



Issue Date: 25 September 2019

Case No.: 2019-ERA-00013

In the Matter of:

GREGORY KELLY
Complainant

v.

STATE OF ALABAMA, PUBLIC SERVICE COMMISSION
Respondent

DECISION AND ORDER

1. Nature of Claim. The above-captioned case arises from a claim of retaliation under the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, the Sarbanes-Oxley (SOX) Act, 18 U.S.C. § 1514A, and Section 11(c) of the Occupational Safety and Health Act. In support of his complaint, Complainant alleges he was terminated from his employment on April 9, 2009 after he informed Respondent it violated the ERA and SOX. Because this claim is untimely and lacks subject-matter jurisdiction, the undersigned issues this Decision and Order sua sponte dismissing the matter with prejudice.

2. Procedural History and Findings of Fact.

a. Complainant has filed multiples other claims that have been referred to the Office of Administrative Law Judges (OALJ) for a formal hearing that arise out of the same or similar set of facts as the instant claim.¹ In summary, Complainant alleges Respondent terminated his employment on April 9, 2009 after he reported alleged violations of various federal laws and regulations.

b. On April 30, 2019, Complainant filed a complaint with the U.S. Department of Labor,

¹ See ALJ No. 2019-CER-001 (Aug. 22, 2019); ALJ No. 2019-ERA-007 (Aug. 22, 2019); ALJ No. 2019-CAA-004 (Aug. 22, 2019); 2019-CAA-005 (Aug. 22, 2019); 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 (Sep. 29, 2015); ALJ No. 2015-ACA-006 (Sep. 29, 2015); ALJ No. 2015-ACA-007 (Sep. 29, 2015); ALJ No. 2015-ACA-008 (Sep. 29, 2015); ALJ No. 2015-SOX-015 (Sep. 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). Other administrative law judges dismissed those cases for lack of subject-matter jurisdiction, untimeliness, and as duplicative.

Occupational Safety and Health Administration alleging Respondent committed violations under the ERA and SOX. Specifically, Complainant alleged Respondent terminated his employment after he reported that he believed Respondent was violating the ERA and SOX.

c. On May 13, 2019, OSHA issued a letter concluding there was no reasonable cause to find Respondent violated the ERA or SOX. OSHA dismissed the complaint as untimely.

d. The matter was subsequently referred to OALJ for a formal hearing. On July 8, 2019, this claim was assigned to the undersigned.

3. Applicable Law and Analysis.

a. *Dispositive Action.* A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. 29 C.F.R. § 18.70(c). If the judge determines at any time that subject matter jurisdiction is lacking, the judge must dismiss the matter. 29 C.F.R. § 18.70(a).

b. *Timeliness of Filing Claims and Equitable Tolling.* Complaints arising under the ERA and SOX must be filed within 180 days after an alleged violation occurs. 29 C.F.R. § 24.103(d)(2); 29 C.F.R. § 1980.103(d). The failure to file a complaint within those timeframes may result in dismissal of the matter without a hearing 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).

The time to file a complaint may be tolled for reasons warranted by applicable case law. 29 C.F.R. § 24.103(d)(2); 29 C.F.R. § 1980.103(d). Although permitting equitable tolling is established precedent by the Administrative Review Board (ARB), 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. *Id.*

The ARB has recognized 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 in issue but has done so in the wrong forum. *Jay v. Alcon Laboratories, Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-2 (ARB Apr. 10, 2009) (citations omitted).

c. *Analysis of Timeliness of Claim.* Because the adverse action, Complainant's employment termination, occurred on April 9, 2009, more than 180 days have elapsed since the filing of his claim with OSHA on April 30, 2019. In fact, more than 10 years have elapsed since the adverse action and the complaint's filing. Complainant did not allege any specific adverse actions or otherwise claim that any action occurred within the 180 days preceding the filing of his OSHA complaint. Thus, on its face, Complainant's OSHA complaint is untimely.

In addition, Complainant has failed to allege any facts that could justify the application of the principles of equitable tolling. Complaint does not allege Respondent actively misled him, he was prevented from filing this claim in some extraordinary way, or that he raised the precise statutory claim but in the wrong forum. Consequently, his complaints of whistleblower retaliation under the ERA and SOX must be denied as untimely filed.

d. *Subject-Matter Jurisdiction Over Alleged OSH Act Violations.* In relevant part, the OSH Act provides:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person.

29 U.S.C. § 660(c)(2).

Alleged violations of the OSH Act's anti-discrimination provisions are not subject to an administrative hearing and OALJ lacks jurisdiction to adjudicate claims arising under the OSH Act. *Gummala v. Carnival Cruise Lines, Inc.*, ARB No. 15-088, ALJ No. 2015-SPA-1, slip op. at 2, n.3 (ARB Sept. 26, 2017) ("The Administrative Review Board is not the proper avenue for [Complainant] to object to OSHA's decision concerning the OSH Act as the Board does not have jurisdiction over the OSH Act.").

Complainant's complaint with OSHA alleges violations under Section 11(c) of the OSH Act. However, there is no provision in the OSH Act or its implementing regulations for a hearing on this type of violation before a U.S. Department of Labor Administrative Law Judge. Complainant has no individual or private cause of action under Section 11(c). Rather, after an investigation, only the Secretary may file a cause of action in U.S. District Court if OSHA determines Section 11(c) has been violated.

4. Order. This claim is DISMISSED with prejudice.

SO ORDERED this day in Covington, Louisiana.

TRACY A. DALY
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 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 (eFile) 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.