6, quoting *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991). *See also Felty v. Graves-Humphreys*, 785 F.2d 516, 519 (4th Cir. 1986).

In determining whether the Board should toll statutes of limitation, we have been guided by the discussion of equitable modification in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (Thomson/West 2004), the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and 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). However, as the ARB has noted, the court in *Allentown* expressly left open the possibility that other situations might also give rise to equitable estoppel. *Allentown*, 657 F.2d at 20; *Halpern*, ARB No. 04-120, slip op. at 4 (three categories identified in *Allentown* not exclusive). Thus, an additional basis the ARB has recognized as giving rise to equitable estoppel is “where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” *Hyman*, ARB No. 09-076, slip op. at 7, citing *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978).

Udofot bears the burden of establishing that he is entitled to equitable modification of the CAA’s filing deadline. Udofot claims that the CAA’s 30-day requirement should be equitably modified because he did not learn the true reason for NASA’s termination decision until February 2009 when he learned of the air-sampling results. Pet. for Rev. at 10. Udofot also claims NASA misled him by intentionally failing to publish the test results. Udofot Br. at 8-9. Finally, Udofot argues that he filed a work-safety complaint in the wrong forum. Pet. for Rev. at 14. For the following reasons, we find that Udofot has failed to prove facts sufficient to establish his entitlement to equitable modification of the CAA’s 30-day filing deadline or to otherwise establish a genuine issue of material fact with regard to equitable considerations that would preclude summary dismissal of his complaint.

1. Udofot’s Discovery of the Air-Sampling Report

Udofot claims that the CAA’s 30-day requirement should be equitably tolled because he did not learn the reason for his termination until February 2009 when he learned of the results of the internal air-sampling test. Pet. for Rev. at 10. Contrary to Udofot’s assertion, the clock does not begin to tick when Udofot learned of a possible motive for his termination, but rather when he received unequivocal notice of his termination. *Halpern*, ARB No. 04-120, slip op. at 5 (“[n]either the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. [A complainant’s] failure to acquire evidence of . . . motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint”); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (“[a] claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.”). Accordingly, the running of CAA’s 30-day filing period, which began on November 24 when Hinkle unequivocally informed Udofot that his employment would be terminated, was not

equitably tolled because he purportedly did not learn of the motive for his termination until later.

2. NASA Did Not Actively Mislead Udofot

As noted above, courts apply equitable estoppel when the defendant's conduct interferes with the plaintiff's ability to exercise his rights. *Rhodes*, 927 F.2d at 878. Udofot argues that NASA misled him by intentionally failing to publish the test results thus preventing him from filing a timely complaint with OSHA. We disagree. Contrary to interfering with Udofot's ability to grieve his termination, NASA's termination letter provided instructions for certain appeals to the EEO and MSPB. Although Udofot may not have received the e-mail, evidence indicates that he was included in the e-mail disseminating the air-sampling results. Moreover, the absence of the air-sampling report did not prevent Udofot from filing complaints under different statutes. Udofot also claims NASA failed to inform him of the CAA when it terminated him. Pet. for Rev. at 7. We note that NASA was not obligated to inform Udofot of all his potential causes of action against NASA. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-079, slip op. at 6 (ARB May 27, 2010). We find that the ALJ did not err in concluding that NASA did not prevent him from filing a timely OSHA complaint.

3. Udofot Did Not File the Precise Statutory Claim in the Wrong Forum

Udofot argues that he filed his complaint in the wrong forum. Pet. for Rev. at 14. In his pleadings to the ALJ and the Board, Udofot contends that the discovery of the report triggered his belief that he had a CAA claim and thus prompted him to file with OSHA. Pet. for Rev. at 7. Udofot's argument that he discovered the CAA whistleblower claim in February 2009, however, is inconsistent with his assertion that he filed the precise statutory claim, the CAA whistleblower claim, in the wrong forum in November and December 2008.

As discussed above, Udofot, upon receiving advance notice of his termination, complained to the EEO, MSPB, IG, and OSC beginning in late November. NASA objects that none of the claims filed in other forums involve retaliation for CAA-protected activity and thus do not constitute precise claims filed in the wrong forum. NASA Br. at 8-9. We agree. Although there are elements and facts in Udofot's work-safety complaints, which likely overlap with those found in an environmental CAA whistleblower complaint, Udofot has failed to show that he filed the precise statutory claim with the EEO, MSPB, IG, or OSC.

In *Johnson v. Roadway Express, Inc.*, 421 U.S. 454, 466 (1975), the Supreme Court held that a timely action brought under the Civil Rights Act of 1964 did not toll the statute of limitations for an action under Section 1981 even though the former might contain the same facts as the latter. The Court initially noted that Section 1981 is not coextensive with Title VII and that the "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 460, 461, 466. The Court ultimately concluded that, "[o]nly where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." *Id.* at 467 n.14 (citation omitted). Accordingly, the Court held that the filing of the EEOC complaint

did not toll the limitations period for filing an action based on the same facts under the Civil Rights Act of 1866. *Id.*; compare *Burnett v. N.Y. Cent. RR Co.*, 380 U.S. 424 (1965) (Supreme Court tolled statute of limitations where plaintiff brought a timely action under the Federal Employer's Liability Act (FELA) in a state court of competent jurisdiction but improper venue, and re-filed the FELA claim in federal court, the correct forum).

Applying *Johnson* to the facts in this case is consistent with the Secretary's holdings in other cases. In *Lewis v. McKenzie Tank Lines, Inc.*, ALJ No. 1992-STA-020 (Sec'y Nov. 24, 1992), the Secretary considered the applicability of the wrong forum ground for tolling in a case arising under the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982. The complainant had filed a timely charge of discrimination with the EEOC in which he claimed that his employer had violated the Age Discrimination in Employment Act by firing him for a safety-related refusal to drive but had not fired a younger employee who acted similarly. Even though the complainant's EEOC complaint referenced a protected activity (a safety-related refusal to drive) and an adverse action (termination of the complainant's employment), the Secretary held that the complainant had not filed his STAA complaint in the wrong forum and dismissed the STAA complaint that was subsequently, but untimely, filed with the Department of Labor. *Lewis*, 1992-STA-020, slip op. at 3-4. *Accord Ferguson v. Boeing Co.*, ARB 04-084, ALJ No. 2004-AIR-005 (ARB Dec. 29, 2005).

Based on these holdings, we find that although Udofot's work-safety complaints with other entities involve activity that may be relevant to a CAA claim, his claims filed with the EEOC and MSPB were clearly intended to address other statutes, and thus the filing of those claims does not constitute the filing of the precise statutory claim filed in the wrong forum that would warrant equitable modification of the CAA timeliness requirement. *Schafermeyer*, ARB No. 07-082. Moreover, as previously noted, the fact that Udofot readily acknowledged that he was unaware of his right to file a CAA whistleblower claim until February 2009 undercuts any argument that Udofot filed his CAA claim timely but erroneously in the wrong forum in November and December 2008.

CONCLUSION

For these reasons we conclude that Udofot's claim of retaliation in violation of the CAA's whistleblower protection provision is untimely filed, Udofot having failed to prove the existence of recognized equities that would toll the running of the CAA's 30-day filing period and further failing to raise a genuine issue of material fact that would preclude the grant of summary judgment in NASA's favor and against Udofot.

ORDER

The ALJ's Decision and Order is **AFFIRMED**, and Udofot's complaint is **DISMISSED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge