



Issue Date: 23 September 2008

CASE NO.: 2008-STA-00040

In the Matter of:

**REX EUBANKS,
Complainant,**

v.

**A.M. EXPRESS, INC.,
Respondent.**

**RECOMMENDED DECISION AND ORDER
DISMISSING CLAIM AS UNTIMELY**

On May 29, 2008, the undersigned administrative law judge issued an Order to Show Cause, which indicated that this matter will be dismissed (or, alternatively, summary judgment will be granted in Respondent's favor) absent a showing of good cause why it should not be dismissed or summary judgment should not be granted. There was no response by either party. As no party has shown good cause for this matter to proceed, and as the record before me reflects that this action should be dismissed as untimely, it is recommended that this matter be dismissed. Further, to the extent that matters outside of the pleadings have been considered, I find that there is no issue of material fact and Respondent is entitled to judgment or summary decision as a matter of law. I reach those conclusions for the same reasons stated in the Order to Show Cause, the discussion of which is reproduced below.

Procedural Background/Undisputed Facts

The copy of the complaint provided by OSHA (on April 16, 2008) reflects that the complaint was filed by facsimile with the Regional Administrator on March 7, 2008.¹ The complaint does not state the actual date that Complainant was terminated but alleges protected activity occurring on March 14, 2007 and at other unspecified times. Complaint ¶ 5 to ¶ 11. It also alleges adverse employment actions in the form of retaliatory blacklisting occurring on unspecified dates. Complaint ¶ 21 to ¶ 22.

¹ A copy of the complaint was provided by OSHA by facsimile of April 16, 2008, in response to a request by this tribunal in the Notice of Assignment and Order of April 10, 2008. A copy was also provided by Complainant on May 6, 2008, together with a Transmission Verification Report reflecting fax transmission on March 7, 2008. The Final Investigation Report provided by OSHA used a filing date of March 12, 2008 and an adverse action date of "[o]n or about March 14, 2007."

On April 28, 2008, Respondent's principal (President Patrick Barron) filed a timely one-page letter response (dated April 21, 2008) indicating that the case should be "immediately dismissed by virtue of the statute of limitations under the STAA" because it was not filed within 180 days of Complainant's termination. Respondent further states that the case has "already been thrown out because of the Statute of Limitations from the Department of Labor." However, hearings before this tribunal are *de novo* and I am not bound by OSHA's findings. 29 C.F.R. §1978.106(a). Moreover, Respondent does not address the viability of a claim based upon blacklisting as the adverse action – the basis for the complaint in this matter.

Complainant's response, consisting of "Complainant's Brief Concerning Timeliness of Complaint" and the supporting "Declaration of Rex Eubanks," was timely filed on May 14, 2008.² In Complainant's Brief, he asserts that the complaint is in compliance with the statute of limitations under the STAA because the alleged adverse action is in the nature of a continuing violation (specifically, "continuous blacklisting.") Complainant argues that the violation is continuing as Respondent has allegedly provided false information concerning a late pick up and delivery to USIS Commercial Services, Inc., a consumer reporting agency that maintains employment records of commercial truck drivers (thereby "blacklisting" him), and the information still appears in Complainant's DAC report and "remains accessible to prospective employers."³ Complainant's Brief at 1-2, 5-6.

Complainant's Declaration states, *inter alia*, that:

- He was employed by Respondent as a commercial truck driver from October 2006 to March 2007. Declaration ¶ 2.
- He was discharged on or about March 14, 2007, following complaints he made to a manager of Respondent concerning deficiencies (relating to the sleep berth, an exhaust leak, an unsecured hood, bald tires, poor wheel alignment, unsecure doors, and worn brake shoes.) Declaration ¶ 2 to ¶ 3.
- After Respondent fired him, he was "continuously denied employment" whenever he applied for work, even though he had had no trouble finding work in the past, leading him to believe that he was being "blacklisted" with prospective employers and on his DAC report. Declaration ¶ 5.
- In response to his June or July 2007 inquiry, he received a copy of his DAC report from USIS Commercial Services (a copy of which he attached to the Declaration) which reflected a late pick up and delivery alleged by Respondent. Complainant asserts that he was never late for pick up or delivery "except when [he] could not meet a schedule without violating the hours of service regulation in 49 C.F.R. § 395.3." Declaration ¶ 8.
- Complainant received the DAC Report from USIS Commercial Services in early August 2007.⁴ Declaration ¶ 7.

² The response is timely, as it was filed by mail and five days are therefore added to the period. See 29 C.F.R. §18.4(c).

³ In the annexed Declaration (at ¶ 6), Complainant clarified that USIS Commercial Services was formerly known as DAC services and the employment information it maintains is contained in what is known as a DAC report.

⁴ If the information was received in early August, Complainant was aware of it on or before August 15, 2007.

Those facts are accepted as true for the purpose of addressing the timeliness issue and all reasonable inferences will be drawn in Complainant's favor.

As noted above, on May 29, 2008, the undersigned administrative law judge issued an Order to Show Cause requiring the parties to make a showing within 30 days. Neither party filed a response of any kind, so the decision will be made based upon the previous filings.

Discussion

Complainant acknowledges that the complaint is untimely as measured from the date of termination, because it was filed more than 180 days later. (Complainant's Brief at 2). In this regard, as Complainant states in his Declaration of May 6, 2008, at paragraph 2, Complainant was fired on or about March 14, 2007; however, the copy of the complaint provided by OSHA reflects that he filed the complaint by facsimile on March 7, 2008, nearly one year later. The STAA statute of limitations requires that an employee alleging discharge, discipline, or discrimination in violation of subsection (a) of the employee protection provisions of the STAA file a complaint with the Secretary of Labor "not later than 180 days after the alleged violation occurred." 49 U.S.C. §31105(b).⁵ Thus, if the adverse action is considered to be the termination, the complaint is clearly untimely, as it was filed more than 180 days after the termination.

The pertinent regulations allow for equitable tolling of the limitations period. Specifically, they provide the following:

(3) [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). Apart from his "continuing violation" theory, discussed below, Complainant has not alleged a basis for equitable tolling nor has he alleged facts that would entitle him to equitable relief.⁶

Here, Complainant is alleging a "continuing violation" in the form of blacklisting. This claim fails, too, because the last action complained of occurred more than 180 days before the complaint was filed and, as noted above, Complainant has asserted no other basis for equitable estoppel or tolling. It is clear that by no later than August 15, 2007, Complainant was aware that allegedly false information appeared in his DAC report and he had a potential claim under the

⁵ The STAA was amended by Public Law 110-053, §1536, 121 Stat. 465 *et seq.* (Aug. 3, 2007) but the limitations provision was unchanged.

⁶ As the STAA limitations period is not jurisdictional, it is subject to waiver, estoppel, and equitable tolling. *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 (Dec. 16, 2005).

STAA based upon blacklisting, but he waited until March 7, 2008, more than 180 days later, to file the complaint in this matter with OSHA.

At the outset, I note that Complainant's status as a former employee does not preclude his filing of an STAA claim. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the United States Supreme Court held that the term "employees" in Title VII includes *former* employees, and the same reasoning is applicable to STAA cases. See *Earwood v. Dart Container Corp.*, Case No. 1993-STA-0016 (Sec'y Dec. 7, 1994). *Earwood* involved a second complaint filed by an employee who had settled the first case, following termination of his employment. Years later, he was denied employment based upon an adverse reference he received from his former employer. Finding actionable discrimination under the STAA, the Secretary of Labor noted that the STAA prohibited blacklisting. *Id.* Other STAA cases (by the Secretary, or, more recently, by the Administrative Review Board) have found blacklisting of former employees to be actionable notwithstanding the nonexistence of a current employer-employee relationship. See, e.g., *Ramirez v. Frito-Lay, Inc.*, ARB No. 06-025, ALJ No. 2005-STA-37 (ARB, Nov. 30, 2006); *Leideigh v. Freightway Corp.*, Case No. 1988-STA-13 (Sec'y June 10, 1991). See also *Muzyk v. Carlsward Transportation*, ARB No. 06-149, ALJ No. 2005-STA-060 (ARB Sept. 28, 2007), slip op. at 5-6 (finding that the STAA covered a former employee who was on lay-off status at the time he brought his STAA action and that the employer's refusal to rehire the former employee was an adverse action.)

Likewise, it is true that the statute of limitations in an STAA action may be tolled based upon a continuing violation theory. The Secretary of Labor explained the basis for a continuing violation theory in *Flor v. United States Department of Energy*, Case No. 1992-TSC-1 (Sec'y Dec. 9, 1994), a case brought under the employee protection provisions of the Toxic Substances Control Act, other environmental statutes, and the STAA:

. . . . The Secretary has held in analogous cases that the timeliness of a claim may be preserved under the continuing violation theory "where there is an allegation of a course of related discriminatory conduct and the charge is filed within thirty days **of the last discriminatory act.**" [Citations omitted. Emphasis added.]

For guidance concerning whether alleged discriminatory acts are sufficiently "related" to constitute a course of discriminatory conduct, the Secretary has turned to a case under Title VII of the Civil Rights Act of 1974, *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983, *cert. denied*, 479 U.S. 868 (1986)). [Citations omitted.] The *Berry* court listed three factors: (1) whether the alleged acts involve the same subject matter, (2) whether the alleged acts are recurring or more in the nature of isolated decisions, and (3) the degree of permanence. . . .

Flor, slip op. at 4. Finding that some of the adverse actions complained of (including the suspension of the employee's security clearance) occurred less than 180 days prior to filing the complaint and were timely under the STAA, the Secretary also found that an earlier investigation and interview concerning the security clearance involved the same subject matter and were closely connected to suspension of the clearance; therefore, allegations concerning the investigation and interview were timely based upon a continuing violation theory. *Flor*, at 4 to

5. The Secretary also remanded for continuing violation findings under the 30-day limitations period applicable to the TSCA, due to the punitive damages provision under that act. *Id.*

In *Thissen v. Tri-Boro Construction Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-35 (Dec. 16, 2005), the Administrative Review Board addressed the continuing violation theory and found it to be inapplicable. Like *Earwood*, *Thissen* involved a second STAA action brought by an employee who had settled the first one. The complainant alleged that his former employer had violated the settlement agreement by refusing to reinstate him, by contesting a worker's compensation claim, and by failing to pay fringe benefits, all in continuing retaliation for his protected activity. Noting that the 180-day statute of limitations begins to run when the employee receives "final, definitive, and unequivocal notice" of an adverse employment decision, the ARB found that the complaint was untimely because (1) each alleged violation occurred more than 180 days before the complainant filed his STAA complaint and (2) the complainant became aware of the violations more than 180 days before he filed his complaint. *Thissen*, slip op. at 5-6. Further, the ARB found that the alleged failure to reinstate and failure to pay fringe benefits, like the breach of promise not to contest the worker's compensation claim, were "discrete, not continuing, adverse actions." *Thissen*, slip op. at 6. The ARB contrasted the discrete acts involved in the case before it with a hostile work environment occurring over a series of days or years, which would not be time-barred, "if all the acts comprising the claim are part of the same unlawful practice and at least one act happens within the limitations period." *Thissen*, slip op. at 6, n. 18, citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002).

Thus, regardless of whether the act complained of here – reporting false employment information in a DAC report, thereby "blacklisting" Complainant – is deemed to be a discrete act or part of a continuing course of retaliation, the complaint must fail, because Complainant has pointed to no actions occurring during the 180-day period prior to the time that he filed his complaint. Furthermore, he received "final, definitive, and unequivocal notice" of the adverse DAC report more than 180 days prior to the time that he filed his complaint. Accordingly, the complaint in this matter is untimely under 49 U.S.C. §31105(b).

Complainant has relied upon cases finding continuing violations when firms have failed to hire minorities or women and continue that policy over a period of time; however, those cases are inapposite. The instant case is different because the sole act by Respondent of which Complainant complains consists of its providing information that was used in the DAC report and that single act occurred more than 180 days before the complaint was filed, and Complainant was aware of it more than 180 days before the complaint was filed. There have been no allegations that Respondent maintained the DAC report or provided supplemental advice for inclusion in the DAC report within the 180-day period prior to the filing of the complaint.

Likewise, the two environmental/nuclear whistleblower cases cited by Complainant as supportive of his continuing violation theory are distinguishable because, in each, the last act complained of occurred within the limitations period. *Leveille v. New York Air National Guard*, Case No. 1994-TSC-3 (Sec'y Dec. 11, 1995) involved blacklisting allegations by an employee against a former employer who had provided adverse information in a Documented Reference Check (DRC). The Secretary found the claim to be timely as to prior allegations, because the

last adverse action – providing the DRC information – occurred during the 30-day limitations period prior to the suit being filed (as noted in footnote/endnote 7 to the decision):

[7] These incidents suggest serial adverse action. While they occurred more than 30 days before the discrimination complaints were filed, the complaints were timely because the final reference in the series, provided to Documented Reference Check and discussed below, *did* occur during the 30-day limitations period.

Leveille, at n. 7, citing *OFCCP v. CSX Transportation, Inc.*, Case No. 1988-OFC-24 (Sec’y Oct. 13, 1994) (Remand Order). Similarly, in *Egenrieder v. Metropolitan Edison Company/G.P.U.*, Case No. 1985-ERA-23 (Sec’y April 20, 1987) (Remand Order), another blacklisting claim, the Secretary addressed the “continuing violation theory” espoused by the complainant and distinguished between the present effects of a past violation and a current violation which is a part of a continuing course of discriminatory conduct. Citing *Van Heest v. McNeilab, Inc.*, 624 F.Supp. 891 (D.Del. 1985), the Secretary found that the continuing violation theory brought “all acts related to the last discriminatory act” within a court’s jurisdiction, provided that the last act in a course of conduct occurred within the limitations period. *Egenrieder*, slip. op. at 3, n. 4. In the instant case, in contrast, the last discriminatory act alleged occurred outside of the limitations period, and Complainant’s attempt to rely upon potential present effects from that past violation is of no avail.

In view of the above, it is recommended that this matter be dismissed as Complainant has failed to present evidence or argument establishing the timeliness of the claim. The showing made by Complainant is insufficient and, in fact, confirms the basis for finding this action to be untimely. In view of Complainant’s acknowledgment that this matter was filed outside of the 180-day period and his failure to cite a viable basis for waiver, tolling, or estoppel of the limitations period, I find that dismissal is appropriate on the pleadings. However, to the extent that extrinsic matters may need to be considered, I also find that there is no genuine issue of material fact and Respondent is entitled to summary decision based upon the undisputed facts. *See* 29 C.F.R. § 18.41. Accordingly,

ORDER

IT IS HEREBY ORDERED that the Complainant’s claim be, and hereby is, **DISMISSED** because the claim was filed more than 180 days after the alleged violations occurred, contrary to 49 U.S.C. §31105(b).

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.