



CASE NOS.: 2015-ACA-3
2015-ACA-4
2015-ACA-6
2015-ACA-7
2015-ACA-8
2015-SOX-15

In the Matter of:

GREGORY KELLY,
Complainant,

v.

ALABAMA PUBLIC SERVICE COMMISSION,
Respondent.

ORDER GRANTING RESPONDENT’S MOTION TO DISMISS

This matter arises out of numerous complaints filed by Gregory Kelly (“Complainant”) against the Alabama Public Service Commission, (“Respondent”) under the Section 1558 of the Patient Protection and Affordable Care Act (ACA),¹ and Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002.²

The above-captioned matter is pending before me for a formal hearing. By Order issued July 23, 2015, the undersigned consolidated the Complainant’s multiple whistleblower claims to most efficiently address the merits of pending dispositive motions. In light of the consolidation, the parties were afforded an additional 30 days to supplement their outstanding motions. On August 21, 2015, the Employer filed a supplement to its *Motion to Dismiss*, the original of

¹ P.L. 111-148 (March 23, 2010), codified at section 18C of the Fair Labor Standards Act, 29 U.S. § 218C, 29 C.F.R. Part 1984. P.L. No. 107-204. Section 806 is codified as 18 U.S.C. § 1514A. It should be noted that the Complainant concurrently alleged violations of the Affordable Care Act (“ACA”); Asbestos Hazard Emergency Response Act (“AHERA”); Clean Air Act (“CAA”); Solid Waste Disposal Act (“SWDA”); Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”); Pipeline Safety Improvement Act of 2002 (“PSIA”); National Transit Systems Security Act (“NTSSA”); Consumer Product Safety Improvement Act of 2002 (“CPSI”); Sarbanes Oxley Act of 2002 (“SOX”); Toxic Substances Control Act (“TSCA”); Food Safety Modernization Act (“FSMA”); Federal Water Pollution Control Act (“FWPCA”); and Consumer Financial Protection Act of 2010 (“CFPA”).

which, pertaining to the previously docketed 2015-ACA-3, was filed on April 6, 2015. Likewise, on August 27, 2015, the Complainant filed a supplement to his previously filed motion for reinstatement, the original of which, pertaining to the previously docketed 2015-ACA-3, was filed on March 3, 2015, and later supplemented, in 2015-ACA-8, on July 15, 2015. Additionally, I note that the Complainant filed a *Motion for Summary Judgment Under Section 1588 of the ACA Mandates* on March 12, 2015; a *Motion for Civil RICO Tolling The Statute of Limitation (“SOL”) Under Section 1588 of the ACA Mandates* on March 20, 2015; and a *Petition to Deny Respondents’ Motion to Dismiss* on April 13, 2015.

Of note, the *pro se* Complainant’s Motion for Summary Judgment fails to clearly delineate an argument for his entitlement to judgment as a matter of law and is consequently denied. Furthermore, for the sake of judicial economy, the contents of the Complainant’s numerous filings will not be comprehensively summarized. Instead, only those assertions which present colorable legal arguments will be expressly addressed.

Respondent’s Motion to Dismiss

In its original Motion to Dismiss, the Respondent asserted that it was entitled to judgment as a matter of law under the summary-disposition provision of the OALJ Rules of Practice and Procedure. Alternatively, the Respondent argued that the Complainant’s claim should be dismissed under Federal Rule of Civil Procedure 12(b)(6) due to the Complainant’s failure to draft a complaint with “enough facts to state a claim to relief that is plausible on its face.” (Motion to Dismiss at 1)(citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570)(2007)).

The Respondent contended that it was entitled to judgment as a matter of law because the Complainant’s allegations were untimely under each of the whistleblower statutes the Respondent was accused of violating. Specifically, the Respondent observed that the ACA requires claims to be filed no later than 180 days after the date on which the violation occurs. (Motion to Dismiss at 3)(citing 29 U.S.C. §218(b)). Similarly, the Respondent specifically addressed each statute at issue in 2015-ACA-3 and demonstrated the untimeliness of the Complainant’s multi-faceted complaint. (Motion to Dismiss at 3-4.)³ Additionally, the Respondent cited Administrative Review Board precedent recognizing four principal situations which may warrant tolling statutes of limitation: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. (Motion to Dismiss at 4)(citing *Kelly v. U.S. Enrichment Co.*, ARB No. 13-063 (ARB Aug. 9, 2013)).

³ The Respondent listed the following Statutes of Limitation: Asbestos Hazard Emergency Response Act—90 days; Clean Air Act—30 days; Solid Waste Disposal Act—30 days; Comprehensive Environmental Response, Compensation, and Liability Act—30 days; Pipeline Safety Improvement Act of 2002—180 days; and National Transit Systems Security Act—180 days.

According to the argument advanced by the Respondent, none of the situations exist in the present actions. Moreover, based on the dates of the Complainant's employment and the dates of filing, the Respondent observed that none of the Complainant's filings were timely. The Respondent summarized:

Although not entirely clear, it appears that Complainant has alleged that the Commission discharged him because he asserted that the Commission was violating the law. Even under the most favorable reading of the numerous and often unintelligible claims, Complainant has not stated a claim that is plausible on its face because none of the claims were timely filed. The relevant statutory provisions described above require a complainant to file a complaint with a certain period of time after the alleged violation, ranging from 30 days to 180 days, depending on the statute. The alleged violation, the termination of Complainant's employment from the Commission, occurred on April 9, 2009. Complainant did not file these complaints until more than five years later, in October and December of 2014. Even if [Complainant] is able to show that he filed a claim on February 7, 2011, [by letter confirming a telephone conversation with a member of the OSHA staff,] well more than 180 days passed between the alleged violation and the filing of the complaint. Therefore, the Complaint was not timely filed and should be dismissed.

(Motion to Dismiss at 6.)

In its Supplement to Motion to Dismiss, filed after the outstanding claims between the parties were consolidated, the Respondent reiterated that claims under the Asbestos Hazard Emergency Response Act; Clean Air Act; Solid Waste Disposal Act; Comprehensive Environmental Response, Compensation, and Liability Act; Pipeline Safety Improvement Act of 2002; and National Transit Systems Security Act were untimely. (Supplement to MTD at 3.) Additionally, the Respondent added that the statutes of limitation under the Consumer Product Safety Improvement Act of 2008 (180 days), Sarbanes Oxley Act of 2002 (180 days), Toxic Substances Control Act (30 days), FDA Food Safety Modernization Act (180 days), Federal Water Pollution Control Act (30 days) and Consumer Financial Protection Act of 2010 (180 days) rendered the consolidated claims similarly untimely. (*Id.* at 5-6.)

The Respondent's argument regarding the untimeliness of all the consolidated claims is meritorious on its face. There is no triable issue of fact regarding the untimeliness of the filings. Therefore, the Respondent is entitled to judgment as a matter of law and dismissal of all complaints unless the record demonstrates a triable issue of fact on whether the various statutes of limitations should be tolled.

Whistleblower statutes of limitations are subject to equitable modification, *i.e.*, equitable tolling and equitable estoppel. However, in order to justify the tolling of an applicable statute of limitations, a petitioner must act diligently, and it is his burden to show that the untimeliness of

the filing is the result of circumstances beyond his control. *Reid v. Boeing Corp.*, ARB No. 10-110, ALJ No. 2009-SOX-27, at 2 (ARB Mar. 30, 2013); *Jose Romero v. Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-21, at 2 (ARB Sept. 30, 2010), accord *Wilson v. Secy. Dept. of Veteran Affairs*, 65 F.3d. 402, 404 (5th Cir. 1995) (ruling on a Title VII claim), quoting *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990).

Furthermore, I note that the Complainant is *pro se*, and the ARB has stated that administrative law judges must “construe complaints and papers filed by *pro se* complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.” *Wyatt v. Hunt Transport*, ARB No. 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012), quoting *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 6 (ARB Apr. 25, 2003).

The Complainant’s voluminous filings have been considered in their entirety, and even construing the record “liberally in deference” to his unrepresented status, I still find them insufficient to avoid dismissal. Despite their regularity and magnitude, the Complainant’s filings contain no credible factual allegation or legally sufficient argument supporting a finding that the long-expired statutes of limitation should be tolled on equitable grounds. Stated differently, it is uncontroverted that the Complainant’s claims were filed well in excess of the applicable statutes of limitation without legal or equitable justification.

Lastly, I note that the Claimant’s accusations of RICO violations by the Respondent are irrelevant. His rather startling characterization of the Respondent as an “ongoing criminal enterprise” influences neither the date of his discharge, nor his inaction for almost five years afterward.⁴ Furthermore, he has failed to establish the applicability of the delayed-discovery doctrine, fraudulent-concealment doctrine, or continuing-RICO-violations doctrine, despite repeatedly citing all three. (*See* Complainant’s Motion for Civil RICO Tolling at 13-16.) Accordingly, I dismiss the above-captioned consolidated claims as untimely.⁵

In sum, I find the Respondent’s timeliness argument to be well-founded. No filing associated with the consolidated claims before me occurred within the period allowed by the respective statutes of limitations at issue. Accordingly, **IT IS HEREBY ORDERED** that the complaints in the above-captioned matter be, and the same hereby are, **DISMISSED** with prejudice.

⁴ The Complainant also filed a *Request for Summary Judgment Under ACA, CWA, SDWA, SOX AND CFPA Whistleblowers’ Statutes* on September 28, 2015, more than a month out of time. Still, however, despite repeatedly alleging a “pattern of abuse,” the Complainant’s motion failed to allege any such abuse occurred within the statutory periods outlined above.

⁵ Although not raised in any of the present filings, the Claimant alleged in separate whistleblower actions filed under the Clean Air Act and the Pipeline Safety Improvement Act that his psychological condition constituted equitable grounds to excuse his late filings. However, the undersigned adjudicated those claims as well, and found that there was no evidence to support equitable tolling of the statutes of limitation. Although the Claimant alleged anxiety, depression, PTSD, and panic attacks, there was no evidence of record that the conditions were of such severity as to prevent him from asserting his rights at a permissible time. *See* ALJ Order Granting Respondent’s Motion to Dismiss in 2014-CAA-4, 2014-PSI-2.

SO ORDERED.

JOHN P. SELLERS, III
Administrative Law Judge

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).