U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

GARY VANDER BOEGH,

COMPLAINANT,

v.

ENERGYSOLUTIONS, INC.
(formerly, Duratek, Inc.),

RESPONDENT.

ARB CASE NO. 15-062

ALJ CASE NO. 2006-ERA-026

DATE: FEB 24 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mick G. Harrison, Esq.; Bloomington, Indiana

For the Respondent:
Steven C. Bednar, Esq. and David C. Castleberry, Esq.; *Manning Curtis Bradshaw & Bednar PLLC*, Salt Lake City, Utah

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Tanya L. Goldman, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This appeal involves claims that Complainant Gary S. Vander Boegh brought against Respondent EnergySolutions, Inc., under the employee whistleblower protection provisions of the Federal Water Pollution Control Act [Clean Water Act] (CWA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (Thomson Reuters 2012); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (Thomson/Reuters 2012); and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson/Reuters 2009), and their implementing regulations found at 29 C.F.R. Part 24 (2016). At issue is whether Complainant may reassert his claims under these four environmental statutes before the Department of Labor

where an Administrative Law Judge (ALJ) had previously dismissed the claims following Complainant's assertion of them in federal court under the supplemental jurisdiction provisions of 28 U.S.C.A. § 1367 (Thomson/Reuters 2010)[1] and the federal court, in turn, had dismissed the claims for lack of subject matter jurisdiction. For the following reasons, the Administrative Review Board affirms the ALJ's order denying Complainant's motion to vacate the ALJ's previous dismissal of his claims under the four environmental statutes and rejecting his request to reassert those claims before the Office of Administrative Law Judges (OALJ).[2]

BACKGROUND

A. Factual Background[3]

From 1992 until 2006, Complainant Vander Boegh was the Landfill Manager for the U.S. Department of Energy's (DOE) Paducah Gaseous Diffusion Plant (Paducah Plant). The Paducah Plant primarily processed nuclear material. The landfill operation Complainant managed involved the storage of contaminated water. From 1992 to 1998, Martin Marietta Environmental Services, the prime DOE contractor in charge of operations at the Paducah Plant, employed Vander Boegh. From 1998 to 2006, Bechtel Jacobs Company (Bechtel) served as prime contractor responsible for operation of the Paducah Plant. Bechtel employed Complainant as Landfill Manager from 1998 to 2000, when it subcontracted landfill operations to WESKEM, LLC and WESKEM then became Complainant's employer. Complainant worked for WESKEM as Landfill Manager until its subcontract ended on April 23, 2006.

During his employment with Bechtel and WESKEM, Complainant raised safety and environmental concerns related to the landfill's capacity to store contaminated water. Believing that his employers began taking adverse employment action against him because of his complaints, Complainant filed whistleblower complaints with the DOE in December 2001 charging Bechtel and WESKEM with whistleblower retaliation. DOE found in favor of Complainant and prohibited the companies from making any changes to Complainant's job position or location for at least one year.

On April 24, 2006, Paducah Remediation Services, LLC (PRS) took over from Bechtel as the prime contractor for the Paducah Plant, and Respondent EnergySolutions, Inc. replaced WESKEM as the subcontractor responsible for landfill operations. It is during this last period

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[1] Complainant's whistleblower protection claims under the four environmental statutes were asserted before the federal court as claims supplemental to Complainant's claim under the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson Reuters 2012), which affords a complainant the right to initiate his or her whistleblower complaint in federal court if it has not been decided within one year of its filing with the Department of Labor. *See* 42 U.S.C.A. § 5851(b)(4).

[2] *See* ALJ Decision and Order Denying Complainant's Motion to Vacate, ALJ No. 2006-ERA-026 (May 11, 2015) (2015 D. & O.).

[3] We note that all information contained in the factual background statement is taken from the ALJ's 2015 D. & O. at 1, 2, 4 n.11, unless otherwise indicated.

that Complainant alleged his cause of action arose, as he applied to be the new landfill manager, but neither PRS or EnergySolutions hired him after WESKEM's subcontract ended.

B. Procedural History

On April 18, 2006, Vander Boegh filed the present complaint against the DOE and four other respondents, including EnergySolutions, under seven environmental whistleblower protection statutes, including the ERA, CWA, SDWA, SWDA, and TSCA.[4] Vander Boegh alleged that he was not hired as the landfill manager because he previously raised safety and environmental concerns and filed a whistleblower complaint with the DOE.[5]

On December 25, 2009, pursuant to the ERA's "kick-out" provision at 42 U.S.C.A. § 5851(b)(4),[6] Vander Boegh notified the ALJ of his intent to file his ERA claim in United States District Court.[7] Upon removal of his ERA claim to federal court, along with his claims under the additional whistleblower protection statutes pursuant to 28 U.S.C.A. § 1367, on February 16, 2010, the ALJ issued an order dismissing Vander Boegh's ERA complaint and ordering that his claims under the six other environmental whistleblower statutes be held in abeyance pending a decision by the federal court on whether it would exercise supplemental jurisdiction over those claims.[8]

On October 12, 2011, in light of the respondents' stipulations, made at Vander Boegh's request, not to contest the subject matter jurisdiction of any of his claims under the other

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[4] Vander Boegh also filed claims originally under the employee whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (Thomson/West 2003) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9610 (Thomson/West 2005). He did not pursue his complaints under the CAA and CERCLA in federal court. 2015 D. & O. at 3 n. 4-5.

[5] 2015 D. & O. at 4.

[6] 42 U.S.C.A. § 5851(b)(4) provides:

> If the Secretary has not issued a final decision within 1 year after the filing of a complaint under paragraph (1), and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

See also 29 C.F.R. § 24.114 (providing the same right to initiate ERA claim in federal district court).

[7] 2015 D. & O. at 5.

[8] *Id.* Additionally, on the same day the ALJ issued an Order Approving Settlement between Vander Boegh and WESKEM. *Id.*

environmental whistleblower statutes in his federal court action, the ALJ issued an Order dismissing all six of his environmental whistleblower statute complaints, including those filed under the CWA, SDWA, SWDA, and TSCA.

C. Federal Court Procedural History

On May 3, 2012, the U.S. District Court for the Western District of Kentucky granted summary judgment in favor of the respondents and against Vander Boegh,[9] from which Vander Boegh appealed to the U.S. Court of Appeals for the Sixth Circuit. On August 14, 2013, the Sixth Circuit reversed the district court's grant of summary judgment in favor of EnergySolutions, affirmed the summary judgment granted in favor of all other respondents, and remanded the claim against EnergySolutions for further proceedings.[10] The Sixth Circuit did not address the federal court's jurisdiction under the ERA's "kick-out" provision or jurisdiction over the whistleblower protection provisions of the CWA, SDWA, SWDA, and TSCA. In remanding Vander Boegh's claims against EnergySolutions, the Sixth Circuit merely found that a genuine issue of material fact existed in regard to Vander Boegh's claims that precluded summary judgment and therefore reversed the district court's determination and remanded the case for further consideration.

On December 17, 2013, the district court dismissed Vander Boegh's complaints against EnergySolutions under the ERA's whistleblower protection provisions, as well as the CWA, SDWA, SWDA, and TSCA. The court concluded that Vander Boegh lacked standing to pursue claims under the several statutes because no employment relationship existed between Complainant and EnergySolutions.[11] Vander Boegh appealed and on November 18, 2014, the Sixth Circuit affirmed the dismissal of Vander Boegh's complaint against EnergySolutions under the ERA, as pursued under the ERA's "kick-out" provision, 42 U.S.C.A. § 5851(b)(4).[12] However, the appellate court further held *sua sponte* that the federal court lacked supplemental jurisdiction under 28 U.S.C.A. § 1367 over Vander Boegh's complaints against EnergySolutions under the whistleblower protection provisions of the CWA, SDWA, SWDA, and TSCA.

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9 *See Vander Boegh v. Energy Solutions, Inc.*, No. 5:10–CV–31, 2012 WL 1576158 (W.D. Ky., May 3, 2012) (unpub.). Vander Boegh did not pursue his complaints under the CAA and CERCLA in federal court. 2015 D. & O. at 3 n. 4-5. Furthermore, the United States district court dismissed Vander Boegh's complaints against the DOE without prejudice on October 12, 2010, and as neither party subsequently chose to again join the DOE, the DOE was no longer a named respondent in the case as of April 4, 2011. 2015 D. & O. at 3 n. 7.

10 *See Vander Boegh v. EnergySolutions, Inc.*, 536 Fed. App'x 522, No. 12-5643 (6th Cir. Aug. 14, 2013) (unpub.).

11 *See Vander Boegh v. Energy Solutions, Inc.*, No. 5:10–CV–00031–TBR, 2013 WL 7141237 (W.D. Ky. Dec. 17, 2013) (unpub.).

12 *See Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1062 (6th Cir. 2014).

Accordingly, the court dismissed Vander Boegh's claims against EnergySolutions under the four environmental whistleblower statutes.[13]

D. Vander Boegh's Motion to Vacate

On December 19, 2014, Vander Boegh filed a Motion to Vacate the ALJ's October 12, 2011 Order dismissing his complaints under the CWA, SDWA, SWDA, and TSCA and to reinstate his complaints under the four environmental whistleblower statutes for hearing before the OALJ.[14] Specifically, Vander Boegh sought equitable relief from the ALJ's prior order dismissing his complaints under the four environmental statutes pursuant to Federal Rule of Civil Procedure (FRCP) 60(b)(1), (5), and (6), and the doctrine of equitable tolling. Vander Boegh also argued that under the supplemental jurisdiction statute at 28 U.S.C. § 1367(d), he was entitled to refile his claims with the OALJ given that he had done so within the thirty-day period specified in the statute.

F. ALJ's Decision and Order

In denying Vander Boegh's motion to vacate the prior order of dismissal and reinstate his whistleblower claims, the ALJ rejected his contention that 28 U.S.C. § 1367(d) entitled him to refile his claims with the ALJ within 30 days of their dismissal by the federal court, a deadline which he had met. The ALJ held that section 1367(d) provides a mechanism by which the limitations period for refiling is tolled only on a party's "state court" claim during its pendency in federal court and for a period of 30 days after its dismissal, but is not applicable to "claims brought in an administrative forum" such as in this case.[15]

In rejecting Vander Boegh's grounds for relief under FRCP 60, the ALJ first noted that because neither the procedural rules for the OALJ applicable at the time of his decision nor the regulations under 29 C.F.R. Part 24 governing complaints under the four environmental whistleblower statutes at issue in this case provide an applicable rule regarding a motion for relief from judgment, the Rules of Civil Procedure for the District Courts of the United States applied, citing 29 C.F.R. § 18.1(a) (2014) (now re-implemented at 29 C.F.R. §18.10(a) (2016)).[16]

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13 *See Vander Boegh*, 772 F.3d at 1064-68.

14 2015 D. & O. at 2, 8-9.

15 *Id.* at 15.

16 *Id.* at 10. Because the Sixth Circuit affirmed summary judgment in favor of the respondents Bechtel Jacobs and Paducah Remediation under the CWA, SDWA, SWDA, and TSCA, *see Vander Boegh*, 536 Fed. App'x 522, No. 12-5643, the ALJ held that pursuant to the doctrine of collateral estoppel or issue preclusion, Vander Boegh was precluded from relitigating those claims against those parties. 2015 D. & O. at 10-12. In response to an Order to Show Cause the Board issued, Vander Boegh notified the Board that he is only proceeding on appeal against EnergySolutions with his retaliation claims under the CWA, SDWA, SWDA, and TSCA.

In addressing Vander Boegh's grounds for relief under FRCP 60, the ALJ noted that Rule 60(c)(1) requires that such a motion must be made within a "reasonable time" and, more specifically, a motion under Rule 60(b)(1) must be made "no more than a year after the entry of the judgment or order." Because Vander Boegh's motion for relief under Rule 60(b)(1) was made over a year after the issuance of the ALJ's original Order of Dismissal, the ALJ denied the motion. Moreover, because Vander Boegh's motion for relief under Rule 60(b) itself was made over three years after the issuance of the ALJ's original Order of Dismissal, the ALJ held that it was "far from reasonable" and therefore denied the motion.[17] In addition, the ALJ held that Vander Boegh "made a strategic decision and may not avoid the consequences of the decision" with a "re-do," as the Sixth Circuit Court has held that Rule 60(b) motions "may not be used 'as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise.'"[18]

Nevertheless, the ALJ also addressed the merits of Vander Boegh's motion under Rule 60(b)(5) and (6). Pursuant to Rule 60(b)(5), the ALJ held that the ALJ's original Order of Dismissal of Vander Boegh's retaliation claims against EnergySolutions under the CWA, SDWA, SWDA, and TSCA was not a "prospective" order, "required no execution nor did it require supervision by" the ALJ and "was not an injunction" or "consent decree." Thus, the ALJ held that Vander Boegh's motion for relief under Section (b)(5) lacked merit and therefore was denied.[19] In regard to Rule 60(b)(6), the ALJ held that Vander Boegh's decision to remove his claims under the CWA, SDWA, SWDA, and TSCA to federal court was "not eligible for relief under Section (b)(6)" as Vander Boegh failed to address or advocate any "exceptional or extraordinary circumstances," which are not addressed by the first five numbered clauses of Rule 60(b). Thus, the ALJ denied Vander Boegh's motion for relief under Section (b)(6).[20]

Finally, in regard to relief pursuant to the doctrine of equitable tolling, the ALJ held that none of the three criteria for equitable tolling the Third Circuit identified in *School District of City of Allentown v. Marshall*[21] applied, as (1) EnergySolutions did not mislead Vander Boegh respecting the cause of action, (2) Vander Boegh was not prevented from asserting his rights, and (3) Vander Boegh did not mistakenly raise his claims in the wrong forum. Thus, the ALJ held that Vander Boegh was also not entitled to relief pursuant to the doctrine of equitable tolling.[22]

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17 2015 D. & O. at 13-14.

18 *McCurry v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 593-594 (6th Cir. 2002) (citing *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291 (6th Cir. 1989)).

19 2015 D. & O. at 13.

20 *Id.* at 14.

21 *School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981).

22 2015 D. & O. at 15.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under the employee protection whistleblower provisions of the Environmental Acts, including the CWA, SDWA, SWDA, and TSCA.[23] The ARB reviews an ALJ's procedural rulings under an abuse of discretion standard.[24]

DISCUSSION

A. 28 U.S.C.A. § 1367

28 U.S.C.A. § 1367, Supplemental Jurisdiction, provides in relevant part:

> (a) *Except* as provided in subsections (b) and (c) *or as expressly provided otherwise by Federal statute,* in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.[25]

Vander Boegh contends that the ALJ erred in holding that 28 U.S.C.A. § 1367(d) provides for tolling of the limitations period for refiling a supplemental claim in the court of original jurisdiction only on a party's state court claim during its pendency in federal court, arguing that section 1367(d) provides for tolling of the statute of limitations on "any" claim brought in federal court.

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23 Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 24.110(a).

24 *NCC Electrical Servs., Inc.*, ARB No. 13-097, ALJ No. 2012-DBA-006, slip op. at 6 (ARB Sept. 30, 2015).

25 *Id.* (emphasis added).

Vander Boegh's argument fails for two reasons. First and foremost, Vander Boegh ignores the Sixth Circuit's ruling, and Administrative Review Board precedent, holding that section 1367(a) expressly precludes supplemental jurisdiction over claims that are barred from district court jurisdiction by Federal statute. The Sixth Circuit held that the district court could not exercise supplemental jurisdiction under 28 U.S.C.A. § 1367(a) over Vander Boegh's environmental whistleblower protection claims directly in federal court because, unlike the federal court "kick out" provision under the ERA, Congress had established exclusive federal court jurisdiction over claims filed under the CWA, SDWA, SWDA, and TSCA through appellate review following an agency administrative decision.[26] The Sixth Circuit rejected Vander Boegh's argument on appeal that the district court could exercise supplemental jurisdiction over Vander Boegh's claims under the CWA, SDWA, SWDA, and TSCA "because we find no statutory private right of action" over the federal claims.[27] Vander Boegh argues that the Sixth Circuit's ruling should be ignored because it is the first and only federal appellate court decision addressing this issue.[28] However, as the ALJ noted, because this case arises out of the Sixth Circuit, we are bound by the appellate court's ruling.

Moreover, ARB case authority is in accord with the Sixth Circuit's ruling on this point. In *Abbs v. Con-Way Freight, Inc.*,[29] the Board addressed whether 28 U.S.C.A. § 1367(a)'s supplemental jurisdiction provision supported finding that a complainant's whistleblower claim brought under the Surface Transportation Assistance Act (STAA) prior to its 2007 amendment incorporating a federal court "kick out" provision was properly before the district court. The Board held that "[b]y its terms section 1367(a) excepts from federal court supplemental jurisdiction those cases in which a federal statute provides otherwise, such as the STAA provisions controlling in the case, which accorded exclusive jurisdiction to the Secretary of Labor, subject to review before the federal circuit courts."[30]

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[26] *Vander Boegh v. EnergySolutions*, 772 F.3d at 1064-69.

[27] *Id.* at 1069, n. 4 (citing *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997) (defining a "claim" for purposes of § 1367 as a "judicially cognizable cause of action")); *Anael v. Interstate Brands Corp.*, No. 00 C 6765, 2002 WL 31109451 (N.D. Ill. Sept. 20, 2002) (TSCA) ("[T]he unambiguous language of the [TSCA]'s retaliation provision clearly evinces Congress' intent not to create a private right of action."); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 & n. 10 (1986) ("When we conclude that Congress has decided not to provide a particular federal remedy, we are not free to supplement that decision in a way that makes it meaningless." (internal quotation marks omitted)).

[28] As the ALJ similarly noted, "the 6th Circuit has alone made a ruling on this issue." 2015 D. & O. at 10, n. 15.

[29] *Abbs v. Con-Way Freight, Inc.*, ARB No. 08-017, ALJ No. 2007-STA-037 (ARB July 27, 2010).

[30] *Id.* at 8-9. Like the CWA, SDWA, SWDA, and TSCA, the STAA provisions applicable in *Abbs* did not provide for a jurisdictional "kick out" to federal court. The STAA was subsequently amended to afford a complainant the same right to "kick out" to a federal district court for de novo consideration as that afforded under the ERA. *See* Implementing Recommendations of the 9/11

Also, contrary to Vander Boegh's contention, 28 U.S.C.A. § 1367 only applies to the exercise by a U.S. district court of supplemental jurisdiction over related state court claims.[31] Thus, 29 U.S.C.A. § 1367(d)'s tolling provision affording a complainant 30 days to refile his or her supplemental claim in the court of original jurisdiction after it is dismissed by a federal court does not apply here.

B. FRCP 60(b) and Equitable Tolling

Having rejected Vander Boegh's contention that 28 U.S.C.A. § 1367 is applicable to Vander Boegh's claims under the CWA, SDWA, SWDA, and TSCA, we address the ALJ's holdings regarding Vander Boegh's motion for equitable relief from the ALJ's final order dismissing his claims pursuant to FRCP 60(b) and the doctrine of equitable tolling.

FRCP Rule 60, Relief from a Judgment or Order, provides in relevant part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
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> (1) mistake, inadvertence, surprise, or excusable neglect; . . .
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Vander Boegh's motion for relief pursuant to FRCP 60 is similarly rejected. Initially, the ALJ did not abuse his discretion in concluding that Vander Boegh's motion for relief pursuant to FRCP 60(b) was untimely. With respect to Vander Boegh's assertion of mistake, inadvertence,

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Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007); 49 U.S.C.A. § 31105(c) (Thomson/West 2007 & Supp. 2010).

[31] *See Gamel v. City of Cincinnati*, 625 F.3d 949, 951 (6th Cir. 2010) ("Section 1367 grants a district court broad discretion to decide whether to exercise jurisdiction over state-law claims that are 'so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.'").

surprise or excusable neglect under FRCP 60(c)(1), his motion would have had to have been filed within one year after entry of the ALJ's order dismissing his environmental whistleblower claims.[32] Vander Boegh filed his motion more than three years after the ALJ's Order of Dismissal.

For the Rule 60(b)(5) and (6) relief sought by Vander Boegh, Rule 60(c)(1) requires that his motion "must be made within a reasonable time." The ALJ properly denied Vander Boegh's motion for relief as untimely under Rule 60(c)(1) because he made his motion more than three years after the ALJ entered his Order, which the ALJ held was "far from reasonable."[33] On review, we hold that the ALJ did not abuse his discretion in holding that Vander Boegh's motion for relief under Rule 60(b) was "far from reasonable" and thus not timely given that he made it over three years after the ALJ issued the original Order of Dismissal. Consequently, the ALJ's denial of Vander Boegh's motion for relief pursuant to Rule 60(b) as untimely is affirmed.

Nevertheless, we will also review the ALJ's holdings on the merits of Vander Boegh's motion for relief pursuant to Rule 60(b). In *Henrich*,[34] the Board held "few if any grounds for rehearing can justify relief" under Rule 60(b).[35] In particular, "a party cannot seek such relief based upon the contention that there was "an error of legal reasoning."[36] "[T]he grounds justifying a Rule 60(b) petition for relief from a judgment are quite different from those justifying a petition seeking to alter that judgment [on rehearing]."[37] The grounds for relief from judgment pursuant to Rule 60(b)(1) "stem from errors or misconduct by a party," and the grounds for relief from judgment pursuant to Rule 60(b)(5) are "based upon incidents that occur after the entry of judgment."[38] Relief from judgment pursuant to Rule 60(b)(6) provides a

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32 The ALJ procedural rules provide that the "Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1(a) (2014) (now re-implemented at 29 C.F.R. §18.10(a) (2016)). Thus, the Board has held that "ALJs—who are subject to the ALJ procedural rules, including the injunction to refer to the Rules of Civil Procedure when necessary—must observe the timeliness provisions in those Rules, and [the Board] should review ALJ decisions for compliance with those provisions." *See Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 6, n.15 (ARB May 30, 2007).

33 2015 D. & O. at 13-14.

34 ARB No. 05-030, slip op. at 16, n.31.

35 *See also Powers v. Paper, Allied-Industrial Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 6 (ARB Dec. 21, 2007).

36 *Henrich*, ARB No. 05-030, slip op. at 16; *Powers*, ARB No. 04-111, slip op. at 6.

37 *Henrich*, ARB No. 05-030, slip op. at 16 n.31; *see also Powers*, ARB No. 04-111, slip op. at 6, n.9.

38 *Id.*

"catch-all ground" when "there is a reason justifying relief," "but few if any grounds for rehearing can justify relief."[39] In *U.S. Dep't. of State*,[40] the Board noted:

> The Administrator notes that Rule 60(b)(6), in particular, provides that a party may be relieved from the action of a federal court "where justice so requires." *United States ex rel. Familian Northwest, Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994). According to the Administrator, interpretative case precedent makes clear that Rule 60(b)(6) may be successfully invoked only where there are "extraordinary circumstances" which support the granting of relief from a final judgment or order in the interest of justice. *Ackerman v. United States*, 340 U.S. 193, 203 (1950). While the "extraordinary circumstances" concept associated with Rule 60(b)(6) may seem to be an open-ended "catchall" provision, a party seeking relief from finality of a judicial or administrative order or judgment must, at a minimum, posit facts or allegations which "set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect'." *Klapprott v. United States*, 335 U.S. 601, 613 (1949).

Because grounds for relief from judgment pursuant to Rule 60(b)(1) "stem from errors or misconduct by a party," the ALJ did not abuse his discretion in holding that because Vander Boegh "made a strategic decision" on his own, and not due to an error or EnergySolutions' misconduct, Vander Boegh "may not avoid the consequences of the decision" with a "re-do." Thus, the ALJ's denial of Vander Boegh's motion for relief pursuant to Rule 60(b)(1) on the merits is affirmed.

Similarly, because grounds for relief from judgment pursuant to Rule 60(b)(5) are "based upon incidents that occur after the entry of judgment," the ALJ did not abuse his discretion in holding that the ALJ's original Order of Dismissal was not a "prospective" order.[41] Thus, the ALJ's denial of Vander Boegh's motion for relief pursuant to Rule 60(b)(5) on the merits is affirmed.

Finally, because the party seeking relief pursuant to Rule 60(b)(6) "must, at a minimum, posit facts or allegations which" establish "'an extraordinary situation which cannot fairly or logically be classified as mere 'neglect,'" the ALJ did not abuse his discretion in holding that Vander Boegh failed to address or advocate any "exceptional or extraordinary circumstances."

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39 *Id. See* 11 WRIGHT, MILLER & KANE, § 2863 (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment.")." *Id.*

40 ARB No. 98-114, slip op. at 10 (ARB Feb. 16, 2000).

41 2015 D. & O. at 13 (citing *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d 574, 587 (6th Cir. 2003) (defining when a judgment is prospective for purposes of Rule 60(b)(5))).

Thus, the ALJ's denial of Vander Boegh's motion for relief pursuant to Rule 60(b)(6) on the merits is also affirmed.

Vander Boegh notes that the ALJ did not originally dismiss his claims under the CWA, SDWA, SWDA, and TSCA on the merits, either on summary judgment or after a hearing, but only due to Vander Boegh's consent and the respondents' stipulations not to contest the subject matter jurisdiction of his claims under these statutes in federal court. Thus, Vander Boegh asserts that granting his motion for relief allowing him to refile his claims would promote the public interest purposes of these environmental whistleblower statutes. It would not, Vander Boegh argues, have served judicial economy or therefore the public interest if he were required to pursue his claims under the CWA, SDWA, SWDA, and TSCA before the ALJ while at the same time separately pursuing his ERA claim in federal court. To hold otherwise could force a complainant to forego his right to pursue his ERA claim in federal court. Consequently, Vander Boegh contends, denying him the right to refile his claims in these circumstances and allow him a hearing will have a chilling effect on environmental whistleblowers.

We note, however, that the ALJ originally held his claims under the CWA, SDWA, SWDA, and TSCA in abeyance and that Vander Boegh chose to remove his ERA claim as well as his other claims to federal court, but did not have to do so. Although judicial economy and convenience may support Vander Boegh's decision to pursue all of his claims in one forum in federal court, as the United States Court of Appeals for the Fifth Circuit has stated:

> [C]onvenience cannot supplant the unambiguous language of a jurisdictional statute. We are sympathetic to the added expense and potential waste of judicial resources [the plaintiff] will likely face in pursuing his claim . . . in a separate action and forum. However, efficiency and economy cannot confer jurisdiction upon the courts where Congress has, according to the Supreme Court, unambiguously chosen to limit such jurisdiction.[42]

Regarding relief pursuant to the doctrine of equitable tolling, in determining whether to toll a statute of limitations, we have recognized four principal situations in which a moving party may be entitled to equitable modification: (1) when the opposing party has actively misled the movant regarding the cause of action; (2) when the movant has in some extraordinary way been prevented from filing; (3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the opposing party's own acts or omissions have lulled the movant into foregoing prompt attempts to vindicate his rights.[43] Vander Boegh argues that he did not abandon or fail to prosecute his claims.

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42 *Griffin v. Lee*, 621 F.3d 380, 389-90 (5th Cir. 2010) (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005)).

43 *Herron v. North American Cent. School Bus, LLC*, ARB No. 16-040, ALJ No. 2015-STA-055, slip op. at 3-4 (ARB Dec. 21, 2016); *Woods v. Boeing-South Carolina*, ARB No.11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012).

On review, the ALJ did not abuse his discretion in holding that EnergySolutions did not mislead Vander Boegh respecting the cause of action, Vander Boegh was not prevented from asserting his rights, nor did Vander Boegh mistakenly raise his claims in the wrong forum. Nor has Vander Boegh asserted and the record does not establish that EnergySolutions lulled Vander Boegh into foregoing prompt attempts to vindicate his rights. Thus, the ALJ's denial of Vander Boegh's motion for relief pursuant to the doctrine of equitable tolling is also affirmed.[44]

C. 29 C.F.R. § 24.115

Finally, Vander Boegh contends on appeal that the Board can "waive any rule or issue any orders that justice or the administration of the [CWA, SDWA, SWDA, and TSCA] requires" pursuant to 29 C.F.R. § 24.115. EnergySolutions contends Vander Boegh did not raise this argument before the ALJ and that arguments not raised below are waived on appeal.[45] In any event, EnergySolutions contends that relief under 29 C.F.R. § 24.115 is only available due to circumstances beyond a complainant's control.

29 C.F.R. § 24.115 provides that in "special circumstances . . . or for good cause shown, the ALJ or the ARB on review may . . . waive any rule or issue any orders that justice or the administration of the [CWA, SDWA, SWDA, and TSCA] requires." Because Vander Boegh had the opportunity to argue his contention under 29 C.F.R. § 24.115 to the ALJ before the ALJ issued his decision but did not, he has waived this argument on appeal.[46] Additionally, as the ALJ held in ruling on Vander Boegh's FRCP 60(b)(6) argument, Vander Boegh failed to address or advocate any "exceptional or extraordinary circumstances" that could also have merited relief pursuant to 29 C.F.R. § 24.115.[47]

Consequently, we affirm the ALJ's D. & O. denying Vander Boegh's motion to vacate the ALJ's prior dismissal of his complaints under the CWA, SDWA, SWDA, and TSCA and to reinstate his complaints.

CONCLUSION

The terms of 28 U.S.C.A. § 1367 are not applicable to Vander Boegh's claims under the CWA, SDWA, SWDA, and TSCA. Moreover, the ALJ did not abuse his discretion in denying Vander Boegh's motion for equitable relief from the ALJ's original final order dismissing his complaints under the CWA, SDWA, SWDA, and TSCA pursuant to FRCP 60(b)(1), (5), and (6) and the doctrine of equitable tolling. Finally, Vander Boegh waived his argument by not raising it before the ALJ and failed to present any circumstances that could entitle him to relief pursuant

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44 *See Woods*, ARB No.11-067, slip op. at 9-12.

45 *See Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-013, slip op. at 11 (ARB May 27, 2010).

46 *Id.* at 11.

47 *See* 2015 D. & O. at 14.

to 29 C.F.R. § 24.115. Consequently, the ALJ's D. & O. denying Vander Boegh's motion to vacate the ALJ's prior dismissal of his complaints under the CWA, SDWA, SWDA, and TSCA and to reinstate his complaints is **AFFIRMED**.

SO ORDERED.

[redacted]

PAUL M. IGASAKI
Chief Administrative Appeals Judge

[redacted]

E. COOPER BROWN
Administrative Appeals Judge

[redacted]

TANYA L. GOLDMAN
Administrative Appeals Judge