

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 February 2008

CASE NO. 2008-AIR-00003

In the Matter of:

ANTHONY L. WILLIAMS,
Complainant,

v.

UNITED AIRLINES, INC.,
Respondent.

Appearances:

Anthony L. Williams
Oakland, CA
Complainant, Pro se

Michael Mankes, Esq.,
Boston, MA
Attorney for Respondent

Before: Gerald M. Etchingam
Administrative Law Judge

**DECISION AND ORDER DISMISSING COMPLAINT
AND ORDER CANCELING HEARING**

This case arose when the complainant, Anthony L. Williams ("Complainant"), filed a complaint under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C.A. § 42121, alleging that his employer, United Airlines ("Respondent"), terminated his employment on May 8, 2003 in retaliation for sending a letter to the Federal Aviation Administration and Respondent alleging that his supervisor, Ron King, falsified information related to aircraft safety maintenance after Complainant refused to falsify the information.

On September 8, 2004, Complainant filed a complaint against Respondent in the United States District Court for the Northern District of California alleging, among other causes of action, retaliatory discrimination under AIR 21. 49 U.S.C.A. § 42121.

On October 18, 2005, the district court granted Respondent's motion for summary judgment, dismissing Complainant's claim on the merits. Complainant appealed.

On August 31, 2007, the Ninth Circuit affirmed the dismissal, but on the grounds that the district court did not have jurisdiction over Complainant's section 42121 claim.

On September 17, 2007, Complainant filed a complaint with the Occupational Health and Safety Administration (OSHA) under AIR 21. 49 U.S.C.A. § 42121.

On November 29, 2007, after an investigation, OSHA determined that the September 17, 2007 complaint was untimely filed. Consequently, OSHA dismissed the complaint, finding "no circumstances justifying the tolling of the statutory time-frame for filing."

On December 6, 2007, Complainant filed an Objection with the United States Department of Labor Office of Administrative Law Judges.

On December 26, 2007, prior to formal hearing, I issued an Order to Show Cause Why Case Should Not Be Dismissed for Untimely Filed Complaint. On January 17, 2008, Complainant submitted a Reply to Order to Show Cause Why the Case Should Not Be Dismissed, and on January 31, 2008, Respondent submitted its response.

After reviewing all of the evidence, I find this complaint is untimely and I find no equitable reasons for tolling the 90 day statute of limitations. Therefore, the complaint in this case is dismissed with prejudice.

ISSUES

The sole issue in this proceeding is whether Complainant is entitled to equitable tolling of the ninety day statutory time limit to file a whistleblower complaint under AIR 21.

DISCUSSION

I. *Timeliness - The 90 Day Statute of Limitations*

"Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980); *Prybys v. Seminole Tribe of Florida*, 95 CAA 15 (ARB Nov. 27, 1996) (The brief filing period in environmental whistleblowing was the mandate of Congress and the limitations cannot be disregarded even though it bars what might otherwise be a meritorious case).

A whistleblower complaint alleging discrimination under AIR 21 must be filed with the Secretary of Labor within ninety days of the alleged adverse action. 49 U.S.C. § 42121(b)(1) (2002); 29 C.F.R. § 1979.103(d) (2002). The ninety day time period begins "when the

discriminatory decision has been both made and communicated to the complainant.” 29 C.F.R. § 1979.103(d) (2003); *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 at p. 5 (ALJ Oct. 18, 2002).

This complaint was filed on September 17, 2007, more than four years after Complainant received notice of his termination on May 8, 2003. Therefore, it was not timely filed and must be dismissed, unless there is some equitable reason to excuse its untimely filing.

II. *Equitable Tolling*

Prescriptive periods are subject to equitable doctrines such as estoppel, tolling, and waiver. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 2076 (2002). The standard for equitable tolling of limitations, however, is high. *Arcega v. Dickinson*, 1994 WL 139266, *4 (N.D. Cal. 1994). Restrictions on equitable tolling must be “scrupulously observed.” *Williams v. Army & Air Force Exchange Serv.*, 830 F.2d 27, 30 (3rd Cir. 1987). A complainant “who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.” *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam). Furthermore, a complainant bears the burden of justifying the application of equitable tolling principles. *See Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995); *see also Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993).

There are three “principal situations” in which tolling is proper: when “(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 her rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.” *Sch. Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981)(quoting *Smith v. Am. President Line, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978)); *see also Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 n.10 & 238 (1976); *see also Herchak v. U.S. Dept. of Labor*, 125 Fed.Appx. 102 (2005).

A. Misled Into Inaction

Equitable tolling may apply when “the defendant has actively misled the plaintiff respecting the cause of action.” *City of Allentown*, 657 F.2d at 20 (quoting *Am. President Line*, 571 F.2d 102). Here, however, Complainant does not argue, nor is there evidence to support the contention, that Respondent actively misled Complainant respecting the cause of action.

B. Prevented From Asserting Rights

Equitable tolling may be appropriate when the complainant “has in some extraordinary way been prevented from asserting her rights.” *Id.* Courts have held that equitable tolling may be applied for “exceptional circumstances,” such as when the complainant has been adjudged mentally incompetent or was institutionalized during the filing period. *See Beister v. Midwest Health Services*, 77 F.3d 1264, 1268 (10th Cir. 1996); *see also Stoll v. Runyun*, 165 F.3d 1238, 1242 (9th Cir. 1999). In *Stoll*, the Ninth Circuit found that extraordinary circumstances beyond the plaintiff’s control prevented her from filing her claim on time. *Stoll*, 165 F.3d at 1242. There, as a result of defendant’s wrongful conduct including repeated sexual abuse, rape, and

assault, the plaintiff was severely impaired and unable to function in many respects as she was unable to read, open mail, or function in society and attempted suicide on numerous occasions. *Id.*

Here, Complainant argues that his untimely filing be excused because Respondent's bankruptcy prevented him from asserting his rights. Complainant explains that he delayed filing his claim because "lawyers" told him that Respondent's bankruptcy made it impossible to receive any monetary award. Further, Complainant argues that bankruptcy proceedings provide Respondent with "instant protection from legal proceedings (including Whistleblower cases) so long as they remain in bankruptcy."

1) Difficulty Collecting a Judgment

Complainant asserts that he was prevented from asserting his rights because he believed he would be unable to collect any monetary award as a result of Respondent's bankruptcy. However, doubts about the ability to collect are quite common in litigation and do not constitute "exceptional circumstances" that would justify equitable tolling. *See Beister*, 77 F.3d at 1268.

2) Automatic Stay

Section 362 of the Bankruptcy Code automatically stays the commencement or continuation of judicial proceedings against a debtor that were or could have been commenced *before* the bankruptcy petition was filed. 11 U.S.C. § 362(a). (Emphasis added.) An automatic stay is a statutory injunction "designed to effect [sic] an immediate freeze of the status quo." *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n.*, 997 F.2d 581, 585 (9th Cir.1993). However, the automatic stay does not apply to claims arising from events that occurred *after* the defendant's bankruptcy petition was filed. *In re New York*, 13 B.R. 757 (Bankr. D. Me. 1981). (Emphasis added.)

Here, I take administrative notice that Respondent filed for Chapter 11 bankruptcy protection on December 9, 2002. Complainant was not terminated until May 8, 2003, nearly five months post-petition. Therefore, Complainant's retaliation claim was not subject to automatic stay. Because the automatic stay was not a barrier to timely filing his retaliation claim, it cannot justify equitable tolling.

3) Bad Legal Advice

The failure of a plaintiff's attorney to act with due diligence is insufficient to justify application of equitable tolling. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). Even if based on the advice of counsel, Complainant's mistaken belief that Respondent's bankruptcy prevented him from asserting his rights does not excuse his untimely filing.

C. Wrong Forum

Equitable tolling may be applicable when the complainant “has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.” *City of Allentown*, 657 F.2d at 20 (quoting *Am. President Line, Ltd.*, 571 F.2d 102). Nevertheless, the filing “must also be timely before it will toll the appropriate limitations period.” *City of Allentown*, 657 F.2d at 20, citing *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965). This exception “is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause.” *City of Allentown*, 657 F.2d at 20. The court “may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired.” *Id.*

Here, Complainant filed his AIR 21 claim against Respondent in federal district court, the wrong forum. However, Complainant filed on September 8, 2004, nearly a year and a half after his May 8, 2003 termination, which is well beyond the statutory limit of ninety days. *See* 49 U.S.C. § 42121(b)(1) (2002); 29 C.F.R. § 1979.103(d) (2002). As such, the equitable tolling exception for timely claims filed in the wrong forum does not apply.

CONCLUSION

For the reasons stated above, Complainant’s complaint is hereby **DISMISSED** *with prejudice* for untimely filing.

IT IS FURTHER ORDERED, in view of the foregoing, that the formal hearing scheduled for March 12, 2008, in San Francisco, California, is hereby **CANCELLED**.

A

Gerald M. Etchingham
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).