

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 03 December 2013

ALJ NO.: 2013-ACA-00003

In the Matter of:

TAMMY A. STROUD,
Complainant

v.

MOHEGAN TRIBAL GAMING AUTHORITY,
Respondent.

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

Tammy Stroud, *pro se*

Andrew Houlding, Esq., Rome McGuigan, P.C., Hartford, Connecticut, for the Respondent

Roger Wilkinson, Esq., U.S. Department of Labor, Office of the Solicitor, for the Directorate of Whistleblower Protection Programs, U.S. Department of Labor, Occupational Safety and Health Administration

DECISION AND ORDER DISMISSING CLAIM

I. Statement of the Case

This proceeding arises under the whistleblower provision found in Section 1558 of the Affordable Care Act, P.L. 111-148 (March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152 (March 30, 2010), 29 U.S.C. § 218c (hereinafter the “ACA” or “Act”). Complainant Tammy Stroud (“Complainant” or “Stroud”) filed a discrimination complaint alleging violations of the ACA against Mohegan Tribal Gaming Authority (“Respondent” or “MTGA”) with the Occupational Safety and Health Administration, U.S. Department of Labor (“OSHA”) on June 18, 2013. Following OSHA’s dismissal of the

complaint as time barred on June 24, 2013, Complainant filed objections and a request for hearing with the Office of Administrative Law Judges (“OALJ”).

Upon receipt of the request for a hearing, the undersigned administrative law judge issued a Notice of Docketing and Order to Show Cause on September 19, 2013. The Order to Show Cause required the Complainant to file a certified copy of a complaint she filed on August 12, 2012 with OSHA in a separate proceeding in which she alleges she referenced the ACA. The parties were also directed to brief the issues of whether Complainant’s request for hearing was timely filed with the OALJ and whether the ACA complaint was timely filed with OSHA. The Order cautioned Complainant that a failure to establish both that her complaint filed with OSHA and her request for a hearing before the OALJ were timely filed would result in a dismissal of her claim. In accordance with the Order to Show Cause, the Complainant filed the original complaint of August 21, 2012 (“8/21/12 Complaint”),¹ and briefs were filed by the Complainant (“Compl. Br.”), Respondent (“Resp. Br.”), and the Assistant Secretary of Labor for OSHA as *amicus curiae* (“OSHA Br.”).²

Considering the evidence before me, as well as the filed briefs, I find that the Complainant has failed to establish as required by the Show Cause Order that her ACA complaint was timely filed with OSHA, and accordingly the claim shall be dismissed.

II. Background

A. August 21, 2012 Complaint

On August 21, 2012, Stroud filed a complaint with OSHA alleging she was terminated by MTGA on March 29, 2012, in retaliation for her reporting of health and safety hazards and violations of Respondent’s audit and signature control procedures. 8/21/12 Complaint at 1. Stroud additionally alleged that she was bullied, harassed, discriminated against, and worked in a hostile work environment. *Id.* She stated that she was “a victim of an attack against [her] faith and favoritism, and nepotism.” *Id.* She additionally reported misuse of company computers, violations of record-keeping requirements, and missing documentation from her personnel file.

¹ The complaint and attached documentation was filed electronically via email and a hard copy was also filed by mail. The mailed copy of the complaint had additional handwritten notes and markings that the Complainant acknowledged during a conference call held on November 15, 2013, were not on the original complaint filed with OSHA. The mailed copy also included an additional page entitled “Memorandum for the Executive Secretariat” indicating that Stroud’s claim with the Employee Benefits Security Administration alleging a violation of Comprehensive Omnibus Budget Reconciliation Act of 1985 (“COBRA”) was closed. Citation to the August 21, 2012 complaint and attached documentation in this Decision and Order will be to the emailed copy as it accurately reflects what OSHA originally received from the Complainant.

² The Complainant attached supporting documentation to her brief. For citation purposes, the attached documentation will be referred to Compl. Br. Supp. Doc. and numbered pages 1-11. OSHA also attached several exhibits to its brief. The exhibits will be labelled and cited to herein numerically as OSHA Br. Ex. 1-5.

Id. at 2. Lastly, Stroud alleged that she was not paid for her last day of work or two weeks of vacation pay. *Id.*³

On December 31, 2012, Stroud sent an email to OSHA in which she wrote “I want to add to the original complaint dated August 21, 2012 that I never received information from my employer [MTGA] to Keep my health care. Continuation of Health Coverage (COBRA).” OSHA Br. Ex. 1. In a later email to OSHA dated August 10, 2013, Stroud alleged defamation by Respondent and additional health and safety hazards. OSHA Br. Ex. 4.

OSHA determined that Stroud had alleged potential claims under Section 11(c)(1) of the Occupational Safety and Health Act (“OSH Act”), 29 U.S.C. § 660(c); Section 806 of the Sarbanes-Oxley Act (“SOX”), 18 U.S.C. § 1514A; and Section 1057 of the Consumer Financial Protection Act of 2010 (“CFPA”), 12 U.S.C. § 5567. OSHA Br. at 4. On March 12, 2013, OSHA dismissed the CFPA claim for failure to demonstrate protected activity, the SOX claim for lack of jurisdiction, and the OSH Act claim for untimeliness. *Id.*; *Stroud v. Mohegan Tribal Gaming Auth.*, 2013-CFP-00003, PDF at 1 (June 14, 2013).

On March 28, 2013, Stroud objected to the OSHA findings and requested a hearing before the Office of Administrative Law Judges on her CFPA and SOX claims. *Stroud*, 2013-CFP-00003 at 1. On June 14, 2013, Administrative Law Judge Timothy J. McGrath issued a Decision and Order Granting Respondent’s Motion for Summary Decision and Dismissing Complaint.⁴ *Stroud*, 2013-CFP-00003. Stroud appealed Judge McGrath’s decision, and the matter is currently pending at the Administrative Review Board.

B. June 18, 2013 ACA Complaint

On June 18, 2013, Stroud, by email, filed a complaint with OSHA alleging that she was retaliated against under Section 1558 of the ACA. *See* Official Record. On June 24, 2013, OSHA issued Findings dismissing the ACA claim as untimely. OSHA Br. Ex. 2. OSHA found that Stroud did not allege in her original complaint filed on August 21, 2012, or in her interview and subsequent filings, that her termination from MTGA was a result of her protected activities under the ACA, and the first instance she mentioned the ACA was in the June 18, 2013 email. *Id.* As such, because the June 18, 2013 complaint alleging violations of the ACA was not filed within 180 days of the alleged adverse action, Stroud’s termination on March 29, 2012, OSHA found the complaint was not timely filed under the Act and dismissed the complaint without an investigation. *Id.*

³ Stroud also filed various complaints with the State of Connecticut Department of Labor, the Equal Employment Opportunity Commission (“EEOC”), the Mohegan Gaming Disputes Court, and the Employee Benefits Security Administration (“EBSA”). 8/21/12 Complaint at 1-2, B-1, B-2, B-3; Compl. Br. at 3-4; Compl. Br. Supp. Doc. at 3-9.

⁴ Complainant’s SOX claim was dismissed for lack of subject matter jurisdiction; MTGA does not fall within the class of employers regulated by the SOX whistleblower provisions as it does not have a class of securities registered under Section 12 of the Securities Exchange Act of 1934, nor is it mandated to file under Section 15 of the Securities Exchange Act of 1934. *Stroud*, 2013-CFP-00003 at 4. The CFPA claim was dismissed based on MTGA’s tribal sovereign immunity against unconsented suits. *Id.*

In a letter addressed to the Chief Administrative Law Judge dated July 18, 2013, Stroud objected to and appealed OSHA's Findings. OSHA Br. Ex. 5. Stroud asserted that she raised her ACA claim in her original complaint dated August 21, 2012 and in subsequent phone calls to Michael Mabee, an Investigator for OSHA, and in emails to talktosolis@dol.gov. *Id.* Stroud attempted to fax the letter requesting a hearing to the Chief Administrative Law Judge on July 18, 2013, but inadvertently sent the letter to the wrong fax number. *Id.* She additionally faxed copies of the letter to Respondent's counsel, Andrew Houlding, OSHA Investigator Michael Mabee, and the OSHA Regional Administrator, Marthe Kent. *Id.* Based on subsequent communications with the Office of Administrative Law Judges, Stroud realized that she had sent the appeal letter to an erroneous fax number for the Chief Administrative Law Judge, and on September 11, 2013, Stroud filed her objections by facsimile to the correct number. *Id.*; Compl. Br. at 2.

II. Findings of Fact and Conclusions of Law

A. Timeliness of Objections/Request for Hearing before OALJ

Pursuant to Section 1558 of the ACA and the regulations at 29 C.F.R. § 1984.106(a) "any party who desires review, including judicial review, of the findings and/or preliminary order [of the Assistant Secretary for OSHA] . . . must file any objections and/or a request for a hearing on the record **within 30 days of receipt of the findings** . . . pursuant to [29 C.F.R.] § 1984.105." The regulations state that the objections/request for hearing must be filed with the Chief Administrative Law Judge of the U.S. Department of Labor, and "[t]he date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing." 29 C.F.R. § 1984.106(a). Subsection (b) of 29 C.F.R. § 1984.106 provides that "if no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review."

The Chief Administrative Law Judge did not receive the Complainant's objections until September 11, 2013 by facsimile. OSHA Br. Ex. 5. According to Section 1984.106(a), this is the date of filing for purposes of timeliness, and September 11, 2013 being outside the maximum thirty day period from the date of the Assistant Secretary's Findings on June 24, 2013, the objections and request for hearing were untimely under the regulations. Stroud did attempt to file her letter requesting a hearing on July 18, 2013 with the Chief Administrative Law Judge as required by the regulations, and sent copies of the letter to the other parties in the matter on that date. OSHA Br. at 6 & Ex. 5. The facsimile filing would have been timely filed with OALJ if sent to the correct fax number. Instead, Stroud inadvertently entered the D.C. zip code for the last four digits of the fax number. Compl. Br. 2.

OSHA in its brief states that equitable tolling is appropriate with respect to Stroud's filing of objections and a request for hearing, considering that Stroud is a *pro se* complainant, and she timely filed objections with OSHA, but not OALJ. OSHA Br. at 6-8. OSHA cites to case law indicating that equitable tolling of the filing deadline is appropriate when objections/requests for hearings are timely filed in the wrong forum. *Elias v. Celadon Trucking Servs., Inc.*, ARB No. 12-032, ALJ No. 2011-STA-028, PDF at 4-5 (ARB Nov. 21, 2012); *Shelton v. Oak Ridge*

National Laboratories, ARB No. 98-100, ALJ No. 95-CAA-19, HTML at 5 (ARB Mar. 30, 2001)(finding equitable tolling applied where Respondents filed a request for a hearing with the Administrator of the Department of Labor’s Wage and Hour Division, but not with the Office of the Chief Administrative Law Judge, as required).⁵ The undersigned accepts Stroud’s explanation with regard to sending her request for a hearing to the wrong fax number for the Chief Administrative Law Judge on July 18, 2013, and finds that equitable tolling should apply as a result of her inadvertent mistake. Stroud timely faxed copies of her objections to all other required parties within the 30 day period, and she promptly resent her objections to the OALJ when she realized it had not received the original fax. Accordingly, Stroud’s Objections and Request for Hearing are timely based on equitable tolling principles.

B. Timeliness of ACA Complaint

Section 1558 of the ACA provides protection for covered employees who receive a credit under Section 36B of the Internal Revenue Code of 1986 or a subsidy under Section 1402 of the ACA or who report any violation of the ACA or object to or refuse to participate in an action reasonably believed to be a violation of the ACA. 29 U.S.C. § 218c; *see Rosenfield v. GlobalTranz Enterprises, Inc.*, No. CV 11-02327-PHX-NVW, 2012-WL-2572984 (D.Ariz. July 2, 2012) (stating that reference to “this title” in Section 1558 refers to Title I of the ACA). The ACA includes health insurance reforms such as prohibiting lifetime dollar limits on coverage, requiring most plans to cover recommended preventive services with no cost sharing, prohibiting denial of coverage due to pre-existing conditions, and prohibiting the use of factors such as health status, medical history, gender, and industry of employment to set premium rates. Interim Final Rule, *Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act*, 78 Fed. Reg. 13222, 13223 (Feb. 27, 2013).

If an employer discriminates against its employee for engaging in protected activity under Section 1558, the employee “may, not later than 180 days after the date on which such violation occurs” file a complaint with OSHA. 29 C.F.R. § 1983.103(d); *see* 29 U.S.C. § 218c(b)(1) (following complaint procedure set forth in the Consumer Product Safety Improvement Act of 2008 (“CPSIA”)); 15 U.S.C. § 2087(b)(1). Stroud filed by email on June 18, 2013 a complaint with OSHA alleging that her March 29, 2012 termination violated Section 1558 of the ACA. Specifically, she wrote: “I had left a message with you this morning about the Whistleblower Affordable Care Act (‘ACA’) Retaliation Complaint.” *See* Official Record. This complaint was not filed within 180 days of the alleged adverse action, her termination from MTGA on March 29, 2012, as required by Section 1983.103(d).⁶

Stroud contends that her 8/21/12 complaint contained allegations which could reasonably be perceived as also including violations of the ACA, making her complaint in this proceeding timely. OSHA Br. Ex. 3. Despite her contention, Stroud did not mention the ACA or make any allegation that could be construed to be covered by the ACA in her 8/21/12 complaint and

⁵ In contrast MTGA contends that Complainant’s filing of objections and request for a hearing were untimely. Resp. Br. at 5. (I note Respondent failed to number the pages of its brief).

⁶ OSHA and Respondent argue that Complainant’s June 18, 2013 complaint alleging violation of the ACA was untimely, and that nothing in the 8/21/12 complaint alleged a violation of the ACA. *See* OSHA Br. at 8-12; Resp. Br. at 4-5.

attached documentation, or in any other document filed in this instant matter. Stroud did mention in an email to OSHA dated December 21, 2012, that MTGA failed to notify her of her right to ongoing health insurance following her termination under the Comprehensive Omnibus Budget Reconciliation Act of 1985 (“COBRA”). OSHA Br. Ex. 1. However, COBRA is a separate and independent statute from the ACA, enforced by the Employee Benefits Security Administration (“EBSA”), and COBRA is not referenced or incorporated into the ACA.

Stroud claims that a document entitled “DOL Laws and Regulations” attached to her original complaint on August 21, 2012, indicated that she was raising a claim under the ACA. OSHA Br. Ex. 3. The document provides employees with a general overview of federal employment laws, specifically the Fair Labor Standards Act (“FLSA”), the OSH Act, the Employee Benefits Income Security Act (“ERISA”), COBRA, and whistleblower protection provisions generally. 8/21/12 Complaint. Next to each description of the above statutes, Stroud handwrote the word “violated.” *Id.* The document makes no reference to the ACA, and the reference to whistleblower provisions in general is insufficient to place OSHA on notice of a potential claim under the ACA. As such, Stroud’s argument that the summary of federal employment laws provides a basis for her ACA complaint must fail. *Id.*

Stroud filed several complaints in different forums, as addressed in her brief and identified in supporting documentation; however, none of these additional complaints raised an allegation of violations under the ACA. Stroud raised COBRA violations in other forums, specifically with the EEOC and Connecticut Department of Labor. *See* Compl. Br. Supp. Doc. at 5-6, 8. As discussed above, COBRA violations do not arise under the provisions of the ACA. Stroud also alleged in her brief that she provided the U.S. Department of Labor, Wage and Hour Division “direct evidence of Affordable Care Act violations.” Compl. Br. at 5. However, she has provided no documentation establishing that she raised ACA allegations in a complaint to the U.S. Wage and Hour Division. There is evidence that she filed complaints with the Connecticut Wage and Workplace Standards Division, but these complaints did not refer to the ACA or anything reasonably related to the ACA. 8/21/12 Complaint at 2; Compl. Br. Supp. Doc. at 4-6. Thus, Stroud is not entitled to equitable tolling based on the theory that she raised “the precise statutory claim in issue but has done so in the wrong forum.” *See Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002/063/067/068, ALJ Nos. 1998- CAA-10/11, 1999-CAA-1/4 /6, PDF at 10-11 (ARB Oct. 31, 2000).

As such, Stroud’s complaint filed on June 18, 2013, in which she raised a claim under the ACA for the first time, is deemed untimely, and her claim shall be dismissed as time-barred.⁷

ORDER

Based on the foregoing analysis, the Complainant has failed to establish, as required by the Show Cause Order dated September 19, 2013, that her ACA complaint was timely filed with

⁷ This Decision and Order focuses solely on timeliness, but it is worth noting that even if the complaint was timely filed in this matter, it is highly unlikely the Complainant would be able to overcome the issue of tribal sovereign immunity, which protects qualified Native American tribes from unconsented suit absent explicit congressional repudiation or a clear abrogation of sovereign immunity by the tribe. *See Stroud*, 2013-CFP-00003 at 4.

OSHA. Accordingly, it is hereby ORDERED that the claim be DISMISSED with prejudice as untimely.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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. § 1984.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1984.110(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-N, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1984.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in

opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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. §§ 1984.109(e) and 1984.110(b). Even if a Petition is timely filed, 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 of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1984.110(b).