

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 July 2005

CASE NUMBER: 2005-STA-00034

In the Matter of:

MARTIN REEVES,

Complainant,

vs.

OLD DOMINION FREIGHT LINE,

Respondent.

Appearances:

Henry Egghart, Esq.
For Complainant

Brian J. Stoddard
For Respondent

BEFORE: Anne Beytin Torkington
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

Martin Reeves (“Complainant”) brings this complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (“STAA”), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), and its implementing regulations, 29 C.F.R. Part 1978 (2004). Complainant alleges that Old Dominion Freight Line (“Respondent” or “Employer”) violated the STAA when it terminated him for his complaints to management about safety regulations. The Regional Administrator of the Occupational Safety and Health Administration (“OSHA”) found that the complaint was filed untimely, and Complainant sought a hearing in this forum.

Pursuant to Complainant’s request for a hearing the case was assigned to me and I issued a Notice of Trial and Pre-Trial Order on May 18, 2005. On May 23, 2005, in response thereto, Henry Egghart, counsel for Complainant, proposed that the live hearing in this matter be

postponed pending resolution of the issue of timeliness of filing. On May 26, 2005, Brian Stoddard, Vice President of Safety and Personnel for Respondent, responded to Complainant's request, agreeing to postponement of the live hearing pending resolution of the timeliness issue.

By order issued on June 6, 2005, the hearing was continued pending a decision regarding the issue of timeliness of filing. The parties were given dates by which briefs would be submitted. Both parties timely submitted pleadings and they are hereby admitted as Administrative Law Judge Exhibits (ALJX). Complainant's brief is ALJX 1 and Respondent's brief is ALJX 2.¹ Complainant attached exhibits to his brief and they will be referred to as CX 1, 2, etc.

ISSUE

The parties agree that the threshold issue of timeliness should be decided before a hearing need be held on the merits. Therefore, the sole issue to be determined is:

Should Complainant's STAA complaint be dismissed for failure to file within the 180-day statute of limitations?

SUMMARY OF DECISION

Complainant is unable to show that the doctrine of equitable tolling applies to his untimely complaint with the Department of Labor. Therefore, the complaint is barred by the 180-day statute of limitations set forth in the STAA at 29 C.F.R. § 1978.102(c) and must be dismissed.

FACTUAL BACKGROUND

It is undisputed that Complainant was terminated from his employment with Respondent on July 19, 2004. It is also undisputed that Complainant filed his STAA complaint with OSHA on March 24, 2005, 248 days later.

Complainant filed an appeal of his termination using an internal appeal process provided by Respondent. CX 5. The Committee responsible for rendering a decision in the appeal found in favor of Respondent on September 27, 2004. *Id.*

On July 9, 2004, Complainant began medical therapy for what he claims to be hepatitis C, although no sworn affidavit was provided by Complainant. As evidence of the treatment Complainant submitted CX 4, a letter from Trish Hernandez, a doctor of pharmacology. The letter states that Complainant would receive "medical therapy to improve his long term health," that it would be received both daily and weekly for forty-eight weeks, that the daily therapy would be done at home, but that the weekly therapy might require the assistance of a registered nurse. The letter further states that Complainant might need to be seen in the office on a weekly

¹ The parties were also given a deadline to file reply briefs, but neither party submitted one.

basis. The letter indicates that Complainant might experience side effects such as “severe fatigue, mood swings, and flu like symptoms,” and that the stress of the therapy would make him susceptible to infections, such as respiratory infections, and that he might be sick more often than usual, as well as irritable. CX 4.

In addition to this evidence, in his appeal to this forum² Complainant alleges (but not under oath) that he was under the care of two doctors, was in the hospital for a liver coring sample, went to a lab for further tests and to “another place” for an x-ray. Complainant concludes that “[t]his therapy came with severe side effects. Making it very difficult to work, go to appointments, and stay on top of all the legal things that needed to be done as a result of my Temporary Termination by Old Dominion on July 19, 2004.”

ANALYSIS

The Surface Transportation Assistance Act protects employees from employer retaliation when they complain about violations of commercial motor vehicle safe requirements. Such retaliation must affect pay, terms, or privileges of employment. 49 U.S.C. § 31105(a)(1)(A).³ Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA within 180 days after the alleged violation occurs. 29 C.F.R. § 1978.102(c). The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Hoff v. Mid-States Express, Inc.*, ARB No. 03-051, 2002-STA-6 (ARB May 27, 2004) citing *Hicks v. Colonial Motor Freight Lines*, 84-STA-20 (Sec’y Dec. 10, 1985); *Nixon v. Jupiter Chem., Inc.*, 89-STA-3 (Sec’y Oct. 10, 1990); *Ellis v. Ray A. Schoppert Trucking*, 92-STA-28 (Sec’y Sept. 23, 1992). The regulations implementing the STAA discuss equitable tolling:

[T]here are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, *e.g.*, where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. *The pendency of grievance-arbitration proceedings* or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period.

29 C.F.R. § 1978.102(d)(3) (emphasis added).

² ALJX 3.

³ “A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding . . .”

The Board has applied equitable tolling principles using as a guide the discussion in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C. § 2622, the court articulated three circumstances in which equitable tolling may apply:

- (1) the defendant has actively misled the plaintiff respecting the cause of action;
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights;
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Allentown, 657 F.2d at 20, citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). The restrictions on equitable tolling must be “scrupulously observed,” *Allentown*, 657 F.2d at 19. None of the *Allentown* factors apply to this case. While the *Allentown* factors are not necessarily exclusive, Complainant has failed to establish any grounds which would support his request for equitable tolling in this case.

Complainant filed his complaint with OSHA on March 24, 2005, 248 days after Respondent terminated his employment. Complainant argues that the statute should be tolled on two bases: (1) pending his internal appeal at his employer which upheld his termination; and, (2) during the period he was allegedly incapacitated due to illness.

Date on which Statute of Limitations Commenced to Run

Complainant argues that the date he was terminated, July 19, 2004, should be tolled until September 27, 2004, the date Respondent’s appeal committee issued its decision upholding the termination. Respondent disagrees.

The law squarely supports Respondent. The pertinent regulation itself specifies that “[t]he pendency of grievance-arbitration proceedings . . . [is an] example of circumstances which do not justify a tolling of the 180-day period.” 29 C.F.R. § 1978.102(d)(3). Further, case law is consistent with the regulation. In whistleblower cases, the time for filing a complaint begins running at “the time of the challenged conduct and its notification, rather than the time its painful consequences are ultimately felt. . . .” *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988); accord, *Jenkins v. City of Portland*, 88-WPC-4 (Sec’y May 22, 1991). See also, *Ellis v. Ray A. Schoppert Trucking*, 92-STA-28 (Sec’y Sept. 23, 1992 (time limit begins running on day complainant discharged rather than day unemployment referral ruled that he was discharged for failing to work); *Kelly v. Flav-O-Rich, Inc.*, 1990-STA-14 (Sec’y May 22, 1991) (pendency of state employment security commission case did not toll the STAA limitation period).

Based on the law and facts, Complainant’s argument fails. His termination was effective on the date of discharge, July 19, 2004, and the 180-day filing period began running on that date. Complainant filed his complaint on the 248th day, March 24, 2005. Thus, the complaint is untimely and must be dismissed.

Incapacity to File Due to Illness

Complainant raises a second argument supporting tolling of the 180-day filing period. He argues that he was incapacitated due to Hepatitis C and the chemotherapy required to treat it. Respondent raises no counter-argument. Based on the law, I must conclude that Complainant's illness and treatment during the relevant time frame does not toll the 180-day filing period. In cases analogous to the whistleblower provision of the STAA under Title VII and the ADEA, *see Allentown*, 657 F.2d at 19, the courts have declined to allow equitable tolling for reasons of ill health unless the plaintiff has been adjudicated or institutionalized as mentally incompetent. *Bassett v. Sterling Drug, Inc.*, 578 F. Supp. 1244, 1248 (S.D. Ohio 1984); *Steward v. Holiday Inn, Inc.*, 609 F.Supp. 1468 (E.D. La. 1985) (physical and mental incapacity are not an additional category for tolling time limitation).

STAA case law is consistent with Title VII and ADEA cases. In *Ellis*, 92-STA-28, a complainant's assertion that he could not timely file his STAA complaint because he had been under extreme duress, on medication for spinal stenosis, a collapsed disc, and spinal obstruction, and had suffered severe memory loss in the months after being discharged, did not provide sufficient grounds for equitable tolling. The complainant did not allege that he was mentally incompetent because of ill health, and he could have had someone (either a lay person or attorney) file a complaint on his behalf. In the instant case, Mr. Reeves's treatment for Hepatitis C, though very debilitating, is not the equivalent of adjudication of or institutionalization for mental incompetence. In fact, Complainant makes no allegation that he was in any way mentally incompetent during the period of his treatment. I must therefore conclude that the 180-day filing period is not tolled due to Complainant's illness and his complaint must be dismissed as untimely.

CONCLUSION

Complainant is unable to show that the doctrine of equitable tolling applies to his untimely complaint with the Department of Labor. Therefore, the complaint is barred by the 180-day statute of limitations set forth in the STAA at 29 C.F.R. § 1978.102(c) and must be dismissed.

RECOMMENDED ORDER

Based on the foregoing, and the entire record, I recommend the following Order:

Complainant's complaint is DISMISSED.

A

ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).