

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 August 2019

**CASE NOS.: 2019-CER-1
2019-ERA-7
2019-CAA-4
2019-CAA-5¹**

IN THE MATTER OF

GREGORY KELLY

Complainant

v.

STATE OF ALABAMA PUBLIC SERVICE COMMISSION

Respondent

DECISION AND ORDER

In June 2018, January 2019 and February 2019, Gregory Kelly (“Kelly” or “Complainant”) filed multiple complaints with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”) under various whistleblower statutes, including, but not limited to, the Clean Air Act (“CAA”), 42 U.S.C. § 7622.² *See also* 29 C.F.R. § 24.100, *et seq.* By letter, OSHA notified Complainant that it was dismissing his complaints because they were untimely and failed to establish reasonable cause to believe that whistleblower retaliation had occurred.³ Complainant filed objections and requests for hearing with the Office of Administrative Law Judges (“OALJ” or “Office”) challenging OSHA’s determinations.

Because it appeared that OALJ lacked jurisdiction to adjudicate the matters alleged in the complaint, the complaints were untimely, and they were duplicative of previous requests for hearing, I issued Orders to Show Cause on April 12, 2019 and May 3, 2019. Those Orders directed the Complainant to show cause why these matters should not be dismissed for the above reasons and provided him an opportunity to submit additional evidence and argument. Complainant’s submissions received on May 16 and 20, 2019, were nonresponsive to the issues noticed in the Orders to Show Cause.

¹ These cases are consolidated pursuant to 29 C.F.R. § 18.43 because they concern the same parties and the same or similar allegations of law and fact.

² The complaints are dated June 18, 2018; January 18 and 31, 2019; and February 4, 25, and 27, 2019.

³ OSHA’s letters are dated January 23, 2019; February 20, 23, and 25, 2019; and March 14, 2019.

DISCUSSION

Viewed deferentially, Complainant alleges that public officials in the State of Alabama retaliated against him for protected whistleblowing activity when they took the following adverse actions: (1) Terminated his state employment on April 9, 2009; (2) constructively denied him employment on December 16, 2014; (3) constructively discharged his son's employment on May 26, 2015; (4) constructively terminated his wife's employment on November 18, 2016; and (5) constructively denied him employment on January 11, 2017. Viewed less deferentially, Complainant alleges a conspiracy to commit systemic fraud, civil rights abuses, and criminal violations by public and private officials in the state.

Dismissal of whistleblower complaints without a hearing may be appropriate for untimeliness, lack of subject-matter jurisdiction, and failure to state a claim under which relief may be granted. *See* 29 C.F.R. § 18.70. As discussed below, I find that the matters alleged are untimely or are outside OALJ's jurisdiction.

A. Timeliness

With respect to the 19 whistleblowing statutes under which an individual may request a hearing before OALJ, complaints under those statutes are required to be filed with OSHA within the following timeframes after the alleged discriminatory acts: CAA—30 days; Toxic Substances Control Act ("TSCA")—30 days; Solid Waste Disposal Act ("SWDA")—30 days; Federal Water Pollution Control Act ("FWPCA")—30 days; Safe Drinking Water Act ("SDWA")—30 days; Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")—30 days; AIR21—90 days; Pipeline Safety Improvement Act ("PSIA")—180 days; Surface Transportation Assistance Act ("STAA")—180 days; Affordable Care Act ("ACA")—180 days; Energy Reorganization Act ("ERA")—180 days; SOX—180 days; FRSA—180 days; NTSSA—180 days; Consumer Product Safety Improvement Act ("CPSIA")—180 days; SPA—180 days; CFPA—180 days; FSMA—180 days; and MAP21—180 days. Failure to file a complaint within those timeframes may result in dismissal of a matter without a hearing without reaching the merits of the complaint. *See, e.g., Tardy v. Delta Air Lines*, ARB No. 16-077, ALJ No. 2015-AIR-026 (Oct. 5, 2017).

In accordance with well-established Board precedent, such limitations periods are not jurisdictional and are subject to equitable modification. But, as the Board has recognized, equitable relief from limitations periods is "typically extended . . . only sparingly." *Woods v. Boeing-South Carolina*, ARB No. 11-067; ALJ No. 2011-AIR-009 (ARB Dec. 10, 2012). The party seeking to be relieved from the tolling bar bears the burden of justifying the application of equitable modification principles.

In determining whether to toll a statute of limitations, the Board has recognized four principal situations in which equitable modification may be appropriate: (1) when the employer has actively misled the complainant regarding the cause of action; (2) when an extraordinary circumstance prevented a timely assertion (such as physical or mental incapacity); (3) when the complainant 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 complainant into foregoing prompt attempts to vindicate his rights. These principle situations are not exhaustive.

Complainant has failed to allege any facts that, if proven, could show that his complaints were timely filed or that could justify the application of equitable modification principles. Viewed deferentially, the most recent adverse action (denial of employment) occurred on January 11, 2017, the date of the letter notifying him that his employment application was not considered. Assuming an additional five days for mail delivery, he would have received notice of the adverse action no later than January 16, 2017. However, his first complaint was filed approximately 732 days later on January 18, 2019. Thus, the complaints are untimely. Further, Complainant has not alleged a basis for equitable modification despite notice and an opportunity to provide additional evidence and argument on the issue. Accordingly, his complaints of whistleblower retaliation under the 19 whistleblower statutes under OALJ's jurisdiction must be dismissed as untimely.⁴

B. Subject-Matter Jurisdiction

Complainant's remaining allegations invoke a number of statutes that are not within OALJ's subject-matter jurisdiction. Subject-matter jurisdiction "refers to a tribunal's power to hear a case." *Morrison v. Nat'l Australian Bank*, 130 S. Ct. 2869, 2877 (2010). As the Administrative Review Board ("Board") explained, OALJ's subject-matter jurisdiction is invoked "when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court's action is not obviously frivolous." *Sasse v. Department of Justice*, ARB No. 99-053, ALJ No. 98-CAA-007, slip op. at 2 (Aug. 31, 2000). Complainant bears the burden of establishing subject-matter jurisdiction.

In addition to allegations of retaliation for whistleblowing, Complainant alleges wide-ranging violations of law over which OALJ has no role. For example, OALJ does not have jurisdiction over Section 11(c) of OSHA. Rather, if the Secretary, after investigation (by OSHA investigators), has determined that Section 11(c) has been violated, the Secretary may file a cause of action in the U.S. District Court. *See* 29 U.S.C. § 660(c)(3). His complaints of retaliation under the International Safe Container Act ("ISCA") and the Asbestos Hazard

⁴ I note that these whistleblowing statutes pertain only to specific types of industries and individuals. For example, the Federal Railroad Safety Act ("FRSA") (railroad carriers); Moving Ahead for Progress in the 21st Century Act ("MAP21") (motor vehicle manufacturers, part suppliers, and dealerships); Sarbanes-Oxley Act ("SOX") (publicly traded companies); Consumer Financial Protection Act ("CFPA") (consumer financial products); Toxic Substances Control Act ("TSCA") (private employers); and the Aviation Investment and Record Act in the 21st Century Act ("AIR21") (air carriers) are not applicable to state and local governments. Further, the National Transit Systems Security Act ("NTSSA") (transit employees); Seaman's Protection Act ("SPA") (seamen); FDA Food Safety Modernization Act ("FSMA") (employees of food manufacturers, distributors, packers, and transporters); Energy Reorganization Act ("ERA") (nuclear industry employees) pertain to employees working in those specific industries. Complainant only vaguely suggests that he was employed by the State of Alabama as an "engineering professional." Accepting as true that he was a state employee, it appears that the proper parties would not be present to satisfy subject-matter jurisdiction under most if not all of these statutes. Further, Complainant has not clearly identified his alleged protected activity. Nonetheless, there is no need to parse through the complaints in further detail, as they are untimely in any event.

Emergency Response Act (“AHERA”) likewise fall under Section 11(c) which provides no right of appeal to OALJ. *See* 15 U.S.C. § 2651; 46 U.S.C. § 80507.

Similarly, Complainant’s allegations that individuals have violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”) are beyond OALJ’s jurisdiction. While Section 1107 of the Sarbanes—Oxley Act (“SOX”) amended the RICO statute, *see* 18 U.S.C. § 1513(e), Section 1107 is enforceable solely by the Department of Justice and the Department of Labor has no jurisdiction over such matters. The provisions of the Eliminating Kickbacks in Recovery Act of 2018 (“EKRA”), the Lacey Act, and the Travel Act must be pursued in U.S. District Court. Neither the Secretary nor OALJ has a role in enforcement actions arising under Title VI of the Civil Rights Act of 1964 (“Title VI”); the American Recovery and Reinvestment Act of 2009 (“ARRA”); the Act to Prevent Pollution from Ships (“APPS”); the 1990 Oil Pollution Act; and the Marine Protection, Research, and Sanctuaries Act (“MPRSA”). While I have done my best to directly address the majority of the other statutes cited by Complainant, a more detailed list would be unwieldy and impractical. It is sufficient to say simply that the matters raised outside of the 19 whistleblower statutes referenced above are not of “a kind or class” which OALJ is authorized to adjudicate. Accordingly, Complainant’s remaining allegations are dismissed for lack of subject-matter jurisdiction.

ORDER

For the reasons discussed above, these captioned matters and the expansive complaints raised therein are DISMISSED.⁵

J. ALICK HENDERSON
Administrative Law Judge

⁵ As noticed in the Orders to Show Cause, Complainant filed prior requests for hearing with OALJ alleging the same or similar facts and legal theories. *See* ALJ No. 2019-CAA-001 (May 4, 2019); ALJ No. 2019-CAA-002 (May 4, 2019); ALJ No. 2019-CAA-003 (May 4, 2019); ALJ No. 2019-WPC-001 (Oct. 30, 2018); ALJ No. 2015-ACA-003 (Sept. 29, 2015); ALJ No. 2015-ACA-004 (Sept. 29, 2015); ALJ No. 2015-ACA-006 (Sept. 29, 2015); ALJ No. 2015-ACA-007 (Sept. 29, 2015); ALJ No. 2015-ACA-008 (Sept. 29, 2015); ALJ No. 2015-SOX-015 (Sept. 29, 2015); ALJ No. 2014-SDW-002 (Jan. 15, 2015); ALJ No. 2014-ACA-042 (Jan. 15, 2015); ALJ No. 2014-SOX-042 (Jan. 15, 2015); ALJ No. 2014-ACA-003 (Jan. 15, 2015); ALJ No. 2014-SOX-002 (Jan. 15, 2015); ALJ No. 2015-ACA-002 (Mar. 30, 2015); ALJ No. 2014-SOX-030 (Jul. 7, 2014); ALJ No. 2014-CAA-004 (Oct. 23, 2014); ALJ No. 2014-PSI-002 (Oct. 23, 2014); and ALJ No. 2014-AIR-018 (Oct. 16, 2014). Those cases were dismissed for lack of subject-matter jurisdiction, untimeliness, and as duplicative. Relitigation of these claims may be barred by the doctrines of res judicata and/or collateral estoppel. However, in light of the above, I decline to address the issue further.

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 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 (e-File) 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

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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.

If filing paper copies, 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 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 may include 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. 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 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.