



Issue Date: 23 March 2011

Case No.: **2010-CAA-00004**

In the Matter of:

STEPHEN P. DURHAM,
Complainant,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises under the Clean Air Act, 42 U.S.C.A. Section 7622 (hereinafter “the Act”), and implementing regulations at Title 29 Code of Federal Regulations Part 24. The Act states in pertinent part:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
- (2) testified or is about to testify in any such proceeding, or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C.A § 7622. The statute is implemented by regulations providing procedures for handling of discrimination complaints. 29 C.F.R. § 24. An employee who believes that he or she has been discriminated against in violation of the Act may file a written complaint within 30 days after the occurrence of the alleged violation. 29 C.F.R. § 24.3(b), (c).

Tennessee Valley Authority (TVA) (hereinafter “Respondent”), moves for summary decision on a complaint filed by Stephen P. Durham (hereinafter “Complainant”), based on the grounds that the complaint is time barred, barred by *res judicata* based on a previous Administrative Law Judge (ALJ) decision, and does not meet the elements of a prima facie case of prohibited retaliation. Complainant contends that the discriminatory action upon which his complaint is based is TVA’s failure to forward his request for reconsideration of his disability retirement benefits based on new evidence to TVARS. Therefore, he argues the claim is not time barred because he filed his complaint within 30 days of the request he made to TVARS that TVARS did not act on. That failure to act, he argues, is the retaliatory act. Further, the Complainant argues that because the alleged retaliatory act is new, the claim is not barred by *res judicata*. Finally, he argues that with construing ambiguities in the non-movant’s favor and liberally construing the Complainant’s *pro se* complaint there remain genuine issues of material fact in dispute, so summary judgment should not be granted.

ISSUES

1. Whether Respondent’s motion for summary decision to dismiss the complaint as untimely should be granted.
2. Whether Respondent’s motion for summary decision to dismiss the complaint as barred by *res judicata* should be granted.
3. Whether Respondent’s motion for summary decision to dismiss the complaint for not stating a prima facie case should be granted.

FACTS

The Complainant is a former employee of the Respondent. He was placed on “do not work” status in December 2004 and terminated on March 27, 2005. On April 15, 2005 he applied for disability retirement and was denied.

On October 13, 2005 the Complainant filed a complaint with the United States Department of Labor, Occupational Safety and Health Administration (OSHA), claiming that TVA denied his participation in the company’s disability program as retaliation for his whistle-blowing activities. Specifically, he claimed that TVA managers had falsified documents to assist the Tennessee Valley Authority Retirement System (TVARS) in denying his claim. OSHA denied his claim and the Complainant appealed to the Office of Administrative Law Judges (OALJ). ALJ Larry W. Price issued a Recommended Decision and Order granting Respondent’s Motion for Summary Decision on February 13, 2006. The Complainant did not file a petition for review.

On November 16, 2006, TVARS notified the Complainant in a letter that his request for disability retirement had been considered twice and he was deemed not eligible and TVARS now considered the matter closed. In a letter to TVARS dated May 27, 2009, and addressed to the TVARS Executive Secretary, the Complainant submitted a new letter from his doctor regarding his claimed disability and requested TVARS reopen his claim. TVARS did not reconsider.

On August 19, 2009 the Complainant filed a complaint with OSHA, contending that on August 4, 2009 he had submitted a new request to TVARS for reconsideration of his disability retirement request and that he was being retaliated against because he was a whistle-blower. The letter stated:

On August 4, 2009, I applied for disability through the Tennessee Valley Authority Retirement System. I have applied for disability through TVARS before and was denied benefits. TVARS maintained that my supervisor in 2004, Greg Barbee, had no knowledge of my disability and had signed statements toward that fact. They also informed me that my physician had put me under no restrictions when he filled out the TVARS disability form (there was no space provided for physical limitations). I contacted my physician and was provided with a letter of clarification on my physical limitation beginning in December, 2004. This information was provided to TVARS along with a request from me to have two TVA management forms (statement by Greg Barbee and Donna Green) be struck from my disability application due to the fact my supervisor "did" know of my disability and testified under oath, with Donna Green as his counsel, to this fact. This sworn statement was provided to TVARS.

TVA has refused to correct their statements to TVARS in an attempt to have my TVARS disability claim denied.

OSHA dismissed the complaint on January 12, 2010, stating that the claim was time barred, it was barred based on *res judicata*, and that TVA was the improper party.

In a letter dated January 27, 2010, the Complainant appealed OSHA's ruling. He stated: "The actions of the Tennessee Valley Authority on 17 November 2009, when my employee medical records were not sent to the Office of Worker's Compensation regarding a claim, were adverse personnel actions subject to whistle blowing provisions of the various acts." He wrote later in the letter: "Complaint stressed the fact that his disability application in August 2009, attempted to have Complainants entire TVA medical file entered for the record, have new probative evidence entered for the record, and to have Respondents false statements corrected for the record. This request was pursuant to Complainants' right and benefit of his employment... TVA Retirement Services personnel are TVA employees, and are not employed by TVARS. TVA Retirement Services personnel handle the entire application process."

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Under the Rules for Practice and Procedure for Administrative Hearings, any party may "move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. § 18.40(a). A party opposing the motion may not rest on the mere allegations or denials of the motion but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c); Peppers v. Coats, 887 F.2d 1493, 1498 (11th Cir. 1989) (stating that when "a nonmoving party's response to the summary

judgment motion consists of nothing more than mere conclusory allegations then the court must enter in the moving party's favor.") The court must view the facts, and all reasonable inferences drawn from those facts, in the light most favor to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). Summary decision is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317 (1986). While the court will not weigh the evidence, a mere scintilla of evidence will not suffice to defeat the motion. Johnson v. Fleet Fin., Inc., 4 F.3d 946, 949 (11th Cir. 1993).

ANALYSIS

Respondent argues that Complainant's claim should be barred as untimely. The Act requires that a written complaint be filed within 30 days of the discrimination or termination. Section 24.3(b) of the regulations clearly states that: "Any complaint shall be filed within 30 days after the occurrence of the alleged violation. For the purpose of determining timeliness of filing, a complaint filed by mail shall be deemed filed as of the date of mailing."

Respondent contends that in Complainant's complaint to OSHA the only alleged act that could support a claim against TVA is a statement made by his former supervisor in 2004. Thus, as Respondent correctly argues, Complainant's 2009 complaint was made well outside of the 30 day period in which he had to file a complaint about that act. Complainant argues in his response to Respondent's motion for summary judgment that the retaliatory act upon which his complaint is based is actually the failure of TVARS to reopen his disability retirement claim after his request that TVARS do so on August 4, 2009.¹ Although he made no such assertion in his complaint to OSHA, Complainant suggests in his appeal of OSHA's decision and in his response to Respondent's motion for summary judgment that it is TVA employees who manage the application process for disability retirement.²

Complainant's August 4, 2009 request to reopen his disability retirement claim came approximately four years after TVARS first denied his claim and more than two and a half years after TVARS sent a letter informing the Complainant that TVARS considered his claim closed. Even if TVA was involved in a decision not to reopen Complainant's disability retirement claim, which I find there is no evidence of, I find the Complainant's attempt to have the closed claim reopened years later did not prompt a new retaliatory act that would reset the tolling of the 30

¹ The Complainant's letter to TVARS is dated May 27, 2009.

² Although Complainant makes this assertion, he has introduced no evidence to support his contention that a TVA employee received his request to reconsider his claim and decided not to forward it to TVARS. His May 27, 2009 request letter is addressed to "Executive Secretary, Tennessee Valley Authority Retirement System," not to TVA. Although he submitted a TVA Retirement Services organizational chart with his brief, the chart shows only that TVA has employees involved in some aspect of retirement services and provides no evidence that either his letter was received by a TVA employee or that a TVA employee made any decision with regards to it that could qualify as a retaliatory act or even that such a role is one normally taken by TVA. As Judge Price has previously found, TVARS is a legal entity separate and distinct from TVA and is not controlled by TVA. Durham v. TVA, 2006-CAA-00003 (Feb. 13, 2006). Therefore, I find Complainant has not provided any evidence that any alleged adverse employment action that was taken was taken by TVA, which he would have to prove to receive protection under the Acts.

day window in which a claim must be filed. TVARS had declared the claim closed, therefore no new action was required or warranted from TVARS and its inaction is thus not a new retaliatory act.

Complainant also suggests in his January 27, 2010 appeal of OSHA's decision that TVA's retaliatory act was its failure to send Complainant's medical records to OWCP on November 17, 2009. Complainant appears to have dropped this contention in his response to Respondent's motion for summary judgment. To the extent that Complainant does seek to pursue such a claim, I find it to be untimely as well as improperly raised upon appeal rather than in his OSHA complaint.

CONCLUSION

Based on the foregoing, and having given Complainant the benefit of all reasonable doubt with respect to the evidence on which he relies, I find that the Clean Air Act complaint filed by Complainant was untimely under the Act and the regulations at 29 C.F.R. Section 24.

In conclusion, the Court finds there is no genuine issue as to any material fact regarding the timeliness of the complaint. Therefore, Respondent's motion to dismiss the complaint as untimely shall be granted as a matter of law.

ORDER

It is hereby **ORDERED** that the complaint filed by Stephen P. Durham be **DISMISSED** as untimely.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/amc
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., 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.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.