



**In the Matter of:**

**JAMAL KANJ,**

**ARB CASE NO. 09-065**

**COMPLAINANT,**

**ALJ CASE NO. 2006-WPC-001**

**v.**

**DATE: December 17, 2010**

**VIEJAS BAND OF KUMEYAAY  
INDIANS,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Scott McMillan, Esq., *The McMillan Law Firm, APC, La Mesa, California***

***For the Respondent:***

**George Howard, Jr., Esq., *Jones Day, San Diego, California***

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Luis A. Corchado, *Administrative Appeals Judge*.**

**DECISION AND ORDER OF REMAND**

The Complainant, Jamal Kanj, filed a retaliation complaint under the employee protection provisions of the Federal Water Pollution Control Act (FWPCA, the Clean Water Act, or the CWA), and its implementing regulations. 42 U.S.C.A. § 1367 (West 2001); 29 C.F.R. Part 24 (2007). He alleged that his former employer, Viejas Band of Kumeyaay Indians (the Tribe), violated the FWPCA whistleblower protection provisions when it retaliated and discriminated against him because he complained about FWPCA violations.. Complaint at 2 (Oct. 3, 2005). After unsuccessfully moving to dismiss this action on sovereign immunity grounds, the Tribe

moved to dismiss because it asserted that Kanj failed to timely file his complaint. A Department of Labor (DOL) Administrative Law Judge (ALJ) ordered that Kanj's complaint be dismissed for untimeliness. For the following reasons, the Administrative Review Board (the ARB or the Board) reverses the ALJ's Decision and Order and remands this matter to the ALJ for further proceedings consistent with this decision.

## **BACKGROUND<sup>1</sup>**

The Tribe hired Kanj on August 21, 2000, as its Director of Public Works and Deputy Tribal Government Manager. Decision and Order (D. & O.) at 2; RX 1 at 6.

Kanj alleges that, in the spring of 2003, he noticed an unusually high amount of fecal coliform in Viejas Creek and reported the results to the Tribal Council, identifying a Tribal Elder's livestock as the likely source of the contamination. D. & O. at 2; Transcript (Tr.) at 266-69; RX 3. That Tribal Elder allegedly targeted Kanj for abuse, which the Tribal Council recognized but ultimately ignored. D. & O. at 2; Tr. at 351-352.

In a letter dated June 23, 2005, the Tribe notified Kanj that his employment was terminated "without cause effective thirty days from the date of this letter." D. & O. at 2; RX 22 at 64. The letter also requested that Kanj not enter the Tribe's facilities unless specifically requested. D. & O. at 2. By letter dated July 25, 2005, the Tribe notified Kanj that his employment was terminated and forwarded Kanj funds for final pay and severance pay in accordance with his employment agreement. D. & O. at 2; RX 23.

On August 5, 2005, Kanj filed a whistleblower complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Tribe terminated him from his position because he reported high levels of fecal coliform in Viejas Creek to the Tribal Council. D. & O. at 1. On September 28, 2005, OSHA found that tribal sovereign immunity barred Kanj from pursuing this claim and dismissed the complaint. D. & O. at 1. Kanj objected and requested a formal hearing.

The ALJ issued an order on October 14, 2005, setting a hearing date. The order stated that "[n]o later than 10 days before the hearing date, all perpetuation and discovery . . . shall be completed." The order also directed the parties to file prehearing statements 15 days before the hearing, identifying the "precise" contentions of the parties. Order at 1.

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<sup>1</sup> It is unclear whether the ALJ resolved disputed findings of fact when he entered his Decision and Order, given that it followed a full evidentiary hearing. Conceivably, the ALJ entered an order pursuant to 29 C.F.R. § 18.40 or 18.41, which allow for decisions based solely on undisputed facts. Regardless, our decision turns solely on repeated admissions and litigation decisions made by the Tribe. Consequently, our factual background will refer to facts as alleged facts, except where the facts seem patently undisputed. Upon remand, the ALJ will be free to decide all disputed factual issues.

The Tribe filed its answer to the complaint on January 19, 2006. In its answer, the Tribe admitted that it terminated Kanj's employment on July 25, 2005, and did not assert a statute of limitations defense.

While the proceedings were pending before the ALJ, the Tribe asserted by motion that it was immune from suit based on its contention that the CWA does not waive sovereign immunity, and it sought interlocutory review. On March 9, 2006, after he denied the Tribe's motion, the ALJ certified the sovereign immunity issue to the ARB. The ARB affirmed the ALJ's denial of summary judgment on April 27, 2007, and remanded for a hearing.

The parties engaged in discovery from September 4, 2007, through part of December 2007. The ALJ set the hearing to begin on January 17, 2008, and the discovery deadline was to be no later than 10 days before the hearing date.

On January 25, 2008, the Tribe filed a motion for leave to file a first amended answer to supplement its pleadings with a tenth affirmative defense asserting that "[s]ome of the claims asserted by Complainant [we]re barred by the statute of limitations found in 22 U.S.C. 1367(b)." In support of the Tribe's motion for leave to file the amended answer, counsel for the Tribe attested, under penalty of perjury, that "adding the defense of the statute of limitations will inject no new factual issues into the case" and that the Tribe "concedes that the filing of the Complaint with the Department of Labor was timely as to Mr. Kanj's termination on July 25, 2005 itself." Declaration of George S. Howard, Jr., (Jan. 24, 2008) ("Declaration") at 2,(c). Attorney Howard stated that Kanj would "suffer no prejudice as a result of th[is] amendment." Declaration at 2,(f).

Kanj objected to amendment of the answer and asserted that: (1) the Tribe admitted that Kanj filed his complaint within thirty days of his termination, (2) the proposed Tenth Affirmative Defense was vague because it contained the language that "[s]ome of the claims . . . are barred by the statute of limitations" without any support as to what claims were barred or any explanation of why any claims were barred, (3) the vagueness of the proposed language resulted in prejudice to Kanj because the Tribe was attempting to change its answer more than two years after the original answer was filed, (4) there was undue delay in the request to amend because the case had been pending for more than two and a half years, (5) the delay was in bad faith because the defense did not say which of his claims or why his claim(s) were time-barred, and (6) amendment would result in delay because it would require additional discovery at a late stage.

In an order dated March 17, 2008, the ALJ granted the Tribe's motion to amend the answer, finding that since discovery in the case was placed on hold for well over a year except as to the question of tribal immunity, the filing delay by the Tribe did not warrant a denial of the motion based on delay or bad faith. Order at 2-3.

On May 14, 2008, Kanj moved to continue the hearing date. The Tribe objected to a continuance of the hearing. On May 22, 2008, the ALJ issued an order continuing the hearing until August 18, 2008.

On August 7, 2008, pursuant to the ALJ's prehearing order dated October 14, 2005, the Tribe filed its prehearing statement. In that statement, the Tribe did not assert a statute of

limitations defense as to the retaliation claim itself, but did argue that some claims were time-barred.

On August 15, 2008, the Tribe filed its Amended Answer to complaint. At paragraph “No. 10” the answer states: “Respondent admits that on July 25, 2005 it terminated Complainant’s employment.” The tenth affirmative defense to the amended answer states: “Some of the claims asserted by Complainant are barred by the statute of limitations.” The Tribe’s pre-trial statement did not mention a statute of limitations defense as to the filing of the retaliation claim.

On August 18, 2008, the four-day hearing commenced. For the first time, three years after the OSHA complaint was filed and two and a half years after the Tribe’s initial answer, the Tribe argued in its opening statement that Kanj’s retaliation claim was time-barred. The Tribe also raised the argument in the trial brief it submitted on August 18, 2008. Tr. at 74.

Kanj’s counsel countered in his opening statement that the Tribe was estopped from making the timeliness argument and that waiver and laches applied. Tr. at 128. Kanj’s counsel also noted that in its motion to amend the answer, the Tribe did not discuss the timeliness of the retaliation claim based on Kanj’s termination of employment. Tr. at 127. The ALJ decided to hold the hearing before considering the timeliness issue. Tr. at 75. At the end of the hearing, the ALJ stated that “which date . . . is the date of the termination” was one of the two legal issues to be discussed in the post-hearing briefs.<sup>2</sup> Tr. at 1012.

In the Tribe’s post-hearing brief, it argued that the date that Kanj received notice of his termination was the date the statute of limitations began running. Resp. Post-Hearing Brief at 19. It thus argued that Kanj’s claim was time-barred. *Id.*

In his post-hearing brief, filed simultaneously with the Tribe’s,<sup>3</sup> Kanj argued that his claim was not time-barred because the effective date of his termination was July 25, 2005. Comp. Post-Hearing Brief at 2. He argued that this was the date of accrual because the June 23, 2005 letter did not qualify as an unequivocal statement of Kanj’s termination. *Id.* at 4.

On January 29, 2009, the ALJ issued an order dismissing the complaint solely on the issue of timeliness. The ALJ concluded that the June 23, 2005 letter, giving unequivocal notice of discharge, was the date on which the thirty-day statute of limitations began to run. D. & O. at 4. The ALJ also concluded that equitable estoppel and tolling did not apply to forgive Kanj’s untimely filing. *Id.* at 5-6.

Kanj filed a motion for reconsideration with the ALJ, asserting that the Tribe waived or forfeited the statute of limitations defense, that his complaint was timely filed, and that the Tribe was equitably estopped from claiming the statute of limitations defense. Kanj referenced the

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<sup>2</sup> The other issue being whether Kanj qualified “as a whistle blower because of his position.” Tr. at 1012.

<sup>3</sup> Tr. at 1007.

Declaration when he argued that the Tribe never asserted a limitations defense to the retaliation claim. See Memorandum of Points and Authorities in Support of Complainant's Motion for Reconsideration at 4. The ALJ denied the motion for reconsideration and stated that Kanj had not addressed any issues or matters that were not considered in his Decision and Order Dismissing the Complaint. Order Denying Motion for Reconsideration at 1 (Feb. 19, 2009).

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated authority to the Administrative Review Board (Board) to issue final agency decisions in cases arising under the FWPCA's employee protection provisions. 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 ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 24.110(b).<sup>4</sup> In reviewing the ALJ's conclusions of law the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. 5 U.S.C.A. § 557(b).

### **DISCUSSION**

As previously noted, the ALJ dismissed the complaint in this matter because he found that Kanj failed to timely file his complaint. On appeal, Kanj challenges the ALJ's ruling on several grounds, but we focus on his argument that the Tribe should be estopped from asserting a statute of limitations defense because it admitted that the claim was timely filed. Most notably, Kanj points to an explicit admission made in the Declaration, where the Tribe conceded that the retaliation complaint was timely filed. See Complainant's Opening Brief at 15.

The Tribe also raises several arguments. Again, we focus on its arguments pertaining to the arguably dispositive admission it made in the Declaration on the issue of timeliness. The Tribe argues that the ALJ allegedly granted it permission to raise the limitations defense as to the retaliation claim. The Tribe also argues that Kanj failed to preserve the estoppel argument in the administrative litigation. Additionally, it argues that the admission was meaningless.

For the following reasons, having fully considered the record and the parties' arguments on appeal, the Board holds that the Tribe's judicial admissions settle in Kanj's favor the issue of timeliness as to his retaliation claim.

To appropriately identify the standard of appellate review, we must first address the

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<sup>4</sup> We note that the regulations have been amended since this complaint was filed. 29 C.F.R. § 24. 72 Fed. Reg. 44,956 (Aug. 10, 2007). The change in the regulations regard the standard of review for findings of fact and is not implicated in this matter in which we are addressing solely conclusions of law.

Tribe's procedural argument that the ALJ allegedly permitted the Tribe to assert the limitations defense in question. If there was such an order, we would have to first consider the effect of such an order on appellate review. There is no such order. The Tribe points to an order dated March 17, 2008, as allegedly approving the addition of a limitations defense to the retaliation claim. However, as Kanj points out, that order expressly focused on the Tribe's motion to allow only a partial limitations defense. The March 17, 2008 order was based on a motion expressly asking to attack "some" of Kanj's claims. From our review of the record, the ALJ never expressly authorized the Tribe to assert a limitations defense as to the retaliation claim.<sup>5</sup> Consequently, the legal issue remains whether the Tribe made a judicial admission that conclusively resolved the issue of timeliness. *See, e.g., Estate of Korby v. Comm'r of Internal Revenue*, 471 F.3d 848, 852 (8th Cir. 2006) (whether a statement constitutes a judicial admission is an issue of law).

Next, we address and readily dispose of the Tribe's argument that Kanj waived his right to argue on appeal that there was a binding judicial admission or that judicial estoppel applies. It is undisputed that the Tribe asserted a full limitations bar for the first time on the first day of hearing. So, Kanj could not have waived any argument prior to that time. Moreover, even upon being completely surprised by this new defense in the throes of an evidentiary hearing, Kanj staunchly objected to the raising of the defense years after the case had been pending, alleging estoppel, waiver, and laches in objection. The ALJ did not address Kanj's objection. At the end of the evidentiary hearing, the ALJ asked for briefing on the operative date of the termination notice for purposes of the deadline for filing a complaint. It is true that Kanj did not argue in his post-hearing brief that the Tribe was estopped from asserting the limitations defense as to the retaliation claim. He did raise an estoppel argument in his motion for reconsideration and expressly referred to the "declarations" made by the Tribe's counsel.<sup>6</sup> The ALJ summarily denied the motion. We believe that Kanj's objections during the evidentiary hearing and his arguments in his motion for reconsideration sufficiently preserved his right to argue on appeal that the Tribe should be barred from raising the limitations defense to the retaliation claim. *See, e.g., Rose v. Dole*, 945 F.2d 1331, 1334 (6th Cir. 1991) (argument may be heard on appeal even if not forcefully raised below). Most importantly, it would be a great miscarriage of justice to allow a party to raise a limitations defense at the evidentiary hearing after years of litigation and then foreclose the right of appeal because the opponent fumbled a response after being unfairly surprised.<sup>7</sup> Accordingly, we are now faced with a legal issue regarding a potential judicial admission. *Korby*, 471 F.3d at 852.

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<sup>5</sup> We are not suggesting or even addressing whether ALJs must expressly grant permission to parties before additional claims and defenses can be raised during the administrative litigation process. We simply note that there is no ALJ procedural order that is before us under the abuse of discretion standard.

<sup>6</sup> See Memorandum of Points and Authorities in Support of Complainant's Motion for Reconsideration at 4.

<sup>7</sup> We note that the ALJ entered an order on October 14, 2005, directing the parties to file prehearing statements 15 days before the hearing and precisely state their contentions. Obviously, the ALJ did this to manage the case and allow the parties to be prepared for hearing. The Tribe failed

As already noted, the Tribe made critical admissions relating to the issue of the timeliness of Kanj's claim of wrongful termination. It made the most critical admission in the January 2008 Declaration of the Tribe's counsel, under penalty of perjury. In the Tribe's initial answer, dated January 19, 2006, it conceded that the Tribe terminated Kanj's employment on July 25, 2005.<sup>8</sup> After completion of discovery, the Tribe sought leave to file an amended complaint and, in support thereof, counsel for the Tribe represented that the Tribe only sought to bar "some" of Kanj's claims as untimely, and expressly conceded that Kanj's claim of unlawful employment termination was timely and that the termination date was July 25, 2005. Consistent with these representations, in its amended answer filed on August 15, 2008, three days before the hearing in this matter, the Tribe asserted that the statute of limitations barred "some of" Kanj's claims, but it conceded that Kanj was discharged on July 25, 2005.

We view the Tribe's admissions that Kanj's claim was timely and that the Tribe terminated his employment on July 25, 2005, as binding factual representations and concessions that the Tribe made, upon which Kanj reasonably and in good faith relied. *See, e.g., Christian Legal Soc. v. Martinez*, 130 S. Ct. 2971, 3005 (2010) (a party's admissions in a joint stipulation of facts was binding on the parties); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court. Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well.") (*quoting Ferguson v. Neighborhood Housing Servs.*, 780 F.2d 549, 551 (6th Cir. 1986) (citations omitted)); *Gospel Missions of America v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) (wherein the Ninth Circuit found that both it, as the appellate body, and the trial court, had discretion to consider a statement made in briefs to be a judicial admission). As a result, the Tribe is deemed bound by their admissions that Kanj's complaint was timely. Our finding is dispositive of this matter because it completely resolves the limitations issue as to Kanj's retaliation complaint. We have strong concerns about the unfair surprise that occurred as well, but we do not need to address that issue or the merits of the Tribe's limitation defense.

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to include in its August 7, 2008 prehearing statement the limitations defense to the retaliation claim. We believe that the ALJ was also caught off guard by the Tribe at hearing and, understandably, did not immediately realize the convoluted procedural state of affairs related to the limitations defense. The only party at fault here for the procedural mishaps is the Tribe, which after years of litigation and even after focusing on the limitations issue months before the hearing, did not fully grasp the limitations issue until the evidentiary hearing commenced.

<sup>8</sup> We recognize that existing ARB precedent holds that, in deciding a statute of limitations challenge, the actual "discharge" or "termination" date may not be the deciding factor. Pursuant to precedent, the statute of limitations begins to run when the employee receives "final, definitive, and unequivocal notice" of a discharge or other discriminatory act. *Corbett v. Energy East Corp.*, ARB No 07-044, ALJ No. 2006-SOX-065 (ARB Dec. 31, 2008). Nevertheless, we find the Tribe's admission as to the termination date significant when coupled with a missing statute of limitations defense. Taken as a whole, the Tribe's answer implicitly conceded the issue of timeliness. Its implied concession was made absolute and indisputable by the Declaration which expressly "conceded" that Kanj's complaint was timely.

**CONCLUSION**

For the preceding reasons, the Board holds that the Tribe's repeated judicial admissions settle in Kanj's favor the issue of timeliness as to his retaliation claim.

**ORDER**

We **REVERSE** the ALJ's Decision and Ordering Dismissing the Complaint. We **REMAND** the case for further proceedings consistent with this decision.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**