



**Issue Date: 28 February 2014**

Case No.: 2012-ACA-1

In the Matter of:

**STEPHEN E. GUESS,**  
Complainant,

v.

**WAL-MART STORES, INC.,**  
Respondent.

**ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND  
DISMISSING THE CLAIM**

This claim arises under Section 1558 of the Patient Protection and Affordable Care Act of 2010 (“ACA”), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Section 1558 of the ACA amended the whistleblower provisions of the Fair Labor Standards Act to include protection for those who engage in protected activities as enumerated in the ACA. 29 U.S.C. § 218C. In pertinent part, Section 18C:

. . . protects employees against retaliation because they have provided . . . , to their employer, the Federal Government, or the attorney general of a State, information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of or amendment made by Title I of the ACA. . . .

Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, 78 Fed. Reg. 13,222, 13,223 (proposed Feb. 6, 2013) (to be codified at 29 C.F.R. pt. 1984).

Stephen E. Guess (“Complainant”) claims that Wal-Mart stores, Inc. (“Respondent”) violated the ACA when it discharged and allegedly subsequently blacklisted him in retaliation for reporting, *inter alia*,<sup>1</sup> that a supervisor was engaged in prescription drug fraud.

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<sup>1</sup> Complainant also reported that his supervisor, a fellow pharmacist, had violated Health Insurance Portability and Accountability Act of 1996, various Colorado state pharmacy laws, and Respondent’s company policy.

## PROCEDURAL HISTORY

In May 2011, Complainant sent a letter to United States Senator Michael Bennet alleging that Respondent terminated him and was blacklisting him from future employment in retaliation for his reports of insurance fraud allegedly perpetrated by his supervisor. On August 1, 2011, Senator Bennet's Office forwarded Complainant's correspondence to the Occupational Safety and Health Administration ("OSHA"). (Secretary's Findings, issued March 16, 2012). OSHA treated Complainant's letter as a complaint and considered it timely filed. *Id.*

On March 16, 2012, OSHA issued the Secretary's Findings in response to the complaint. OSHA made the following pertinent findings: 1) the Complainant had been employed by the Respondent as a pharmacist in its Avon, Colorado store; 2) the Complainant is a covered "employee" and the Respondent is an "employer" under the jurisdictional provisions of the ACA; 3) throughout June and portions of August, 2010, the Complainant allegedly witnessed and reported that his supervisor illegally used her mother's insurance data to obtain prescription medication for her personal use; 4) Complainant alleged that he reported this conduct to Respondent's management; 5) Complainant asserted that his termination and subsequent alleged "blacklisting," from further employment opportunities, was a direct result of his reporting the purported pharmaceutical fraud; 6) In May of 2011, the Complainant wrote a letter to Senator Michael Bennet alleging that the Respondent discriminated against him in violation of the ACA; 7) Senator Bennet's office forwarded the letter to OSHA's investigative office on August 1, 2011; and 8) this constituted timely filing of the complaint, as it was within 180 days of the alleged adverse action. (Secretary's Findings, issued March 16, 2012).

OSHA dismissed the complaint after concluding that "[t]he provisions of Title I of ACA address[] health insurance and services; however, the title does not include a provision governing prescription fraud. Therefore, Complainant's complaint pertaining to prescription fraud cannot be considered protected activity under this statute." (Secretary's Findings, issued March 16, 2012). Further the OSHA Regional Administrator found that there was insufficient evidence to confirm Complainant's allegation of blacklisting. *Id.*

On March 26, 2012, Complainant filed an appeal with the Chief Judge of the Office of Administrative Law Judges, listing numerous reasons he disagreed with OSHA's findings. He stated that the Respondent terminated him in retaliation for filing reports with the Department of Health and Human Services and the Colorado Board of Pharmacy two months prior to his termination.

On July 16, 2012, Respondent filed Respondent's Motion to Dismiss. In response, Complainant cited to regulations promulgated under the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) and the Age Discrimination in Employment Amendments of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). (Complainant Stephen Guess Response to Respondent's Motion to Dismiss, filed August 10, 2012). Complainant further stated that "[t]here is language in the ACA that closely resembles my case, the exception being that it only applies to services billed to Medicare or

Medicaid. As of 8/2/12, CMS has not been able to verify whether the mothers' insurance was Medicare or not." *Id.*

On September 19, 2013, I issued an Order Denying Respondent's Motion to Dismiss. Preliminarily, I agreed with Respondent's argument that the Complainant did not engage in protected activity by reporting a violation of the ACA, because Title I of the ACA does not cover reports of pharmaceutical fraud or "blacklisting." However, I denied the Motion as the Respondent had not shown that the Complainant did not have a *reasonable belief* when filing the complaint, that an act or omission committed by the Respondent constituted a violation of Title I. *See* 29 U.S.C. § 218C(a)(2).

On January 8, 2014, Respondent filed Respondent Walmart Stores Inc.'s Motion for Summary Judgment ("Respondent's Summary Judgment Motion"). By Motion for Extension to Respond filed January 23, 2014, Complainant requested an additional thirty days to respond to Respondent's Summary Judgment Motion. By Order issued January 24, 2014, the undersigned granted Complainant's unopposed request for an extension of time. On February 10, 2014, Complainant filed Complainant's Response to Walmart Store Inc.'s Motion for Summary Judgment ("Complainant's Response"). On February 18, 2014, Respondent filed Respondent Walmart Store Inc.'s Reply Brief in Support of Motion for Summary Judgment ("Respondent's Reply Brief").

On February 21, 2014, Respondent filed Respondent Walmart Stores, Inc.'s Supplemental Reply in Support of Motion for Summary Judgment ("Respondent's Supplemental Reply"). Respondent also attached a DVD containing digital recordings of Complainant's interviews with an investigator while this claim was pending before OSHA. The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges do not authorize the filing of reply briefs.<sup>2</sup> Respondent did not request, nor has the undersigned granted, leave for the submission of either Respondent's Reply Brief or Respondent's Supplemental Reply with attached evidence. Thus, the undersigned will consider neither the arguments contained therein nor the evidence attached thereto.

#### DISCUSSION AND ANALYSIS

Respondent argues that it is entitled to summary judgment because: 1) Complainant did not file his complaint within 180 days of the alleged adverse action as required by the ACA; 2) Complainant did not engage in activity protected by the ACA's whistleblower provision; and 3) Respondent terminated Complainant's employment for "legitimate, nondiscriminatory reasons unrelated to his alleged protected activity." (Respondent's Summary Judgment Motion at 2). Complainant responds by arguing: 1) that his complaint was timely filed; and 2) that he has set forth specific facts showing that there is a genuine issue of fact for the hearing. (Complainant's Response at 1-2, 10).

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<sup>2</sup> *See* 29 C.F.R. pt. 18.

### Standard for Summary Judgment

At least twenty days prior to a scheduled hearing, any party may “move with or without supporting affidavits for a summary decision on all or part of the proceeding.”<sup>3</sup> The administrative law judge must view all of the facts, and all inferences drawn from the facts, in the light most favorable to the party opposing summary judgment.<sup>4</sup> However, a party opposing the motion must set forth specific facts showing there is a genuine issue of fact for the hearing.<sup>5</sup> An administrative law judge may grant a motion for summary judgment “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.”<sup>6</sup> A material fact is one “whose existence affects the outcome of the case.”<sup>7</sup> There is a “genuine issue” when the nonmoving party produces sufficient evidence regarding a material fact that a fact-finder must resolve the differing versions at a hearing.<sup>8</sup> If a nonmoving party fails to produce sufficient evidence on an essential element of his claim, there is no issue of material fact because “a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.”<sup>9</sup>

### Timeliness

Complainant alleges, *inter alia*, that Respondent retaliated against him in violation of the ACA by terminating his employment. Donald White, a Regional Director for Respondent, emailed Complainant on January 25, 2011, stating that “your employment is terminated effective 1-25-2011.” (Respondent’s Motion for Summary Judgment, Exhibit J). Complainant responded to Mr. White’s email the same day. *Id.*

Complainant subsequently sent a letter to Senator Bennet in which he summarized his allegation that he had witnessed his supervisor defraud her mother’s insurance company and that, as a result, he had been terminated and blacklisted by Respondent. (Respondent’s Summary Judgment Motion, Exh. A). Senator Bennet’s office forwarded Complainant’s letter to OSHA by facsimile on August 1, 2011. *Id.*

An employee alleging retaliation in violation of the whistleblower provision of ACA may file a complaint with the Secretary of Labor “not later than 180 days after the date on which [the alleged] violation occurs.”<sup>10</sup> The date of the transmittal of an ACA complaint that is filed by facsimile is considered the date of filing for purposes of determining whether the claim was timely filed.<sup>11</sup> However, the 180-day statute of limitations is subject to equitable tolling.<sup>12</sup> An

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<sup>3</sup> 29 C.F.R. § 18.40(a).

<sup>4</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

<sup>5</sup> *See* 29 C.F.R. § 18.40(c).

<sup>6</sup> 29 C.F.R. § 18.40(d).

<sup>7</sup> *Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, slip op. at 7 (Sept. 30, 2008)(CAA) (citing *Anderson*., 477 U.S. at 248).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

<sup>10</sup> 29 U.S.C. § 218C(b)(1); 15 U.S.C. § 2087(b); 29 C.F.R. § 1984.103(d); 78 Fed. Reg. 13,222, 13,226 (Feb. 27, 2013).

<sup>11</sup> 29 C.F.R. § 1984.103(d).

administrative law judge may equitably toll the statute of limitations if the complainant raised the precise statutory claim in issue within the statute of limitations period but did so in the wrong forum.<sup>13</sup> The complainant bears the burden of establishing entitlement to equitable tolling.<sup>14</sup>

The complainant must have intended to file a whistleblower complaint despite its erroneous filing in the wrong forum; therefore, a complainant is not entitled to equitable tolling if “he was not even aware of [the] existence of the whistleblower protections” at the time a complaint was filed in the incorrect forum.<sup>15</sup> Moreover, to involve the “precise claim mistakenly raised in the wrong forum,” the initial complaint must be asserted under the correct whistleblower statute.<sup>16</sup> That is, even where a complainant files a complaint alleging facts that would otherwise give rise to a claim under the whistleblower statute at issue, if the complaint is not asserted under the correct statute, it does not “involve the precise claim mistakenly raised in the wrong forum.”<sup>17</sup> Further, to be entitled to equitable tolling based on the filing of the claim in the wrong forum, the complainant must have filed a complaint in an incorrect forum.<sup>18</sup> A forum is defined as “a court or other judicial body.”<sup>19</sup>

#### *Timeliness of Complainant’s Claim based on his Employment Termination as an Adverse Action*

Respondent’s email on January 25, 2011 informed Complainant that his employment with Respondent was terminated effective the same day, and thus unequivocally notified Complainant of the termination of his employment. (Respondent’s Motion for Summary Judgment, Exhibit J). Complainant responded to the termination email the same day. *Id.* Thus, Respondent had actual knowledge of his termination (the adverse action he alleges was taken against him in violation of the ACA) on January 25, 2011. Respondent’s letter to Senator Bennet, was not filed with OSHA until 188 days later, on August 1, 2011. (Respondent’s Summary Judgment Motion, Exh. A). Thus, Complainant did not file his complaint with OSHA within the 180-day statute of limitations period for the filing of an ACA whistleblower complaint. Accordingly, Complainant’s claim alleging that he was terminated from employment in retaliation for engaging in protected activity must be dismissed as untimely unless Complainant establishes that he is entitled to equitable tolling.

#### *Equitable Tolling of Complainant’s Employment Termination Claim*

In May 2011, Complainant sent Senator Bennet a letter in which he alleged that Respondent had terminated him because he had reported alleged prescription insurance fraud by

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<sup>12</sup> 29 C.F.R. § 1984.103(d).

<sup>13</sup> *Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, slip op. at 9 (Sept. 30, 2008) (CAA). Equitable tolling is also appropriate when the respondent has actively misled the complainant with regard to the cause of action and when the complainant has “in some extraordinary way” been prevented from filing the claim. Here, Complainant does not allege, and the evidence of record does not support a finding, that Respondent misled him regarding his ACA claim or that he was prevented from filing his claim.

<sup>14</sup> *Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, slip op. at 7 (Nov. 29, 2006) (LCA) (citing *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, slip op. at 8 (Sept. 29, 2006) (SDW)).

<sup>15</sup> *Schafermeyer*, ARB No. 07-082, slip op. at 14.

<sup>16</sup> *Id.* at 15 (citing *Lewis v. McKenzie Tank Lines, Inc.*, No. 1992-STA-020 (Nov. 24, 1992)).

<sup>17</sup> *Id.* (citing *Lewis*, No. 1992-STA-020; *Ferguson v. Boeing Co.*, ARB No. 04-084 (Dec. 29, 2005) (AIR)).

<sup>18</sup> *Ndiaye v. CVS Store No. 6081*, ARB No. 05-024, slip op. at 8 (Nov. 29, 2006) (LCA).

<sup>19</sup> *Id.* (citing BLACKS LAW DICTIONARY (8th ed.) (West 2004)).

his supervisor. (Respondent's Summary Judgment Motion, Exh. A). However, I find that the letter does not evidence Complainant's intention to file a whistleblower complaint *under the ACA*. Complainant does not refer to the ACA in the letter. *Id.* Even if one assumed that Complainant's letter sets forth sufficient facts to support a violation of the whistleblower provision of the ACA, Complainant failed to explicitly allege a violation of the ACA. Moreover, Complainant has admitted that he did not file a complaint with the Department of Labor because, at the time of his termination, he was unaware of the ACA. (Respondent's Motion for Summary Judgment, Exh. C: Deposition of Complainant dated June 26, 2013, at 38). Thus, Complainant did not assert a claim under the correct whistleblower statute. Further, Complainant sent his letter to Senator Bennet, a member of the United States Congress. Congress is not a "court or other judicial body." Thus, I find that Complainant did not file a complaint with a venue that qualifies as a forum. Accordingly, because Complainant did not file the precise statutory claim in the wrong forum, he has failed to establish that he is entitled to equitable tolling of the 180-day statutory limitation period. Therefore, Complainant has raised no genuine issue of material fact in relation to the question of the untimely filing of his claim based on his employment termination as an adverse action.

#### *Timeliness of Complainant's Claim based on Blacklisting as an Adverse Action*

Complainant's letter to Senator Bennet also alleged that Respondent retaliated against him by blacklisting him from other employment opportunities. (Respondent's Summary Judgment Motion, Exh. A). As previously discussed, the statute of limitations runs from the date the alleged violation of the ACA occurs.<sup>20</sup> In his letter to Senator Bennet, Complainant alleged that Respondent was continuing to blacklist him in retaliation for his protected activities. (Respondent's Summary Judgment Motion, Exh. A). Because Complainant's letter included an allegation that Respondent continued to engage in retaliatory conduct, the statute of limitations did not begin to run on Complainant's claim based on blacklisting prior to the filing of his claim with OSHA. Accordingly, I find that Complainant's ACA claim, to the extent it alleges that Respondent engaged in a retaliatory adverse action by blacklisting Complainant, was timely filed with OSHA within the 180-day statute of limitations period.

#### Dismissal of Complainant's Claim based on Blacklisting as an Adverse Action

In his letter to Senator Bennet, Complainant alleged that Respondent was blacklisting him from future employment opportunities because he reported prescription insurance fraud by his supervisor. (Respondent's Summary Judgment Motion, Exh. A). During his deposition on June 26, 2013, Complainant conceded that does not "have any evidence that [Respondent] has done anything to interfere with [his] ability to secure other employment." (Respondent's Summary Judgment Motion, Exh. C at 277). In Complainant's Response, Complainant states that he "cannot prove that Walmart interfered with his efforts to find employment without endangering other people's jobs." (Complainant's Response at 10).

To establish a claim under the whistleblower provision of the ACA, a complainant must establish 1) that he engaged in protected activity as set forth in the statute; 2) that his employer

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<sup>20</sup> 29 U.S.C. § 218C(b)(1); 15 U.S.C. § 2087(b); 29 C.F.R. § 1984.103(d); 78 Fed. Reg. 13,222, 13,226 (Feb. 27, 2013).

knew of the protected activity; 3) that the employer took an adverse action against the employee; and, 4) that the adverse action was taken because of the complainant's protected activity.<sup>21</sup> As previously discussed, to survive a motion for summary judgment, the nonmoving party must establish that there exists a genuine issue of a material fact.<sup>22</sup> If a nonmoving party fails to produce sufficient evidence on an essential element of his claim, there is no issue of material fact because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."<sup>23</sup> Here, Complainant has conceded that he has no evidence to support his allegation that Respondent blacklisted him from future employment opportunities. Thus, Complainant has failed to produce sufficient evidence of an essential element of his blacklisting claim, that Respondent took an adverse action against him. Accordingly, I find that Respondent is entitled to summary judgment on Complainant's claim under the whistleblower provision of the ACA to the extent it is based on an allegation that Respondent retaliated against Complainant by blacklisting him from future employment opportunities.

### Conclusion

I have found that Complainant failed to file the termination portion of his ACA whistleblower claim within the 180-day statute of limitation period. Moreover, I have found that Complainant has not established entitlement to equitable tolling of the limitations period. Finally, I have determined that, while Complainant timely filed his ACA claim based on his allegations of Respondent's "blacklisting" activities, Complainant has failed to establish a genuine issue of material fact with regard to the complete absence of evidence supporting this portion of his claim.

ACCORDINGLY,

### ORDER

**IT IS ORDERED** that Respondent's Motion for Summary Judgment is hereby **GRANTED**, and the claim is **DISMISSED**. **IT IS FURTHER ORDERED** that the hearing scheduled to be held in Denver, Colorado during the week of April 7-11, 2014, is hereby **CANCELLED**.

PETER B. SILVAIN, JR.  
Administrative Law Judge

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<sup>21</sup> 29 U.S.C. § 218C.

<sup>22</sup> 29 C.F.R. § 18.40.

<sup>23</sup> *Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, slip op. at 7 (Sept. 30, 2008)(CAA); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

**NOTICE:** Review of this Decision and Order is by the Administrative Review Board pursuant to 29 CFR § 1984.110: Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal 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 ARB. Copies of the petition for review must be served on the Assistant Secretary, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.