



In the Matter of:

JAMES WHITAKER,

ARB CASE NO. 98-036

COMPLAINANT,

(ALJ CASE NO. 97-CAA-15)

v.

DATE: May 28, 1999

CTI-ALASKA, INC.,

and

ALYESKA PIPELINE SERVICE CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case arises under the employee protection (“whistleblower”) provisions of the Clean Air Act, 42 U.S.C. §7622 (1998) (CAA), the Safe Drinking Water Act, 42 U.S.C. §300j-9(I) (1998) (SDWA), the Toxic Substances Control Act, 15 U.S.C. §2622 (1998) (TSCA) (collectively the environmental statutes), and the regulations promulgated at 29 C.F.R. Part 24.^{1/} The Chief Administrative Law Judge (ALJ) issued a decision recommending that the complaint be dismissed as untimely. Recommended Order of Dismissal (R. O. D.). For the reasons

^{1/} These regulations were amended in February 1998 to provide, *inter alia*, for review of environmental and nuclear whistleblower complaints upon the filing of an appeal by a party aggrieved by an Administrative Law Judge’s decision. *See* 63 Fed. Reg. 6614 (Feb. 9, 1998). In this case, the Administrative Law Judge issued a recommended decision and order on November 17, 1997; accordingly, this matter is before the Board pursuant to the pre-1998 automatic review provision of the regulations. 29 C.F.R. §24.6(a) (1997).

discussed below, we disagree with the ALJ and remand the case for further proceedings consistent with this decision.^{2/}

BACKGROUND

I. Procedural History

Prior to February 5, 1997, Complainant James Whitaker (Whitaker) had been the General Manager/Quality Control Supervisor (“General Manager”) at the Alyeska Marine Terminal in Valdez, Alaska. On March 7, 1997, Whitaker filed a letter/complaint with the Department of Labor, alleging that he had been retaliated against by Respondents CTI-Alaska (CTI) and Alyeska Pipeline Service Company (Alyeska). Whitaker alleged in pertinent part:

After many promises made to me by Alyeska and CTI to keep me employed as the Quality Control Supervisor, I was offered employment with far less responsibility, authority and wage compensation. The reason I believe that I was not hired with the new contractor is because of my support of the whistle blowers that had come forth with concerns from 1991 through present.

Whitaker alleged that Respondents’ failure to hire him violated the employee protection provisions of the environmental statutes.

Whitaker’s complaint was forwarded to the Occupational Safety and Health Administration, which on May 29, 1997, dismissed it on the grounds that the complaint had not been filed within the 30-day statute of limitations prescribed by the environmental statutes. “Your claim of discrimination was filed by letter dated and mailed March 7, 1997, which is within 30 days of your last day of employment, but not within 30 days of January 22, 1997, the date you became aware that you would not be transferred or hired into an equivalent position with CTI.” Letter from Richard S. Terrill, Acting Regional Administrator, Occupational Safety and Health Administration, to James Whitaker, dated May 29, 1997.

On June 6, 1997, Whitaker filed an appeal and a request for hearing with the Office of Administrative Law Judges. On June 24, 1997, the Chief ALJ directed the parties to brief the question whether Whitaker’s complaint was timely filed.^{3/} Although the ALJ noted that

^{2/} CTI filed with the Board a motion to strike Whitaker’s Rebuttal Brief, arguing that the brief “impermissibly injects arguments regarding the purported merits of [Whitaker’s] underlying claim.” Motion at 2. Whitaker opposed that motion, and CTI filed a rebuttal. It is unnecessary for us to rely on Whitaker’s Supplemental Statement of Facts, Rebuttal Brief at 2-3, or on the attachment to Whitaker’s Rebuttal Brief in reaching our decision, and we have not done so.

^{3/} Although CTI is a named respondent in this case, neither the Prehearing Order nor any other
(continued...)

Whitaker at that time appeared to be proceeding *pro se*, he did not direct the parties' attention to the applicable rule governing summary decision, 29 C.F.R. §18.40, or indicate that the parties should submit affidavits to support their claims.

On November 17, 1997, the ALJ recommended that the complaint be dismissed for untimeliness. The ALJ ruled that the 30-day filing period began on January 22, 1996, when Whitaker learned that CTI had offered Whitaker's position as General Manager at the Valdez terminal to another individual, and that individual had accepted it. Thus, the 30-day limitations period expired on February 21, and Whitaker's March 7 complaint was late. *See R. O. D.*

II. Standard of Review

Inasmuch as the ALJ's recommended decision rested on both rulings of law and findings of fact, he treated the timeliness issue as a matter for summary judgment. An ALJ's recommendation to grant summary judgment is reviewed *de novo*. 5 U.S.C. §557(b); *cf.*, *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).^{4/} We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact in dispute, and whether the ALJ correctly applied the relevant substantive law. We do not weigh the evidence or determine the truth of the matters asserted, but only determine whether there is a genuine issue for trial. *Jesinger, supra*. The burden of demonstrating that there are not material facts in issue is upon the party seeking summary judgment. *See, e.g., Williams v. United States Dept. of Labor*, 697 F.2d 842, 844 (8th Cir. 1983).

III. Factual Allegations

In late 1996 and early 1997, Whitaker worked for Arctic Slope Inspection Services (ASIS) as General Manager/Quality Control Supervisor (evidently a mid-level management

^{3/}(...continued)

document was served on CTI while this matter was pending before the ALJ. On March 4, 1998, after a briefing schedule had been issued by the Board on review, CTI filed a motion for extension of time in which to file its reply brief. CTI asserted that it had not been served with notice of Whitaker's request for a hearing or with any documents while the case was pending before the ALJ, including the R. O. D. The Board granted CTI's request, and CTI subsequently submitted its brief. In light of our disposition of this matter we need not decide whether CTI was harmed by the failure of the parties and the ALJ to see that CTI was served properly.

^{4/} Our authority to review summary judgment recommendations *de novo* comes not only from the Administrative Procedure Act, but also from the nature of summary judgment itself, which goes only to the questions (1) whether the correct legal standard has been applied, and (2) whether the factual allegations are sufficiently specific and uncontroverted, *i.e.* that no material issues of fact are disputed. Because the analysis on summary judgment is only about whether triable claims have been presented, the special functions and contributions of the presiding judge are not brought into play.

position) at the Alyeska Marine Terminal, operated by Alyeska in Valdez, Alaska.^{5/} Whitaker was responsible for ensuring that the terminal was properly inspected for all safety and quality compliance requirements. He supervised between eight and twenty inspectors. He received numerous statements complimenting the quality of his work.

Although Alyeska had contracted with different inspection companies over the years, the contract employees who actually performed the inspections work generally had remained the same. If a different company won the inspection contract, the successor contractor typically hired the employees of the predecessor contractor. Sometime in 1996, Alyeska decided to rebid the inspection services contract held by ASIS. In early January 1997 CTI was named as the successor contractor.

In November 1996 Whitaker had been involved “in a few conflict resolutions” with Tim Karnowski, the ASIS Quality Engineer. The conflicts involved activity protected by the employee protection provisions of the environmental statutes. Shortly thereafter Karnowski was hired as Project Manager by CTI. Karnowski played a major role in the hiring decisions that were subsequently made by CTI as it staffed up in order to assume the inspection services contract on February 5, 1997.

In November and December 1996, Jim Kingrea (Alyeska’s inspection contract steward) encouraged Whitaker to apply with CTI for the position he currently held with ASIS and told Whitaker that he had recommended to CTI that they maintain Whitaker in that position. Kingrea told Whitaker on December 5, 1996, that he had put in a good word for Whitaker with CTI. Kingrea asked Whitaker on December 11, 1996, whether he had sent a resume to CTI. Kingrea advised Whitaker not to sell his home in Valdez because he was going to be hired by CTI in his current position.

In December 1996, and again in January 1997, Jeff Arbison, a manager with CTI, phoned Whitaker and asked if he would be interested in working for CTI. In response to the January call, Whitaker and Arbison set up an appointment for Whitaker to be interviewed on January 13, 1997. Following his phone conversation with Arbison and prior to his interview, Whitaker met with Kingrea. Kingrea told Whitaker that Karnowski had been hired by CTI as Inspection Project Manager. Whitaker then told Kingrea that “now I’m really very concerned about being employed by CTI because of conflicts I’ve had in trying to deal with Karnowski.” Kingrea assured Whitaker that “Karnowski will treat you right.”

On January 13, 1997, Whitaker interviewed with Karnowski and Arbison. The entire discussion related to issues relevant to supervision and management. At the end of the

^{5/} Whitaker had worked for ASIS since 1991 in various positions. It is not clear from the record when he became the General Manager at the Alyeska Marine Terminal, but Alyeska asserts in its Opposition Brief filed with the Board that Whitaker served in that position beginning in July 1996. Brief at 3. Whitaker was holding that position when the facts relevant to this case occurred.

interview, Karnowski and Arbison told Whitaker that the interview had gone “extremely well.” Karnowski said he would deliver an offer of employment when he came to Valdez on January 17th.

However, Karnowski did not get in touch with Whitaker on the 17th as promised. Instead, on January 20, 1997, Karnowski offered Whitaker a position as a Mechanical Inspector. This position was not supervisory, was two levels below Whitaker’s position with ASIS, and involved a significant pay cut. Whitaker immediately declined that offer. Karnowski then offered Whitaker a half time position as Mechanical Inspection Supervisor, which would have paid Whitaker at the same hourly rate as his current position, but only at half time, and was one level of supervision below the position Whitaker held with ASIS. Whitaker declined that position as well.

Shortly after Whitaker learned that his job had been given to another individual, he phoned Ted Owen, the manager of Alyeska’s Employee Concerns Program, and expressed his concerns about CTI’s hiring practices. Owen called Whitaker back on January 30. Owen told Whitaker that he had already been informed of concerns similar to those expressed by Whitaker, and was scheduled to meet with Alyeska’s Kingrea and CTI’s owner, George Hoggen, on February 3 to discuss those concerns.

On January 23, 1997, Jordis Clark, an employee with CTI’s office of Human Resources, offered Whitaker the same position Karnowski had offered Whitaker on January 20. Whitaker once again declined the position because it was a step backward in his career. Whitaker then

asked Ms. Clark “why was I not offered the position I presently hold at the Terminal”? Ms. Clark indicated that she was not aware of what position that is. I then informed her . . . “that I am the Marine Terminal QC Supervisor/Manager now.” Ms. Clark paused for 10 seconds or more then replied, “Oh, I was unaware of that, I’ll get with Karnowski and call you later”.

Letter from Whitaker to Garde, February 1, 1997 (Garde Letter), at 5-6. Whitaker did not hear back from Clark and had no further conversations with Karnowski regarding employment with CTI. No one at CTI or Alyeska ever told Whitaker “that the previous offers were . . . final.” Whitaker’s Memorandum of Law Asserting Timely Filing of Complaint (Whit. Mem.) at 6.

On February 1, 1997, Whitaker wrote to an attorney, Billie Garde, apparently seeking legal representation. On February 5, 1997, ASIS’ contract with Alyeska – and Whitaker’s employment – terminated. CTI did not make any other job offers to Whitaker.

Although the General Manager position was Whitaker’s preferred position, there were comparable positions with CTI that would have been acceptable to him. For example, Whitaker considered the pipeline inspection supervisor located in Fairbanks as comparable to the General Manager at the Valdez Marine Terminal.

DISCUSSION

Whitaker's factual allegations and legal arguments emerged in stages during the ALJ proceeding. Whitaker admitted from the outset of the proceeding that he learned on January 22, 1997, that CTI had offered his position as General Manager to another individual, who had accepted the job. He argues, however that January 22 did not trigger the 30-day period for filing his complaint, because he had been led to believe that even if CTI did not hire him for the General Manager position, CTI would find a comparable position for him. Whitaker argues that he did not know (and could not have known) that CTI would not be offering him a comparable substitute until February 5, when CTI's contract became effective and it became clear that CTI had filled all the positions it planned to fill as part of its takeover. Whitaker also argues that CTI and Alyeska should be equitably estopped from invoking the 30-day bar because they told him he would have a comparable job and never told him that the two lower-level jobs CTI did offer him were CTI's final offers.

Apparently acting *pro se* at the time, Whitaker requested a hearing on his complaint by filing a letter with the Office of Administrative Law Judges. That letter contained some of his allegations and became part of the record in this case. Whitaker evidently attached to his complaint his February 1 letter to the attorney, Garde, which became the source of most of Whitaker's factual allegations.

In August 1997, Whitaker's attorney filed a brief arguing against dismissal for lack of timeliness. In that document Whitaker sought to demonstrate how his factual allegations (including an affidavit attached to the brief) proved that CTI and Alyeska had led him to believe that even if CTI did not keep him as General Manager in Valdez, he still would get a comparable position elsewhere, and that he could not know that CTI and Alyeska would renege on this commitment until CTI's restaffing was completed on February 5, 1997. Also in that document, Whitaker argued that the same facts that misled him into waiting until February 5 -- still hoping for a suitable job offer -- should estop Alyeska and CTI from invoking the 30-day limit as of January 22, 1996.

Alyeska filed its brief for dismissal on grounds of untimeliness in July 1997 -- when it was on notice of Whitaker's factual claims but before Whitaker's arguments about reasonable reliance and estoppel were filed.^{6/} Alyeska's July brief focused entirely on the theory that the 30-day period should begin to run from January 22, 1996, because that was the date Whitaker learned he would not continue as General Manager in Valdez. In support of that argument, Alyeska appended an affidavit from Karnowski, in which Karnowski confirmed Whitaker's

^{6/} The ALJ originally ordered the parties to file memoranda on timeliness within 15 days of his June 24, 1997 order. Alyeska filed its memorandum on July 17, 1997, along with a motion for leave to file late. On August 18, 1997, Whitaker filed a motion to file his memorandum late together with his memorandum, stating that Alyeska's counsel did not oppose the late filing.

allegations that Karnowski offered Whitaker only lesser positions and thus Whitaker was aware before February 1 that he would not be continued in his General Manager slot.

Alyeska first learned from Whitaker's August brief opposing dismissal that Whitaker was also arguing that he reasonably believed that if he did not keep the General Manager position he would be given a comparable slot elsewhere and that CTI and Alyeska should be estopped from invoking the January 22 date. Upon receiving Whitaker's August brief, Alyeska filed a motion requesting an opportunity to reply:

A reply memorandum is necessary because Complainant asserts two fundamentally wrong points in support of his position. First, he asserts that he did not know until February 5, 1997 that he would not be hired into his prior position. Second, he asserts that he only learned on February 5, 1997 that he would not be hired into an acceptable position.

Alyeska further contended that "there is no showing in his papers that the positions which he considered acceptable (a fact which he had not communicated to CTI) were filled or unfilled on [February 5, 1997]." Alyeska described no evidence that would support its claim that Whitaker had not communicated to CTI about a comparable position. Alyeska made no reference to Whitaker's estoppel claim.

The ALJ granted Alyeska's motion for leave to reply. However, Alyeska did not in fact reply. Thus, as the record stands, Alyeska has not effectively controverted Whitaker's factual allegations or suggested any reason why, as a matter of law, Whitaker's factual allegations are not material to his legal theories.

Each of the employee protection statutes applicable here, the CAA, the SDWA, and TSCA, requires that a complaint of retaliation be filed within 30 days of the date of discrimination. The Board and the Secretary have held that the whistleblower statutes of limitations begin to run on "the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person [similarly situated to Complainant] with a reasonably prudent regard for his rights." *Ross v. Florida Power & Light Co.*, ARB Case No. 98-044, ALJ Case No. 96-ERA-36, ARB Fin. Dec. and Ord., March 31, 1999, slip op. at 4, quoting *McGough v. U.S. Navy*,^{2/} Case Nos. 86-ERA-18,19, and 20, Sec. Dec. June 30, 1988, slip op. at 9-10 (citing numerous cases). The 30-day limits within which employees must file their complaints under these statutes are not jurisdictional; they are statutes of limitations subject to waiver, tolling, and estoppel. See, e.g., *Zipes v. TWA*, 455 U.S. 385 (1982) ("a technical reading [of a filing provision of Title VII] would be particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the

^{2/} In *McGough*, the Secretary remanded for a hearing on timeliness because it was not clear from the record when facts sufficient to put a reasonable person on notice became apparent.

process.” (internal quotations omitted)); *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991) (applying tolling analysis under Energy Reorganization Act, which at that time set a 30-day limit within which employees must file discrimination complaint with the Department of Labor).

Based on our *de novo* review of the facts averred by the parties, we conclude that there are facts in dispute which are material to the timeliness issue. In so ruling we are mindful that we are not to find facts, but solely to determine whether there are material facts which need to be subject to fact-finding.

The fact that Whitaker knew on January 22, 1997, that he would not be hired into the General Manager position with CTI is not a basis for dismissing the complaint as untimely, because Whitaker asserted two other theories of the case: (1) that he reasonably believed that after January 22 he was still being considered for another position comparable to General Manager at the terminal in Valdez and had no way of learning this was not true until completion of CTI’s “staffing up” on February 5; and (2) that Alyeska and CTI should be estopped from invoking the 30-day limitations period as of January 22, because they misled him into holding false hopes until February 5.

With respect to the “comparable alternative job” claim, Whitaker asserted that there was a fairly predictable process by which employees of a predecessor contractor were hired by a successor contractor following the transfer of work from one to the other contractor:

While Alyeska would occasionally hire different inspection companies, the people who actually performed the work generally remained the same. If a new company won the contract with Alyeska, they would hire people who were with the old company. The process is logical, because a company who lost a contract would have no need of its inspectors in Alaska and would then lay them off. The new company would need to add staff and would hire these now-available personnel.

* * * * *

ASIS’s most recent contract with Alyeska was set to expire on June 14, 1996. Under a mutual agreement the contract was extended to Thursday, February 5, 1997. ASIS lost the contract. Alyeska awarded the inspection contract to CTI. Although Whitaker heard many rumors to this effect, the official announcement to him came from Jeff Arbison on January 7, 1997.

Whit. Mem. at 3. Therefore, according to Whitaker, CTI had less than a month -- between the award of the inspection contract and the actual transfer of functions from ASIS to CTI on February 5, 1997 -- in which to hire its employees. As of February 5 the contract period would begin, and CTI would be required to be fully staffed. Not only did Alyeska offer no

countervailing factual allegation, it submitted an affidavit from Karnowski that is consistent with Whitaker on this point: “*In the process of staffing up to perform under the inspection services contract, I discussed possible employment with James Whitaker. . . .*” Karnowski Affidavit, Exh. A, p. 2 ¶ 2. (July 14, 1997) (emphasis supplied).

Viewing the evidence in the light most favorable to Whitaker, the party opposing summary judgment, and in light of Alyeska’s failure to present any plausible rebuttal evidence, we conclude that Whitaker’s allegations raised triable issues of fact under two valid theories -- reasonable reliance on a promise to find a comparable alternative, and estoppel. Whitaker alleges that he was repeatedly assured by Alyeska that he would be placed with CTI, and that he had nothing to fear in terms of supervisory or financial loss; he had been called for an interview with CTI; the interview with CTI had focused entirely upon supervisory and managerial issues; both CTI officials who interviewed Whitaker (including Karnowski) told him that the interview had gone extremely well; Whitaker was never told that the two positions Karnowski offered him on January 20, 1997, were final offers. We do not make any findings on the merits of these allegations, but conclude that these allegations are sufficient to entitle Whitaker to a hearing on his claims that he reasonably relied on CTI and Alyeska’s promises to find him a comparable alternative job until February 5, 1997, or that he was misled into continuing to wait for a comparable position until February 5 when none was in fact even being considered.

CONCLUSION

For the foregoing reasons we do not adopt the recommended decision of the ALJ, but instead remand the case for a hearing on the question whether Whitaker’s complaint was timely filed. If the ALJ concludes that the complaint was timely filed he shall conduct further proceedings on the merits of Whitaker’s complaint.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

I concur in the result only.

E. COOPER BROWN

Member