



**Issue Date: 07 April 2006**

Case No.: 2006-SOX-0048

In the Matter of:

BARRON STONE,  
Claimant,

v.

DUKE ENERGY CORPORATION,  
Employer.

### **RECOMMENDED DECISION AND ORDER**

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. §1514A, and its implementing regulations found at 29 C.F.R. Part 1980. F. Barron Stone (Stone) filed a complaint on November 3, 2005, alleging that Duke Energy Corporation (Duke) violated SOX when it terminated his employment. OSHA conducted an investigation and on December 22, 2005, issued its report finding that the complaint was untimely as it was filed more than 90 days after the termination. On January 17, 2006, Stone appealed that determination.

On March 24, 2006, a hearing was held in Charlotte, North Carolina, to address the timeliness of the filing of the complaint. The Court admitted into evidence the Complainant's Brief with attached exhibits (ALJ 1) and Duke's Brief with attached exhibits (ALJ 2). Stone, Robert Bisanar and Mark Short testified. On March 31, 2006, the Parties submitted supplemental briefs. Based on the evidence presented, the Court makes the following findings of fact:

1. On May 20, 2005, Stone was removed from service without pay pending further investigation of allegations that he had used his workstation computer to view pornographic material at work. The Duke corrective action procedures provide that an employee will be removed from service when behavior or conduct which may warrant discharge has occurred. (ALJ2, Ex 1). During the course of this investigation Stone provided statements to Mark Short, the HR Manager at Duke. On July 15, 2005, Stone and his attorney, Gerard Bos, met with Short. Stone was given the opportunity to provide additional information concerning the

investigation. At this meeting Stone was told that a final decision would be made in two weeks.

2. On the morning of August 3, 2005, Robert Bisanar, Duke's in-house counsel, contacted Bos by telephone and informed him that a decision had been reached to terminate Stone. Bos was given Short's telephone number so that Stone could contact Short to take care of matters related to the termination. Bos telephoned Stone and told him he had been terminated and that he needed to contact Short.

3. Later on the morning of August 3, 2005, Stone contacted Short. They discussed the recourse procedure, termination of benefits, COBRA benefits, Stone's AMEX account and turning in of Stone's company badge. (ALJ2, Ex 4). The only discussion concerning the date of the termination was whether it would be August 2 or August 3 as Stone was concerned about medical coverage for a doctor's appointment his son had on August 3.

4. I found Short's testimony concerning his conversation with Stone to be credible. Specifically, I find that he never indicated to Stone that his termination was anything but final and that he never intended to mislead Stone about the finality of the August 3, 2005 termination.

5. The other evidence of communications between Stone and Duke consist mainly of emails. (ALJ1; ALJ2, Exs. 6-13). In the first, on August 3, Short references the "termination" and appended benefits information for "Terminated Employees." Short noted that they had agreed that he would box up Stone's personal belongings. (ALJ2, Ex 6). In his reply, Stone refers to his status as "wrongfully terminated" and asks that his personal belongings be packed when other employees are not in the workplace. (ALJ2, Ex 7). On August 8, Stone was concerned that the Duke employment verification line indicated his status was terminated on August 2 and he was concerned that he was given bad advise that his medical coverage continued until August 3. (ALJ2, Ex 8). On August 14 Stone submitted his recourse request "regarding my termination, which I was notified of on Wednesday, August 3, 2005." (ALJ2, Ex 9).

6. Duke records indicated Stone was terminated on August 3, 2005. (ALJ2, Ex 3). This record was not provided to Stone.

7. Duke has an employee recourse procedure. (ALJ2, Ex 5). The procedure is divided into a process for "active employees" and a process for "terminated employees." In the case of termination, the procedure states that the executive committee "provides FINAL response to employee in writing (*within 15 calendar days of receipt of employee recourse letter*)."

8. Stone applied for unemployment benefits and listed his last day worked as August 2, 2005. (ALJ2, EX. 14).

9. Stone began other employment on August 15, 2005.
10. On September 14, 2005, Stone was notified that his recourse application had been denied.
11. On November 3, 2005, Stone filed this complaint alleging that Duke violated SOX when it terminated his employment. This was 92 days after the August 3, 2005 termination.

An employee alleging retaliation in violation of SOX must file his complaint within 90 days after the alleged violation occurred. 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-III, 98-128, AU No. 97-ERA-53, slip op. at 36 (ARB Apr. 30, 2001). See *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coil. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

In whistleblower cases, statutes of limitation, such as section 1514A(b)(2)(D), run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision. See, e.g., *Jenkins v. United States Env'tl. Prof. Agency*, ARB No. 98-146, AU No. 1988-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). “Final” and “definitive” notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. “Unequivocal” notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Larry v. The Detroit Edison Co.*, 86-ERA-32, slip op. at 14 (Sec’y June 28, 1991). Cf. *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141(6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer’s intent to discharge complainant).

Stone first argues that the August 3 termination decision was not final as he had the Duke recourse procedure available. It has been held that where a decision to terminate an employee is communicated to the individual, the pendency of the employer’s internal grievance procedure does not mean that the termination was not final or that the statute of limitations is tolled. In *Ricks*, the Supreme Court noted that “the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods.” *Ricks* at 261. I find the decision to terminate Stone was communicated to Stone on August 3, 2005, and the fact that Stone could and did use the Duke recourse procedure did not toll the running of the limitations period.

Stone next argues that he timely filed his complaint based upon the principles of equitable tolling. The Board has recognized three situations in which equitable tolling is

proper: (1) when the respondent has actively misled the complainant respecting the cause of action; (2) the complainant has in some extraordinary way been prevented from asserting his rights; or (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. These categories are not exclusive but courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. *Halpern v. XL Capital, Ltd.*, 2004-SOX-00054; ARB No. 04-120 (August 31, 2005).

With regard to the first category, Stone contends that he was misled by Duke into making a late filing of his SOX complaint. The only person that is alleged to have misled Stone was Short. However, I found credible Short's testimony that he did not intend to mislead Stone. Further, I find the evidence shows Stone was not in fact misled. The testimony of Stone and Short, the unemployment benefits application, the discussions concerning COBRA and the email references to the "termination" all convince this Court that on August 3, 2005, Stone understood that he was being terminated. The only confusion was whether the termination was effective August 2 or August 3. I find that Stone was not actively misled respecting the cause of action and that Duke did not lull him into refraining from filing a timely complaint.

With regard to the third exception for invoking equitable tolling, Stone does not argue that he mistakenly commenced an action pursuant to SOX in another forum. Nor does Stone argue that he was, in some extraordinary way, prevented from asserting his rights. I therefore conclude that Stone has not met any of the requirements for equitable tolling of the limitations period governing his complaint.

Further, Stone has not shown that he is entitled to relief pursuant to the doctrine of equitable estoppel. Stone's equitable estoppel argument is identical to his tolling argument, *i.e.*, that Duke misled him into believing that he had not yet been terminated. As stated above, this argument fails because Duke did not mislead Stone regarding his termination.

Finally, Stone asserts that a hostile environment analysis should be applied and that Duke perpetrated numerous retaliatory acts upon Stone concluding with the discriminatory recourse process. Stone relies on the recent Supreme Court decision in *National Railroad Passenger Corporation v. Morgan*, 536 U.S.101, 122 S.Ct. 2061 (2002), a race discrimination case under Title VII.

In *Morgan* the Supreme Court held that a discrete retaliatory or discriminatory act "occurred" on the day that it "happened." A party, therefore must file a charge within [the statutory number of] days of the date of the act or lose the ability to recover for it. *Id.* at 2070-71. The Court provided the following examples of such "discrete" acts that "are easy to identify": "termination, failure to promote, denial of transfer, or refusal to hire." *Id.* at 2073

*Morgan* noted, however, that, "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." The Court stated: The

"unlawful employment practice" therefore cannot be said to occur on a particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. *Id.* at 2073. The Court provided the following example (quoting from an earlier Supreme Court opinion) of an act that might make up a hostile environment claim: "[M]ere utterance of an ... epithet which engenders offensive feelings of a[n] employee ... does not sufficiently affect the conditions of employment to implicate Title VII." Such claims are based on the cumulative effect of individual acts.

I find that a hostile environment analysis is not appropriate to this case. As stated in *Morgan*, termination is a discrete action that is easy to identify. In this case, Stone's termination occurred on the date it happened, August 3, 2005.

Stone has failed to show that his complaint was timely filed. He has also failed to show that the filing period should be equitably tolled or that Duke is estopped from challenging the timeliness of his complaint.

### RECOMMENDED ORDER

Accordingly, it is the recommendation of the Court to the Secretary of Labor:

That the complaint of F.Barron Stone be DISMISSED AS UNTIMELY.

A

LARRY W. PRICE  
Administrative Law Judge

LWP/LPR  
Newport News, VA

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. See 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed

when the Board receives it. See 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. See 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).