



IN THE MATTER OF:

JONATHAN D. BROFFORD,
COMPLAINANT,

v.

PNC INVESTMENTS LLC,
RESPONDENT.

ARB CASE NO. 2018-0003

ALJ CASE NO. 2017-CFP-00002

DATE: FEB 14 2019

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jonathan D. Brofford, *pro se*, Columbus, Ohio

For the Respondent:

Robert S. Whitman, Esq., *Seyfarth Shaw LLP*, New York, New York; Gary J. Lieberman, Esq., *Littler Mendelson, P.C.*, Boston, Massachusetts (on brief)

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567 (2010) (CFPA). On October 5, 2016, Jonathan D. Brofford filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that PNC Investments LLC (PNC) fired him in November 2012 for engaging in CFPA-protected activity. OSHA dismissed the complaint as untimely. Brofford requested a hearing on his complaint before an Administrative Law Judge (ALJ).

While Brofford's case was pending before the ALJ, PNC filed a Motion to Dismiss (Motion), with exhibits, arguing that the complaint was untimely. Brofford, appearing *pro se*, responded to the Motion by submitting a document entitled "Response to PNCI's Motion for Summary Dismissal," with exhibits. On September 21, 2017, the ALJ issued a Decision and Order Dismissing Complaint (D. & O.).¹ Brofford has appealed the ALJ's ruling to the Administrative Review Board (ARB).

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the CFPA and its implementing regulations at 29 C.F.R. Part 1985 (2018). Secretary's Order No. 2-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,378; 69,379 (Nov. 16, 2012); 29 C.F.R. § 1985.110(a). The ARB reviews an ALJ's grant of summary decision *de novo* under the same standard the ALJ applies. Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2018). The ARB views the record on the whole in the light most favorable to the non-moving party. *Stroud v. Mohegan Tribal Gaming Auth.*, ARB Nos. 13-079, 14-013, ALJ Nos. 2013-ACA-003, 2013-CFP-003, slip op. at 2 (ARB Nov. 26, 2014).

Under the CFPA, a retaliation complaint must be filed within 180 days of the alleged adverse action. 12 U.S.C. § 5567(c)(1)(A). In determining whether the Board should permit the adjudication of an otherwise untimely complaint, we have recognized four principal situations in which equitable modification of filing deadlines may apply: (1) respondent has actively misled the complainant regarding the cause of action; (2) complainant has in some extraordinary way been prevented from filing his or her action; (3) complainant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) respondent's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his or her rights. *Turin v. AmTrust Financial Services, Inc.*, ARB No. 11-062, ALJ No. 2010-SOX-00018, slip op. at 8 (March 29, 2013).

A review of the record reveals that Brofford filed his complaint over three years and ten months after PNC terminated his employment. The ALJ took into consideration

¹ Although he did not cite any regulation, the ALJ treated the Motion to Dismiss as a motion for summary decision. *See, e.g.*, D. & O. at 2 ("I find there is no genuine issue of material fact relative to Complainant's filing of his claim, that it is time barred, and that Respondent is entitled to judgment as a matter of law."). If matters outside a motion to dismiss and any responsive pleading are presented to and not excluded by the administrative law judge, it is appropriate to treat the original motion as one for summary decision, *see* Fed. R. Civ. P. 12(d), and analyze the evidence under the framework provided in 29 C.F.R. § 18.72 (2018).

not only that Brofford was appearing pro se but also that whistleblower limitations periods are subject to modification (i.e., equitable tolling) when the untimeliness is the result of circumstances beyond the complainant's control. But ultimately the ALJ held that Brofford had failed to establish that he was entitled to an extension of the filing period.²

On appeal Brofford focuses on what he asserts is PNC'S pretextual basis for his termination. Specifically, he asserts that the "reason [for his termination] offered by the respondent is utterly false and misled me to falsely believe that PNC fired me for a legitimate company policy violation with a universally applied pre-prescribed penalty of termination." Complainant's Petition for Review at 1.

We are not persuaded that allegations of a pretextual termination, without more, are sufficient to constitute the compelling circumstances that would justify departure from the statutory filing deadlines applicable to complaints under the CFPA. Many whistleblower complaints allege pretextual termination, and to hold that such allegations are sufficient to excuse untimely filing would create an exception that would largely swallow the rule requiring timely filing of whistleblower complaints.

For these reasons, we agree with the ALJ that there is no genuine dispute as to any material fact concerning Brofford's untimely filing and PNC is entitled to decision as a matter of law. Our review of the record discloses no ground for an equitable extension of the statutory filing deadline of 180 days. We therefore **AFFIRM** the ALJ's decision and order and this case is hereby **DISMISSED**.

SO ORDERED.

² D. & O. at 2 ("There is no evidence in the record to show that Respondents [sic] actively misled Complainant, that Complainant was prevented from asserting his rights in some extraordinary way, or that Complainant raised the claim in the wrong forum Complainant asserts that the complexity of the banking framework made it impossible for him to conclude that he was entitled to whistleblower protections and it was only when the news reported fraud in the industry that he learned that his termination could be protected Complainant focuses on the underlying basis of his complaint and fail [sic] to assert evidence that tolling should apply.").