U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 September 2012

Case No. 2012-CAA-4

In The Matter Of:

Pong Wu,
Complainant

v.

Association of Central Oklahoma Governments,
Respondent

RECOMMENDED ORDER OF DISMISSAL

This case arises under the employee protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7622. The enforcing regulations are at 29 C.F.R. Part 24. For the reasons set forth below, the Complainant's complaint is DISMISSED.

PROCEDURAL BACKGROUND

The Complainant, Pong Wu, filed a complaint on September 19, 2011, with the Occupational Safety & Health Administration (OSHA), alleging that he was discharged on September 14, 2011, in retaliation for suffering a back injury at work, and incurring medical expenses. On May 30, 2012, the Secretary issued a determination dismissing Mr. Wu's complaint, finding that there was no reasonable cause to believe that the Respondent violated Section 11(c) of the Occupational Safety & Health Act. Mr. Wu did not further pursue this complaint.[1]

However, during the course of the OSHA investigation, Mr. Wu raised additional claims, including his claim that he was retaliated against for complaining about safety conditions, initiating an OSHA complaint, raising environmental complaints, and for being Asian. On June 8, 2012, the Secretary issued a determination that Mr. Wu's May 2, 2012, complaint alleging that the Respondent retaliated against him in violation of the CAA was untimely, and his complaint was dismissed.[2] Mr. Wu submitted his objections to this finding on July 14, 2012.[3]

[1] In his objections to the Secretary's June 8, 2012, determination, the Complainant discussed his claims in this matter at length, as well as his disagreement with the Secretary's findings. However, even if these objections are construed as objections to the May 30, 2012, determination, they are clearly untimely.
[2] The Secretary also determined that there was no reasonable cause to believe the Respondent violated Section 11(c).
[3] The Respondent argues that the Complainant's submission of objections to the June 8, 2012 determination was untimely. The Complainant's letter forwarding his objections was dated July 14, 2012, although the postmark

On July 23, 2012, I issued an Order directing the parties to address the timeliness issue. The Complainant and Respondent submitted written briefs on August 21, 2012; the Complainant and Respondent submitted response briefs on September 5, 2012.

DISCUSSION

Legal Standard for Summary Decision

The purpose of summary judgment is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Green v. Ingalls Shipbuilding, Inc*., 29 BRBS 81 (1995); *Harris v. Todd Shipyards Corp*., 28 BRBS 254 (1994). An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact, and that a party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp*., 33 BRBS 204, 207 (1999).

Whistleblower claims under environmental statutes such as the Clean Air Act (CAA) must be filed within 30 days of when the complainant becomes aware of the allegedly retaliatory adverse employment action against him or her. 29 C.F.R. § 24.103(d)(1). Though the 30-day statutory limitations period for filing environmental employee protection complaints is "extremely brief," that filing period was the mandate of Congress and an agency is not permitted "to disregard a limitations period merely because it bars what may otherwise be a meritorious cause." *Prybys v. Seminole Tribe of Florida*, 1995-CAA-15 (ARB Nov. 27, 1996) (citing *School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981)). The Administrative Review Board ("ARB" or "Board") has found that the time limits for filing whistleblower claims under these statutes must be "scrupulously observed." *Id.*

Based on the parties' submissions, the following facts are not in dispute.[4] The Complainant was employed by the Respondent, as an Associate Transportation Planner at the Respondent's Transportation & Planning Services Division. The Complainant was discharged by the Respondent on September 14, 2011, due to unacceptable workplace performance.

In his brief, the Complainant stated that, beginning in August 2011, he made numerous reports to the Department of Transportation Inspector General with allegations of wrongdoing by the Respondent (CX 1, 2).[5] After he was discharged on September 14, 2011, on September 19, 2011, the Complainant telephoned OSHA and spoke to a staff person, and was assigned an OSHA safety complaint number and whistleblower case number. The Complainant set out the issues he discussed during that phone conversation, principally involving health and safety

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indicates that it was mailed on July 13, 2012. It was filed in our office on July 17, 2012. As the time computations under 29 C.F.R. 18.4 provide five additional days when a party is required to take action after service of a document, and five days for submission by mail, I find that the Complainant's objections were timely filed.

[4] In their initial briefs, the Claimant submitted Exhibits 1 through 7 (CX), and the Respondent submitted Exhibits A through F (RX). In their response briefs, the Claimant submitted Exhibits 1 through 6 (CXR), and the Respondent submitted Exhibits 1 through 4 (RXR).

[5] None of these reports implicated violations of the Clean Air Act, or any other environmental statutes.

issues, as well as alleged false reporting of VMT (vehicle miles traveled) data. The Complainant did not indicate in any fashion that he made any claim during that conversation that he was fired in retaliation for reporting or complaining about violations of the Clean Air Act by the Respondent.

According to the Department of Labor Discrimination Case Activity Worksheet completed on September 19, 2011, the Complainant alleged that he was fired for sustaining a back injury (not for reporting the injury), and causing the Respondent to accrue medical expenses (RX C). Nor does the report reflect that the complaint was classified under the CAA or any other environmental whistleblower provisions.

The Complainant sent a letter dated November 3, 2011, to the OSHA investigator, repeating his September 19, 2011, complaints (CX 3). His allegations included "reckless ignorance of employee's safety and health," discriminatory treatment by the Employer with respect to treatment for his injury, and failure of the Respondent to develop OSHA compliance manuals or perform safety consciousness training. He alleged that because he reported the Respondent's discrimination, he was discharged. But again, the Complainant did not indicate in any fashion that he was fired in retaliation for reporting or complaining about violations of the Clean Air Act by the Respondent.

On November 28, 2011, the Complainant sent an email to an OSHA staff person, again discussing his work injury, as well as his complaint that the Respondent did not have OSHA compliance manuals, or work safety conscious training (CX 5). He again claimed that he had been "discriminated by ACOG with different treatment and retaliated due to my complaints of discrimination."

The Complainant made those same complaints in a letter dated March 23, 2012, adding claims that the Respondent falsified documents, and subjected him to racial discrimination (CX 4). He again discussed his claim of the Respondent's "violation and carelessness about employee's health and safety, during the years from 2009 to 2011." The Complainant claimed that he was discharged because he reported the Respondent's "deliberate violation of public safety and health," and objected to its "intentional fraud activities etc."

The Complainant attached a transcript of his meeting on February 29, 2012, with Investigator Anthony Incristi (CX 6).[6] According to that transcript, the Complainant repeated his claim that the Respondent engaged in fraudulent reporting of traffic volume, which misrepresented the level of air pollution.

In a letter dated April 30, 2012, and apparently emailed to OSHA on May 2, 2012, the Complainant stated that during the February 29, 2012 meeting, he reported the Respondent's violation of the CAA, as well as "related federal regulations on Transportation Greenhouse Gas Emissions. . . ." (CX 7). The Complainant discussed the basis for his claim, and charged that

> the employer has violated the Clean Air Act and related federal laws when it fired me for reporting their illegal practices through request me use false and inappropriate wrong data

[6] It is not clear who prepared this transcript, and there is no information about its authenticity.

for federal funded study/analysis on region's true level in Transportation Greenhouse Gas Emissions and Vehicle-Miles of Travel (VMT) five years from last study.

The unauthenticated transcript submitted by the Claimant does not include any complaints that the Respondent violated the CAA. The first time that the Complainant mentioned the CAA, or violations thereof, was in this April 30, 2012, letter, transmitted to OSHA on May 2, 2012.

Indeed, in his objections to the Secretary's June 14, 2012, determination, the Complainant noted that in his call to OSHA on September 19, 2011, he reported that the Respondent had retaliated against him for protected activities that included refusal to make a fraudulent analysis of the reduction of VMT, raising concerns about workplace hazards and changing injury records to mislead OSHA and DOL, false statements to OSHA, and disparate medical treatment for his work-related injury; he did not claim that he reported any violations of the CAA, or any retaliation as a result of protected activity under the CAA. The Complainant noted that on May 2, 2012, he "**also** reported OSHA about my identified violation of Clean Air Act associated with one of previously complained the employer's multiple illegal activities over the phone in September 19, 2011." (emphasis added).[7]

Even construing all of the available documentation in the light most favorable to the Complainant, there is nothing to indicate that he made a complaint to OSHA that he was discharged in retaliation for raising concerns about Respondent's violation of the CAA, until his April 30, 2012 letter, emailed to OSHA on May 2, 2012.[8]

The Complainant has not relied on the principles of equitable tolling, and I find that equitable tolling is not applicable. Thus, the three specific instances where equitable tolling has been applied to time limitations for the filing of an appeal in whistleblower cases do not apply to the undisputed facts of this claim. *See, English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988); *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981); *Hill v. Department of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995) (employer actively concealed or misled employee); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978); *Crosier v. Westinghouse Hanford Company*, 1992-CAA-3 (Sec'y, January 12, 1994) (employee was prevented from asserting his right in some extraordinary way); *Gutierrez v. Regents of the University of California*, 1998-ERA-19 (ARB, November 8, 1999) (complainant raised precise statutory claim in wrong forum).

A timely complaint is an essential element of the Complainant's case. Without it, his claim fails and the Respondent is entitled to judgment in its favor as a matter of law. In this case, the correspondence clearly reflects that the Complainant did not make his complaint under the CAA in a timely fashion. Nor has the Complainant even alleged any specific facts that could make timeliness a disputed issue in this case. Therefore, I find that it is undisputed that the

[7] I note that nowhere does the Complainant claim that he was discharged by the Respondent in retaliation for reporting violations of the CAA, or otherwise engaging in any protected activity. The basis for his invocation of the CAA appears to be his claim that he reported such violations to OSHA, after he was discharged.

[8] Even if I were to accept the Complainant's claim that he reported violations of the CAA during the February 29, 2012, meeting, his complaint was untimely.

Complainant's complaint was untimely, which entitles the Respondent to judgment as a matter of law and dismissal of the case against it.

CONCLUSION

For all of the foregoing reasons, I find that the Complainant failed to file a claim of discrimination under the CAA within 30 days from the date of the alleged violation, and that the doctrine of equitable tolling is not applicable in this case. Thus, the Complainant's claim under the CAA is time-barred.

ORDER

Accordingly, it is hereby recommended that the Complainant's claim be dismissed.

SO ORDERED.

Digitally signed by Linda Chapman
DN: CN=Linda Chapman,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Washington, S=DC, C=US
Location: Washington DC

LINDA S. CHAPMAN
Administrative Law Judge

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.