



Issue Date: 28 February 2013

Case No.: 2013-CPS-00001

In the Matter of

EDWARD JAMES DOUD
Complainant

v.

ROCKLINE INDUSTRIES
Respondent

DECISION AND ORDER
DISMISSING COMPLAINT

The above-captioned matter arises from a complaint of employment discrimination filed Edward James Doud (“Complainant”) against Rockline Industries (“Respondent”) under Section 11(c) of the Occupational Safety and Health Act (“OSH Act”), 29 U.S.C. § 660(c); the Food Safety Modernization Act of 2011 (“FSMA”), 21 U.S.C. § 399d(a); and Section 219 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), 15 U.S.C. § 20871, and is governed by the CPSIA’s implementing regulations found at 29 CFR Part 1983.¹ On December 19, 2012, the instant matter was referred to the Office of Administrative Law Judges (“OALJ”) for formal hearing pursuant to the written request Complainant submitted.

In a letter dated November 13, 2012, the Occupational Safety and Health Administration (“OSHA”) stated that the Complainant filed a formal complaint on November 1, 2012 in which he alleged that his termination by Respondent in November 2010 was retaliation in violation of the OSH Act, the FSMA and the CPSIA. In its November 13, 2012 letter, OSHA advised Complainant that his complaint would be dismissed as untimely filed under both the OSH Act and the CPSIA. OSHA also advised the Complainant that it lacked jurisdiction to investigate under the FSMA because the adverse action at issue, i.e., the Complainant’s termination, occurred prior to the date on which the FSMA was enacted.² (OSHA Case No. 2-2585-12-002).

Under the OSH Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 30 days of the violation. Under the CPSIA and the

¹ The CPSIA was enacted on August 14, 2008 with §2087 being effective on August 14, 2008. The interim final regulations were effective August 31, 2010; 75 Fed. Reg. 53533 - 53544. Final regulations were effective on July 10, 2012; 77 Fed. Reg. 40494 – 40509.

² FMSA is also referenced as Pub. L. 111–353 which was enacted on January 4, 2011.

FSMA, an employee alleging discharge or other discrimination must file a complaint with Secretary of Labor within 180 days of the violation. The regulations implementing the CPSIA found at 29 C.F.R. § 1983.103(d) provide that a complaint of discrimination must be filed within 180 days of the alleged violation, but that “the time for filing of a complaint may be tolled for reasons warranted by applicable case law.” The language of FSMA does not provide that it applies retroactively to actions which occurred *prior* to its enactment. Only the CPSIA and FSMA provide for right to a formal hearing on the record before the United States Department of Labor OALJ.

By my Order To Show Cause (“OSC”) issued on January 11, 2013, the Complainant was directed to demonstrate why his complaint should not be dismissed (1) as untimely filed with regard to the OSH Act or the CPSIA and (2) for lack of jurisdiction with regard to the FSMA. The applicable standards for tolling the statute of limitations and the apparent jurisdictional deficiency were outlined in the OSC. The Complainant’s timely response to the OSC dated January 25, 2013 and received by this office on January 28, 2013, has been considered. For the reasons discussed below, the complaint is DISMISSED as untimely filed.

Discussion

This complaint is presumably based on actions occurring in New Jersey, which is within the jurisdiction of the U.S. Court of Appeals for the Third Circuit and therefore its standards apply in this matter. Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981), *citing Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978). The Administrative Review Board has held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *See e.g., Doyle v. Alabama Power Co.*, 1987 ERA 53 (Sec’y, Sept. 29, 1989).

The Complainant does not dispute that his complaint was untimely filed. Indeed in his request for a hearing before this office, the Complainant stated that the following:

I realize that this claim is untimely. However due to catastrophic [sic] flooding in the previous two years which [sic] caused my family to be displaced for extended periods of time, I was not able to take action on this matter.

See Complainant’s hearing request dated December 19, 2012.

In his response to the OSC, the Complainant extensively outlines the factual allegations in support of his claim of unlawful retaliation. As to the reasons for the untimely filing of his complaint, the Complainant merely states that he “was unable to take action on this matter because of the problems [he] was faced with.”

While I am not unsympathetic to the Complainant's purported problems, I find that he has not shown that tolling of the statute of limitations is proper in this matter. He does not contend that he was actively misled by the Respondent regarding the cause of action or that he previously raised his claims of unlawful retaliation in the wrong forum. The Complainant instead contends that he was prevented from asserting his rights due to 'problems' – ostensibly the flooding and family displacement he mentioned in his hearing request. The Complainant's vague assertion of hardship, however, is insufficient to show he was prevented from timely asserting his rights in some extraordinary way. Therefore, I find a tolling of the applicable time limits set forth under the CPSIA is not appropriate in this matter.

As for any claim under the FSMA, the Complainant's response to the OSC did not address how that statute enacted *after* his termination by the Respondent at issue would confer jurisdiction in this matter.

ORDER

Based on the considerations discussed herein, the complaint is DISMISSED as untimely filed under the CPSIA and for lack of jurisdiction under the FSMA.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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. 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 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. § 1983.110(a). Your Petition must specifically identify the

findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1983.110(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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1983.110(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. §§ 1983.109(e) and 1983.110(b). 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. § 1983.110(b).