



Issue Date: 30 April 2020

Case No.: 2020-ACA-00002

In the Matter of:

FELOGINA BERMUDEZ
Complainant

v.

**HORIZON BLUE CROSS BLUE SHIELD
OF NEW JERSEY**
Respondent

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises from a complaint filed by Felogina Bermudez (“Complainant”) against Horizon Blue Cross Blue Shield of New Jersey (“Respondent”) under the employee protection (*i.e.*, whistleblower) provisions of the Patient Protection and Affordable Care Act (“ACA” or “the Act”). Specifically, the employee protection codified at section 18C of the Fair Labor Standards Act, 29 U.S.C. § 218c. The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (“OALJ”) found at 29 C.F.R. Part 18, Subpart A and the ACA regulations at 29 C.F.R. Part 1984 govern this proceeding.

Relevant Factual and Procedural Background

Complainant is a foreign-trained medical doctor who worked for Respondent for 27 years, most recently as a medical policy analyst. This position appears to have required a review approvals for reimbursement of expenses under health insurance plans, including Respondent’s plan covering federal employees. On December 6, 2018, Respondent terminated Complainant.

On May 31, 2019, Complainant filed a complaint with the Department of Labor, Civil Rights Center (“CRC”). The record does not include the complaint filed with the CRC. By letter dated July 5, 2019, the CRC informed Complainant that her complaint did not fall within its jurisdiction and was instead being forwarded to the Equal Employment Opportunity Commission (“EEOC”). Based on the information it obtained through its investigation, the EEOC was unable to conclude that Respondent violated any statute within its jurisdiction. Accordingly, on August 13, 2019, the EEOC dismissed Complainant’s complaint and issued a notice to sue letter.

On July 29, 2019, Complainant filed a complaint with the New Jersey Division on Civil Rights (“NJDCR”). In that complaint, Complainant raised concerns about alleged fraud involving Respondent’s approval of payments under the federal employees’ health insurance plan for certain prescription drugs, medical tests, and surgeries. Complainant also claimed that

she was given directives which violated “federal medical policy rules and regulations” and was instructed by Respondent not to report the alleged fraud. The record does not contain any information relating to the disposition of her complaint with the NJDCR.

On October 24, 2019, Complainant wrote an anonymous letter to the National Anti-Fraud Department, a division within Respondent’s parent company. In this letter, Complainant identified seven occasions where Respondent allegedly approved payment for expenses relating to prescription drugs, medical testing, and surgery that were not covered by the federal employees’ plan. Because the expenses were not covered by the plan, Complainant implied that they were improper and fraudulent. In that same letter, Complainant also claimed that she had contacted the company’s anti-fraud hotline on November 29, 2018.

Complainant filed a complaint against Respondent under the Act with the United States Department of Labor, Occupational Safety and Health Administration (“OSHA”) on November 13, 2019. Complainant alleged Respondent subjected her to adverse employment actions including her December 6, 2018 termination in retaliation for her protected activity under the ACA. Complainant included a letter, dated November 4, 2019, in her complaint. This letter is identical to the letter she submitted to the National Ant-Fraud Department.

On December 17, 2019, the OSHA Assistant Regional Administrator issued the Secretary’s Findings. OSHA determined that Complainant had first alleged that she had engaged in activity protected under the ACA in her July 29, 2019 complaint to the NJCDR, some 235 days after her termination. Because of this, OSHA determined that her complaint was equitably tolled on that date, but was nonetheless not filed within the 180-day statute of limitations under the ACA.

By letter dated January 6, 2020, Complainant objected to OSHA’s determination and requested an appeal. In objecting to that determination, Complainant claimed that she had timely filed her complaint with the CRC on May 31, 2019. Complainant also asserted that she had been misled by Respondent about the nature of her termination. She stated that Respondent led her to believe that her position had been eliminated as part of a corporate reorganization, but she discovered later her position had been filled.

Included with her objection to the OSHA determination in this matter, Complainant submitted the following documentation:

- OSHA’s December 17, 2019 dismissal letter and closing conference email;
- Complainant’s May 31, 2019 email entitled “File Complaint to EEOC,” describing her CRC complaint;¹
- The July 5, 2019 letter from the CRC advising Complainant of its lack of jurisdiction over her complaint;

¹ This email is both addressed to and sent from Complainant’s email account. Thus, it appears that this email was not sent to the EEOC. That being said, in the text of the email, Complainant alleges discrimination based on age and that she was, in her view, mistreated by her supervisors. She does not alleged that Respondent took an adverse employment action on account of her protected activity under the ACA.

- The August 13, 2019 dismissal and notice of suit rights from the EEOC;
- Complainant's July 29, 2019 charge of discrimination with the NJDCR;
- Complainant's October 24, 2019 anonymous letter to the managing director, National Anti-Fraud Department;
- Complainant's November 4, 2019 letter to "U.S. Department of Labor" and titled "Whistleblower Complaint" from "FB" and an OSHA online whistleblower complaint form stamped received in November 2019;
- A waiver and release agreement signed by Complainant in January 2019;
- Excerpts from online articles about Respondent; and
- Miscellaneous emails and screenshot (somewhat illegible).

Complainant's objections and request for a hearing was received by OALJ on January 13, 2020.

On February 3, 2020, the undersigned issued a Notice of Assignment and Order to Show Cause Why Complaint Should Not Be Dismissed As Untimely ("Show Cause Order"). Complainant was instructed to submit a response explaining why equitable tolling principles should apply to her case. The Show Cause Order advised such response could consist of "statements or affidavits, as well as documentation sent to or received from other agencies related to this matter, including any such documentation sent or received around May 31, 2019." *Bermudez v. Horizon Blue Cross Blue Shield of New Jersey*, ALJ Case No. 2020-ACA-00002, *Notice Of Assignment And Order To Show Cause Why Complaint Should Not Be Dismissed As Untimely* (ALJ Feb. 3, 2020).

Complainant responded on February 14, 2020. She claimed that her claim was timely filed on May 31, 2019. Complainant also claimed that equitable tolling is appropriate in this case. She stated that Respondent "had deliberately concealed the fact that [she] had been discharged, as opposed to having been laid off." Complainant also claimed that there were "extraordinary circumstances or obstacles standing in the way of bring her claim." Specifically, she alleged that she was threatened by a co-worker in June 2018 and later told by a supervisor not to report "fraud directly."

Along with her response, Complainant included the following documentation: positive performance evaluations; an email correspondence with Edith Lucas, an employee of Respondent, from September 12, 2018; and emails from June 22, 2018 and November 21, 2018 which include screenshots of what appear to be telephone call logs.

Respondent submitted its reply to Complainant's response on March 4, 2020, insisting Complainant was terminated as part of a company-wide reduction in staff and generally denying the assertions made by Complainant in her February 14, 2020 response to the Show Cause Order.

Analysis and Findings

Under the Act, aggrieved employees must file a complaint with OSHA no later than 180 days after an alleged violation. 29 U.S.C. § 218c(b)(1), referencing 15 U.S.C. § 2087(b)(1). The statutory limitations period begins to run when a “complainant has final, definitive, and unequivocal knowledge of a discrete adverse act[.]” *See, e.g., Cante v. New York City Dep’t of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-00004, slip op. at 10 (ARB July 31, 2009).

This time limitation, however, may be tolled (suspended) by equitable consideration. 29 C.F.R. § 1984.103(d); *see also School District of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981). The Administrative Review Board (“the Board” or “ARB”) has recognized four principal and nonexclusive “situations in which equitable modification may apply: (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.” *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-00009, slip op. at 8 (ARB Dec. 10, 2012) (citations omitted).

The party seeking equitable tolling bears the burden of justifying the application of these principles. *Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, ALJ Case No. 2007-CAA-00001 (ARB Sep. 30, 2008); *Satterfield v. Johnson*, 434 F.3d 185, 195 (3d Cir. 2006) (applying equitable tolling principles); *see also Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears the burden of establishing entitlement to equitable tolling). Equitable tolling, however, must be invoked “sparingly,” and a complaint “who fails to exercise ... reasonable diligence may lose the benefit” of the doctrine. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994); *Butler v. Neier, Inc.*, ARB No. 16-086, ALJ Case No. 2014-STA-00068 (ARB Nov. 21, 2016).

Here, there is no dispute that Complainant was aware that she suffered an adverse employment by December 6, 2018. On this date, Respondent ended Complainant’s employment. Accordingly, the time period for Complainant to file her complaint begins to run on that date.² Complainant’s complaint with OSHA was filed on November 13, 2019, long after the 180 day period. Thus, her claim is untimely unless equitable tolling applies.

In her response to the Show Cause Order, Complainant argued that equitable tolling is appropriate here for several reasons. First, Complainant claimed that Respondent misrepresented the nature of the adverse employment action taken on December 6, 2018. Complainant stated that she was misled into believing that she had been laid off (that is, that temporary suspended with the expectation of returning to work at some point in the future) and not permanently

² The administrative record also contains several references to actions taken by Respondent that could be considered adverse employment actions, such as harassment or assignment to different work location. However, these all pre-date Complainant’s termination.

terminated. Complainant also asserts that extraordinary circumstances prevented her from timely filing her complaint. Specifically, she alleged that the June 2018 threat from a co-worker and the instruction from her supervisor not to report “fraud directly” constitute extraordinary circumstances.

Finally, although not specifically addressed by Complainant, equitable tolling may be appropriate if Complainant timely raised a claim that would have been covered under the ACA in the wrong forum. Here, Complainant would be entitled to equitable tolling if she alleged that she was retaliated against because she engaged in protected activity under the ACA in a forum other than OSHA prior to June 4, 2019 (or 180 days after her termination). However, for the reasons set forth below, equitable tolling is not appropriate in this case.³

Initially, Complainant has not shown that she was misled by Respondent or in any way lulled into forgoing prompt attempts to file her complaint. To demonstrate as much, Complainant would have to establish that Respondent’s actions induced her into filing her complaint in an untimely fashion. *Hyman v. KD Resources*, ARB No. 09-076, ALJ Case No. 2009-SOX-00020 (ARB Mar. 31, 2010). She has not done so here. Complainant alleges that Respondent mischaracterized the nature of her December 6, 2018 and led her to believe that she was not permanently terminated. Such a mischaracterization could be grounds for equitable tolling. *See, e.g., Hyman*, ARB No. 09-076 slip op. at 16-18 (equitable tolling was appropriate when the employer promised that complainant would be returned to work or awarded a consulting contract in the near future); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981) (employer promised plaintiff would be reinstated).

Here, however, even if Respondent did mischaracterize the nature of the December 6, 2018 adverse employment action, Complainant has not shown that the supposed mischaracterization contributed to her late filing. Irrespective of any representation Respondent may have made at the time, Complainant would have been aware that she had experienced some sort of adverse employment action (*i.e.*, that she had either been terminated or laid off). Moreover, Complainant filed her May 31, 2019 complaint with the CRC 175 days after her termination. The record does not show that this complaint in any way implicates the employee protection provisions under the ACA. Indeed, it does show the CRC forwarded the matter to EEOC, not OSHA. It was not until July 29, 2019 when Complainant filed a complaint with NJDCR alleging Respondent’s fraudulent approval of payments under the federal employees’ health insurance plan for certain prescription drugs, medical tests, and surgeries. Complainant has not demonstrated how any mischaracterization about the nature of her employment termination precluded her raising such allegations before that date. Thus, Complainant has not shown that Respondent misled or lulled her into filing her complaint out of time.

³ The ACA provides protections for employees who engage in protected activity. 29 U.S.C. § 218c. Relevant to this case, the ACA prohibits an employer from taking an adverse employment action against an employee who takes certain action under the reasonable belief that a violation of Title I of the ACA has occurred. 20 U.S.C. § 218c(a); 29 C.F.R. § 1984.102. Based on a review of Title I, the pertinent regulations, and relevant case law, the conduct complained of by Complainant could not be deemed to constitute a violation of the ACA. Title I of the ACA does not govern the administration of a private health insurance plans, such as Respondent’s federal employees’ health insurance plan.

Complainant's assertion that extraordinary circumstances prevented her timely filing also fails. Complainant alleges that, in June 2018, while she was still employed by Respondent, she was threatened by a co-worker and was instructed by a supervisor not to report what she believed to be fraud. Even assuming that this is true, Complainant has not shown how the alleged threat or the supervisor's instruction would have prevented her from filing this complaint in a timely manner. Once again, she was still able to file her complaint with the CRC prior to the filing deadline. Therefore, Complainant has not shown that equitable tolling is appropriate based on extraordinary circumstances.

The remaining option available to Complainant is to show that she timely raised "the precise statutory claim" in the incorrect forum. In other words, Complainant must show that she brought the right claim to the wrong place. *See, e.g., Ferguson v. Boeing Co.*, ARB No. 04-084 (Dec. 29, 2005). There is no dispute that the claim filed with the CRC on May 31, 2019, was filed within the 180 day time frame and that the complaints filed with the NJDCR and OSHA were filed late. Because Complainant's CRC complaint is the only complaint raised prior to the timeliness deadline, Complainant must show that she raised a complaint that would be covered under the ACA then.

Complainant has not included any documentation that shows that she raised a claim that would have been covered under the ACA (or even related to the ACA's subject matter) in her complaint with the CRC. The record contains email correspondences between Complainant and the CRC. These emails reference attached letters and attached complaints. Complainant has not included any of those attachments in her submission to OSHA or to OALJ.

The Show Cause Order advised Complainant to include information pertaining to her May 31, 2019 complaint to the CRC in her response. Complainant's response, however, included only documentations related to her performance evaluations and emails containing screenshot of what appear to be telephone call logs from the time she was employed by Respondent. Therefore, because Complainant has not offered any evidence to support finding she raised a claim that may have been covered by the ACA in her complaint to the CRC. Complainant cannot then demonstrate that she raised the 'precise statutory claim' in an improper forum.

Conclusion

As stated above, the burden is on the Complainant to demonstrate that equitable tolling is appropriate. *Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, ALJ Case No. 2007-CAA-00001 (ARB Sep. 30, 2008); *Satterfield v. Johnson*, 434 F.3d 185, 195 (3d Cir. 2006). Complainant has not carried her burden. Accordingly, the undersigned concludes that equitable tolling is not appropriate in this case and Complainant's complaint must be dismissed as untimely filed.

ORDER

The complaint is dismissed with prejudice.

SO ORDERED.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey