



In the Matter of:

FRANCIS X. MCGOWAN,

ARB CASE NO. 12-094

COMPLAINANT,

ALJ CASE NO. 2012-ERA-009

v.

DATE: February 28, 2014

BECHTEL NATIONAL, INCORPORATED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Francis X. McGowan, *pro se*, Richland, Washington

BEFORE: Paul Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; Lisa Wilson Edwards, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER

This case arises under the whistleblower provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851(a)(1)(West 2007) (ERA), and its implementing regulations, 29 C.F.R. Part 24 (2013). On October 7, 2011, Francis McGowan filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, Bechtel National, Inc. (Bechtel), violated the ERA when it terminated his employment. OSHA dismissed the complaint. McGowan objected and requested a hearing with the Office of Administrative Law Judges.

Prior to a hearing before an Administrative Law Judge (ALJ), Bechtel moved to dismiss the complaint for lack of timely filing with OSHA. On May 17, 2012, the ALJ entered an order to show cause whether the complaint should be dismissed as untimely. On July 16, 2012, the ALJ granted the motion and dismissed the complaint. McGowan petitioned the Administrative

Review Board (ARB) for review. We vacate the ALJ's decision and remand for further proceedings consistent with this decision and order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to ARB the authority to issue final agency decisions under the ERA. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012). We review de novo an ALJ's grant of a motion to dismiss a whistleblower complaint due to untimeliness. *Williams v. Nat'l Railroad Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 2 (ARB Dec. 19, 2013); *Johnson v. The WellPoint Cos.*, ARB No. 11-035, ALJ No. 2010-SOX-038 (ARB Feb. 25, 2013).

BACKGROUND

A. Facts

McGowan, a disabled veteran and Bechtel employee, reported an occupational injury on September 24, 2008. McGowan states that as a result of the injury, the company did not permit him to return to work and terminated his employment on July 16, 2009.

The parties in this case agree that the "last alleged act of discrimination took place on July 16, 2009," the date the company terminated McGowan's employment. *McGowan v. Bechtel Nat'l, Inc.*, ALJ No. 2012-ERA-009, slip op. at 3 (July 16, 2012)(D. & O.). McGowan filed a claim with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) on February 24, 2010. On December 3, 2010, OFCCP informed McGowan that his case would be closed. On October 7, 2011, McGowan filed an ERA whistleblower complaint. McGowan contended in the complaint that he was not informed about the ERA whistleblower protection provisions until sometime in 2011.

B. ALJ's Decision and Order Dismissing the Complaint (July 16, 2012)

While the case was pending before the ALJ, on May 14, 2012, Bechtel moved to dismiss McGowan's OSHA complaint. The ALJ ordered the parties to show cause whether the motion should be granted. McGowan responded to the show cause order on May 31, 2012, and argued, in part, that Bechtel failed to comply with the regulatory requirement, 29 C.F.R. § 24.102(d)(1), that the ERA whistleblower law be prominently posted on company premises. McGowan Response to Show Cause Order at 5; see also McGowan Letter to ALJ at 2-3 (dated July 15, 2012).

On July 16, 2012, the ALJ entered a Decision and Order Dismissing the Complaint. The ALJ stated that the ERA gives a complainant 180 days from the time of the adverse action to file a complaint. D. & O. at 2, citing 42 U.S.C. § 5851(b); D. & O. at 2-3, citing 29 C.F.R. Part 24. The ALJ noted that under limited circumstances, "[e]quitable tolling is available to modify the

period provided by employee protection acts.” D. & O. at 3. The ALJ rejected McGowan’s contention that the complaint filed with OFCCP tolls the 180-day time limitation period. D. & O. at 3. The ALJ stated:

The complaint was filed by Complainant with OFCCP on February 24, 2010, some 223 days following the last alleged act of retaliation. Further, the OFCCP notified Complainant by letter dated December 3, 2010, that it was closing his complaint. Yet, Complainant failed to file his complaint until October 7, 2011, some 308 days following the dismissal of his OFCCP complaint.

D. & O. at 3. The ALJ determined that McGowan failed to meet the 180-day filing limitations period and “has presented no evidence to show that his complaint was either timely filed or that other circumstances exist that would preclude the application of the 180-day limitations period to his Complaint herein.” *Id.* The ALJ did not address McGowan’s argument that the company failed to post the ERA whistleblower law as required by 29 C.F.R. § 24.102(d)(1) and (2).

DISCUSSION

Under the ERA, “[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination.” 42 U.S.C.A. § 5851(b)(1). The regulation promulgating this provision of the ERA states:

Under the Energy Reorganization Act, within 180 days after an alleged violation of the Act 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 of the Act may file . . . a complaint alleging such retaliation.

29 C.F.R. § 24.103(d)(2).

The ERA whistleblower regulations set out a posting requirement for companies that fall within the scope of the Act. That regulation states that “[e]very employer subject to the [ERA], as amended, shall prominently post and keep posted in any place of employment to which the whistleblower provisions of the Act apply, a fully legible copy of the notice [prepared by OSHA or the Assistant Secretary] that contains substantially the same provisions and explains the whistleblower provision of the Act and the regulations in this part.” 29 C.F.R. § 24.102(d)(1). The regulation provides that failure to comply with the posting requirement can affect the limitations period for filing a complaint with OSHA. Section 24.102(d)(2) of 29 C.F.R. states:

Where the notice required by paragraph (d)(1) of this section has not been posted, the requirement in 24.103(d)(2) that a complaint

be filed with the Assistant Secretary within 180 days of an alleged violation will be inoperative, unless the respondent establishes that the complainant had knowledge of the material provisions of the notice. If it is established that the notice was posted at the employee's place of employment after the alleged retaliatory action occurred or that the complainant later obtained knowledge of the provisions of the notice, the 180-days will ordinarily run from whichever of those dates is relevant.

The company's compliance with the posting requirement of 29 C.F.R. § 24.102(d)(1) and (2) goes to the timeliness of McGowan's OSHA complaint. As the trier of fact, the ALJ must determine in the first instance whether Bechtel complied with the posting requirement, and if not, whether this noncompliance rendered the 180-day requirement for McGowan to file his ERA complaint with OSHA inoperative, or whether McGowan's OSHA complaint is timely based on his "later obtained knowledge of the provisions of the notice." 29 C.F.R. § 24.102(d)(2).¹

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order Dismissing Complaint is **VACATED**, and the case is **REMANDED** for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

¹ The petition for review states that McGowan filed an OSHA complaint "alleging discrimination for report of occupational injury." Petition for Review at 4 (dated Sept. 10, 2012). Should the ALJ on remand determine that McGowan timely filed his OSHA complaint, the ALJ will be required to assess whether McGowan's alleged protected activity, *e.g.*, reporting his occupational injury, falls within the scope of the ERA whistleblower provision.