



Issue Date: 16 October 2014

Case Number: 2014-AIR-00018

In the matter of

GREGORY KELLY,

Complainant,

v.

ALABAMA PUBLIC SERVICE COMMISSION,

Respondent.

ORDER OF DISMISSAL

This case arises under multiple whistleblower statutes including the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121.¹

Procedural History

The procedural history of this matter appears in previous orders issued by me. However, I will briefly review the relevant history and applicable filings for purposes of clarity.

This case commenced on April 24, 2011 when Gregory Kelly (“Complainant” or “Kelly”) filed a letter with the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ” or “Office”) seeking a hearing and objecting to the dismissal letter issued by the Occupational Safety and Health Administration (“OSHA”), Region IV, the Atlanta Regional Office, U.S. Department of Labor, dated June 9, 2014. Complainant asserts, and Respondent does not dispute, that he was an employee of the Alabama Public Service Commission (“Respondent” or “Alabama PSC”) and that he was terminated by that employer on or around April 9, 2009.

Complainant’s original pleadings before OSHA and this Office contained claims under a variety of laws including the following:

1. Surface Transportation Assistance Act (“STAA”);

¹ As noted below, I determined that AIR 21 and several other statutes upon which Complainant was relying applied only to private employers and could not apply to the Alabama PSC, a state entity.

2. Toxic Substances Control Act (“TSCA”);
3. Energy Reorganization Act (“ERA”);
4. Sarbanes-Oxley Act (“SOX”);
5. Federal Rail Safety Act (“FRSA”);
6. Seamen’s Protection Act (“SPA”);
7. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”);
8. Dodd-Frank, Consumer Product Safety Improvement Act (“CPSIA”); and
9. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”).

I dismissed these claims *sua sponte* in my Notice of Docketing and Order to Show Cause dated July 15, 2014 because the statutes listed above concern private employers or employers in different specified sectors and do not include coverage of a public entity like the Alabama Public Service Commission. In this same order, I dismissed *sua sponte* Complainant’s claims under the other statutes because the OALJ has no role in the enforcement of the statutes listed below:

10. Noise Pollution and Abatement Act (NPAA”);
11. The Federal False Claims Act (“FCA”);
12. Title VI of the Civil Rights Act;
13. 11 (c) of OSHA;
14. Racketeer Influenced and Corrupt Organization Act (“RICO”); and
15. American Recovery and Reinvestment Act (“ARRA”).

Because his original filing was unclear, I also sought additional information from Complainant. Specifically, I requested evidence and argument addressing whether the remaining claims should be dismissed as: untimely; for lack of factual and legal bases; on grounds of claim or issue preclusion; for lack of subject matter jurisdiction; or for failure to state a claim upon which relief could be granted. The remaining claims were claimed to have arisen under the following statutes:

16. Safe Drinking Water Act (“SDWA”);
17. Federal Water Pollution Control Act (“FWCPA”);
18. Solid Waste Disposal Act (“SWDA”);
19. Clean Air Act (“CAA”);
20. Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”);
and
21. National Transit Systems Security Act (“NTSSA”).

In my July 15, 2014 Order, I also denied Complainant’s request for an indefinite stay of all proceedings because he failed to present any evidence of “mental disabilities and disorders” or identify a date by which he would be prepared to participate in these proceedings.

Parties were originally directed to respond to the July 15, 2014 Order to Show Cause on or before August 12, 2014. That date was later extended to September 3, 2014. Complainant filed responses on August 8 and 25, 2014. Respondent filed a brief and motion to dismiss on August 29, 2014.

In Complainant's August 25, 2014 response, he raised additional, unclear allegations under the following Acts and an Executive Order:

22. Patient Protection Act ("PPACA");
23. "FTC Fair Trade Laws";
24. Fair Credit Reporting Act ("FCRA");
25. Fraud Enforcement and Recovery Act ("FERA"); and
26. National Labor Relations Act ("NLRA");
27. Executive Order 11738.

In Respondent's August 29, 2014 Brief and Motion to Dismiss, Alabama PSC alleged that Kelly's complaint should be dismissed under the summary disposition provisions of 29 C.F.R §§ 18.40 and 18.41. Alabama PSC provided with its motion an affidavit stating Complainant was terminated on April 9, 2009 and asserted that the statutes of limitations for the listed environmental whistleblower laws and the NTSSA (30 and 180 days, respectively) have expired. Respondent therefore argued Kelly's complaint is untimely and should be dismissed with prejudice.

On September 10, 2014, I issued a Supplemental Order to Show Cause to allow Complainant to supplement his pleadings with evidence and argument addressing the question of whether the time limits applicable to the instant whistleblower complaint should be tolled due to "extraordinary circumstances."² I explained that Complainant had failed thus far to provide any evidence that would entitle him to equitable tolling from the date he was fired until the filing of his complaint. I specifically identified for Complainant what would constitute relevant responsive evidence, such as affidavits, business records, or medical records linked to the arguments he has made. I also informed Complainant of the prescribed requirements to meet his legal and factual burdens in order for his instant claims to be heard on the merits and provided him with a final opportunity to explain why his remaining environmental and NTSSA claims should not be dismissed as untimely.³

Applicable Standards for Excusing Untimeliness and Finding A Statute of Limitations Tolled

The standards for summary judgment and dismissal of a complaint for untimeliness have been previously identified and need not be repeated here in light of my determination on the timeliness of Kelly's complaint. *See* 29 C.F.R. §§ 18.40 and 18.41; Fed. R. Civ. P. 12 and 56.

As noted in my Supplemental Order to Show Cause, each of the environmental statutes at issue in this matter require the filing of a complaint within thirty days after the alleged violation occurs, 29 C.F.R. §24.103(d), and the remaining statute at issue, the National Transit Systems Security Act, requires that a whistleblower complaint be filed within 180 days of the occurrence of the alleged violation. 29 C.F.R. §1982.103(d). According to Kelly's complaint, these statutes were violated when he was fired by the Alabama PSC on April 9, 2009. Thus, at the latest,

² In my September 10, 2014 Supplemental Order, I ruled the allegations raised by Kelly in his August 25, 2014 response numbered 22 through 27 above were untimely raised, insufficiently pled, and outside the jurisdiction of this Office. Each of those claims were therefore dismissed.

³ Once again, I urged Complainant to retain counsel to assist him in this matter, but he remains *pro se* at this time.

Complainant would have had to file his environmental complaints on or before May 9, 2009 and his NTSSA complaint on or before October 6, 2009. Kelly's complaint was filed with OSHA, however, on April 24, 2014, nearly five years after the applicable statutes of limitations had run. Thus, to avoid dismissal, Complainant must demonstrate that these statutes of limitations should be tolled.

Whistleblower statutes of limitations are not jurisdictional, but 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). The Administrative Review Board ("ARB") has specifically adopted equitable modification in environmental whistleblower cases, *see, e.g.*, *Kelly v. U.S. Enrichment Co.*, ARB No. 13-063, ALJ No. 2012-ERA-15 (ARB Aug. 9, 2013), and relied on *School District of Allentown v. Marshall*, 657 F. 2d 16 (3rd Cir. 1981) for guidance. *Marshall* sets out three principal situations in which equitable tolling 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; and (3) when the plaintiff has raised the precise statutory claim at issue but done so in the wrong forum. *Id.* at 20. The ARB, like the Circuit Courts, has recognized that equitable tolling is an extraordinary remedy which is "typically applied sparingly." *Romero*, ARB No. 10-095, at 4, citing *Drew v. Dept. of Correction*, 297 F. 3d 1298, 1286-87 (11th Cir. 2002). "Extraordinary circumstances" is a high standard. *Kelly*, ARB No. 13-063, at 2; *see, e.g.*, *Stoll v. Runyon*, 165 F. 3d 1238, 1242 (9th Cir. 1999) (requiring "complete psychiatric disability" to cover the entirety of limitations period rendering the party "unable to read, open mail, [and] function in society"). Moreover, even where tolling may apply, a claimant must show that he exercised "due diligence in preserving his legal rights" and must still file within a reasonable time period. Equitable modification periods do not run indefinitely. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-79, at 5 (ARB May 27, 2010), *citing Wilson*, 65 F.3d. at 404 and *Irwin v. Dept. of Veteran Affairs*, 498 U.S. at 96.

DISCUSSION

As noted previously, 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). Kelly filed Complainant's Memorandum in Opposition to Defendant's Motion to Dismiss on September 10, 2014, the same day I issued the Supplemental Order to Show Cause. He subsequently filed a brief on September 23, 2014 in further response to my September 10, 2014 Supplemental Order to Show Cause. Nothing in the record before me, including Kelly's submissions viewed liberally, suggests that Alabama PSC actively misled Complainant as to his cause of action or that he every timely raised these precise claims but did

so in the wrong forum. On the contrary, the sole basis for his contention that the applicable statutes of limitations should be tolled is that he has “in some extraordinary way been prevented from filing his action.” After a careful review of the entire record, including Kelly’s Memorandum in Opposition to Defendant’s Motion to Dismiss received September 10, 2014, Complainant’s Supplemental Response received September 23, 2014, and the remaining facts alleged in his numerous filings, I conclude that the evidence does not support Kelly’s argument that extraordinary circumstances prevented him from timely raising the claims at issue in this case.

In my Supplemental Order to Show Cause, I directed Kelly to produce evidence demonstrating how Complainant misunderstood his legal rights and therefore could not have timely acted upon those rights by filing his instant claims. In his Supplemental Response to my Order to Show Cause, Complainant submitted evidence he alleged explained the untimeliness of his claim, including, for example, letters dated April 17, 2014 from the U.S. Department of Transportation (“DOT”), Office of Inspector General (“OIG”) and one dated June 26, 2014 from the Federal Aviation Administration (“FAA”).⁴ However, neither of these documents appears to have any bearing on his current claims. On the contrary, the letter from the DOT OIG indicates that Complainant provided information including “concerns related to ‘GOP State Officials [who allegedly] employed OJT engineering and ‘dumb-downed’ technical standards when addressing safety and health threats in minority communities.” Similarly, the letter from the FAA notes that Kelly’s complaint, which is not described in the letter, did not implicate any violation of FAA rules or regulations or involve a U.S. air carrier, contractor or subcontractor. Both agencies simply determined that Kelley’s allegations involved matters outside their respective jurisdictions.⁵ The letters, neither of which were authored by Kelly, fail to meet the high standard of “extraordinary circumstances” required to demonstrate that he did not understand his legal rights in time to properly exercise those legal rights. *See, e.g., Stoll v. Runyon, supra*, 165 F. 3d at 1242 (requiring “complete psychiatric disability” to cover the entirety of limitations period rendering the party “unable to read, open mail, [and] function in society”).

In addition, Complainant’s ability to submit letters to other federal agencies and navigate their complaint systems shows that he was able to understand and act upon his legal rights and manage his affairs as required. *See Hall v. EG&G Defense Materials, Inc.*, ARB No. 98-076, ALJ No. 1997-SDW-9, slip op. at 2 (ARB Sept. 30, 1998) (mental illness tolls statute of limitations only if it prevents sufferer from managing his affairs and understanding his legal rights). More recently, the ARB clearly held that, absent extraordinary events preventing a

⁴ Kelly also submitted certain documents pertaining to a civil case filed by him in the Northern Division of the U.S. District Court for the Northern District of Alabama, including a copy of time records apparently maintained by the attorney representing the defendants in that case. The litigation appears to have occurred prior to when Kelly was fired by Respondent on April 9, 2009, and the documents thus appear to be totally irrelevant to the issue of whether Kelly was prevented by extraordinary circumstances from understanding his legal rights and acting upon them within the relevant time limits in this case.

⁵ I note that the facts of the claims he presented to the DOT and FAA are not detailed in either of the letters Complainant submitted, and Kelly has not provided any correspondence or other documentation in his submissions describing the allegations he made or what statutes or regulations were implicated in those matters. Even if I were to assume that either complaint was the “precise statutory claim at issue” in this matter, it appears that neither complaint would have been timely filed inasmuch as the dispositions in both matters occurred in 2014, *i.e.*, at least four or five years after Kelly was fired by Alabama PSC in April 2009.

claimant from asserting their rights, tolling the statute of limitations is improper. *Woods v. Boeing-South Carolina*, 2011-AIR-9, at 2-3 (ALJ Dec. 10, 2012). While I note that Complainant has provided a copy of an SSA decision awarding him disability insurance benefits, that determination does not support his assertion that he is unable to manage his affairs. As described in my September 10, 2014 Supplemental Order to Show Cause, the SSA letter was a determination of disability *solely* for purposes of an award of disability insurance benefits under the SSA. The disabilities noted by the ALJ in his decision include, in addition to depression and anxiety, keratoconus, glaucoma, blindness in the left eye, multiple lumbar herniated nucleus pulposus with spinal stenosis, and probable left hemisphere transient ischemic attack. In concluding that Kelly was disabled for purposes of receiving Social Security disability benefits, the ALJ discussed *only* his physical disabilities noting, for example, that Kelly needed a cane to ambulate, he could not lift or carry more than 10 pounds, he could not use his hands for repetitive actions and he was unable to work around unprotected heights and moving machinery. A diagnosis of anxiety and major depressive disorder standing alone does not prove Complainant has been unable to manage his affairs. Complainant's voluminous pleadings in this and other matters similarly support the conclusion that Kelly retains the ability to conduct his personal business, *i.e.* to file complaints and to articulate his position before this and other administrative bodies. Accordingly, I do not find that Complainant was so disabled that he was unable to manage his affairs or to understand and act upon his legal rights.

Based on the foregoing, I find that Complainant has failed to present probative evidence of the extraordinary circumstances required for tolling the applicable statutes of limitations in this case. I find that Respondent's termination of Complainant's employment on April 9, 2009 was a discrete actionable act that extinguished the employer-employee relationship⁶, and Complainant was thus required to file his environmental whistleblower complaints on or before May 9, 2009 and his NTSSA complaint on or before October 6, 2009. Having failed to do so, I hereby dismiss his complaint in this matter as untimely.

SO ORDERED.

STEPHEN L. PURCELL
Chief Administrative Law Judge

⁶ *Cante v. New York City Dept. of Education*, ARB Case. No. 08-12, ALJ No. 2007-CAA-4 (July 31, 2009).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business 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. 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. § 1979.110(a). 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 must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(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-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(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. § 1979.110. 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. §§ 1979.109(c) and 1979.110(a) and (b).