

U.S. Department of Labor Office of Administrative Law Judges
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Issue Date: 10 September 2015

Case No.: 2015-FDA-00002

In the Matter of:

JOSEPH KENNEDY,

Complainant,

v.

STERICYCLE, INC.,

Respondent.

APPEARANCES: Joseph Kennedy
Pro se, Complainant

Cara J. Ottenweller
Attorney for Respondent

BEFORE: DANA ROSEN
Administrative Law Judge

ORDER OF DISMISSAL WITH PREJUDICE

This case arises out of a complaint filed on December 29, 2014, under the FDA Food Safety Modernization Act (FSMA), 21 U.S.C. §399d and the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. §1514A.

A Final Determination letter was issued by OSHA on January 15, 2015. In the Secretary's Findings, OSHA determined that the Complainant did not file a timely complaint. Complainant alleged he was constructively discharged on August 1, 2012. On December 29, 2014, he filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the Act. The complaint was not filed within 180 days of the alleged adverse action, and the Secretary stated "it is not deemed timely filed." The Secretary noted that per 29 CFR 1987.103(d), there are procedures for filing a discrimination complaint under the FDA Food Safety Modernization Act (FSMA), 21 USC § 399d and 29 CFR §1980.103 stating that "there may be circumstances which would justify tolling the 180-day period based upon recognized equitable principles or because of strongly extenuating circumstances." The Secretary noted that

Complainant spoke with an inspector on February 26, 2013, 209 days after the date of his alleged constructive discharge. The Secretary noted that no evidence was presented by the Complainant that he contacted another regulatory agency within 180 days of his alleged constructive discharge. The Secretary found that it “did not find that these equitable principles or strongly extenuating circumstances applied in this case. Consequently this complaint is dismissed.”

A preliminary review of the complaint shows that Complainant alleged he was constructively discharged on August 1, 2012, spoke with an investigator on February 26, 2013, and filed his complaint on December 29, 2014. The date of filing is not within the 180 day filing requirement. On June 17, 2015, an Order to Show Cause was issued ordering the Complainant to show cause, within 20 days of that Order, as to why this complaint should not be dismissed for failure to file a timely complaint. On July 9, 2015, Complainant submitted a Motion for Extension which was granted by the undersigned. On July 24, 2015, Complainant’s Response was received with his reasons why the matter should not be dismissed. On July 29, 2015, Respondent’s Response to Complainant’s Memo to Show Cause and Motion to Dismiss was received.

Complainant stated that he argued three points to support his appeal. Complainant stated:

1. The Complainant had neither actual nor constructive knowledge of the filing period and the forum for appropriately filing his claim, and the Respondent did not properly inform the Complainant of his rights under the Act.
2. The Complainant had timely filed a similar complaint with an agency other than OSHA.
3. The Complainant erred, an honest mistake, in reporting his final date of employment with OSHA, and in fact did file a timely complaint with the FDA.

Complainant stated that he retained an attorney, Mr. Jon Little, in approximately the end of August 2012. Complainant stated that Mr. Little did not inform him “that filing a complaint with OSHA within 180 days would be the appropriate place to address the Complainant’s concerns,…” Complainant stated that Mr. Little represented him for 7 months and then Mr. Little “abruptly” ended his representation. “In the time that elapsed since Mr. Little’s termination of the Complainant’s representation, the Complainant had long believed that Mr. Little had not done a single thing to resolve the Complainant’s concerns, aside from set up the meeting with the FDA inspector which occurred on the first week of March, 2013.” Complainant stated this was “a troubling period of time… for the Complainant,…”

Complainant argued that the statute of limitations should be equitably tolled. He stated he did not have actual or constructive knowledge that he was required to file his whistleblower complaint within 180 days to OSHA even though he had an attorney. Complainant cited to case law arguing that pursuant to Cooper v. Bell, “a claimant’s time period for filing a claim may be equitably tolled where she (or he) ‘had neither actual nor constructive notice of the filing period.’” Complainant argued that “after the fruitless meeting with the FDA, and Mr. Little’s release of the Complainant from his representation, the Complainant never yielded in executing all due diligence to pursue his claim, while at the same time, somehow never managed to

stumble upon the knowledge required in order to appropriately file the claim and the right forum.” Complainant argued that equitable tolling should apply in his case even though he had an attorney citing to Edwards v. Kaiser Aluminum and Chemical Sales Inc. Complainant also argued that he “makes the case that equitable tolling ought to apply, as even two years after the date of his constructive discharge, he had neither actual nor constructive knowledge of the time period for filing a claim.”

Complainant stated that the Respondent did not advise him of his rights under the Act. He stated that his attorney did not inform him of the filing deadlines or where to bring his claims. He stated that he looked for other counsel. He stated he also filed a complaint with the City of Indianapolis in July 2013, filed a complaint with the EEOC in September 2013 and a complaint with the NLRB in November 2014. Complainant stated that a claim “may be equitably tolled when for example, a Complainant mistakenly files a complaint with another agency.” (It is noted that these complaints were also filed after the 180 day time limit.)

Complainant stated that he timely filed his complaint with the FDA within the 180 time limit on February 12, 2013, through an e-mail from his attorney to the FDA inspector.

Complainant stated that he made “a reasonably honest mistake, in reporting that his final date of employment with the Respondent was August 1, 2012.” Complainant argued that in correcting his date error, he believed that August 17, 2012, based on his resignation letter “is the earliest possible ‘final, definitive, and unequivocal’ date of wrongful termination by the Respondent.” Complainant argued that [therefore he] did timely file a complaint with the FDA within the 180 day filing period.”

Respondent Stericycle responded and argued that “Complainant failed to file his complaint within the applicable statute of limitations, and he has failed to set forth sufficient facts to warrant equitable tolling of the limitations period. Thus, his complaint should be dismissed as time-barred.”

Respondent stated that “Complainant was employed by Stericycle from March 2012 through August 2012. Complainant contends that he was forced to resign as a result of reporting workplace concerns. He submitted his voluntary resignation notice on August 1, 2012. According to Complainant, he retained an attorney in late August 2012. On February 26, 2013, 209 days after submitting his resignation notice, Complainant’s attorney submitted an email to the Food and Drug Administration (FDA) in connection with Complainant’s workplace concerns. In March 2013, Complainant and his attorney apparently met with someone from the FDA to discuss Complainant’s allegations.”

Respondent stated that “[o]ver a year and a half later, Complainant filed this complaint with OSHA on December 29, 2014. He filed his complaint over two years (and almost 900 days) after his separation from employment with Stericycle. He exceeded the 180-day statute of limitations for such complaints by nearly 720 days. As a result, OSHA dismissed his complaint on the grounds that it was not timely filed. Complainant now seeks review of the dismissal.”

“... According to Complainant, he exercised due diligence by: looking for another attorney, filing a complaint with the City of Indianapolis in July 2013 (though he does not provide any details); filing a Charge Of Discrimination with the Equal Employment Opportunity Commission (EEOC) in September 2013; and filing a complaint with the National Labor Relations Board (NLRB) in November 2014. Despite Complainant’s allegations that he was ignorant to the law and that he exercised due diligence, his complaint should be dismissed as time-barred.” Respondent also noted that “his claims with the EEOC and the NLRB were dismissed as untimely. All of these filings occurred well after OSHA’s 180-day deadline.”

Respondent argued that “[u]nder extremely limited circumstances, a Claimant’s failure to file a timely claim may be excused under the doctrine of equitable tolling. However, equitable tolling is an extreme remedy and is rarely used. Tucker v. Kingston, 538 F. 3d 732, 734 (7th Circuit 2008) (citing Irwin v. Dep’t of Veterans Affairs, 498 U. S. 89, 96 (1990)).... As the Supreme Court has stated:

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the Complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass. Irwin v. Department of Veterans Affairs, 49 U. S. 89, 96 (1990) (holding that the extreme measure of equitable tolling does not extend to “a garden variety claim of excusable neglect.”)

Respondent further argued that “[m]ere mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting equitable tolling.” Arrieta v. Battaglia, 461 F. 3d 861, 867 (7th Circuit 2006). Similarly, ‘a lawyer’s mistake is not a valid basis for equitable tolling.’ Taliani v. Chrans, 189 F. 3d 597, 598 (7th Cir. 1999).”

Respondent additionally argued that “[a]lthough OSHA also recognizes the principle of equitable tolling for the various whistleblower statutes it enforces, OSHA-like the courts-applies the doctrine sparingly.”

Respondent argued that in the case at hand, “Complainant’s arguments for equitable tolling fail. First, he argues that he lacked knowledge of the proper filing deadline and forum. However, under both OSHA’s guidelines and controlling case law, ignorance of the law is insufficient for equitable tolling. Simply not knowing or understanding the law is not the kind of extraordinary circumstance that would permit equitable tolling.”

Respondent argued “[m]oreover, Complainant’s lack of knowledge argument also fails because he was represented by counsel throughout the entire limitations period. Therefore, he was charged with “constructive knowledge” of the law’s requirements. *See e. g.*, Coppinger-Martin v. Solis, 627 F. 3d 745, 750 (9th Circuit 2010) (upholding the ARB’s decision to dismiss an untimely OSHA whistleblower complaint because the employee had a lawyer). Indeed, ‘once a Claimant retains counsel, tolling ceases because [he] has gained the means of knowledge of [his]

rights and can be charged with constructive knowledge of the law's requirements.' *Id.* Any claim that Complainant lacked knowledge of OSHA's filing requirements is entirely inadequate to invoke equitable tolling."

Respondent argued that while Complainant basically alleged that his attorney was negligent, "courts agree that attorney error is insufficient for equitable tolling."

Respondent argued that "[e]ven if he argues that he filed a timely complaint in the wrong forum, his argument for equitable tolling still fails. First, a few days after his resignation, Complainant allegedly filed something with the Federal Trade Commission (FTC) on August 4, 2012. However, the document purportedly submitted does not adequately set forth a whistleblower complaint. Even assuming that he did allege a whistleblower claim in his generalized letter to the FTC, equitable tolling still does not apply. Shortly after submitting his letter to the FTC on August 4, 2012, Complainant obtained an attorney in late August 2012." Respondent cited to Coppinger-Martin v. Solis, 627 F. 3d at 750 (emphasis added by Respondent) that "[o]nce a Claimant retains counsel, **tolling ceases** because [he] has gained the means of knowledge of [his] rights and can be charged with constructive knowledge of the law's requirements." Respondent further argued that "once Complainant obtained counsel in late August, he had approximately 150 days left and the legal means to articulate a whistleblower claim, correct any prior filing errors, and properly file a valid whistleblower complaint with OSHA." Respondent argued that Complainant failed to file within the remaining 150 days and instead, "it took him another **two and a half years** from the time he submitted his generalized email to the FTC to file with OSHA." (Emphasis in original) Respondent argued that therefore "this is not a case of filing in a mistaken forum-Complainant simply sat on his claims. *See Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 453 (7th Circuit 1990)."

Respondent further argued that "Complainant's complaints with the City of Indianapolis, the EEOC, and the NLRB cannot be used as grounds for equitable tolling either because they were all filed long after 180-day statute of limitations (and indeed, were dismissed for such untimeliness)." Respondent noted that Complainant's attorney's email dated February 26, 2013, to the FDA, was mailed "well outside the limitations." Respondent argued that regardless of the forum, Complainant missed his deadlines for filing.

Respondent finally argued that "Complainant does not raise any other allegations that could arguably justify equitable tolling. He does not allege that Stericycle somehow tricked him into missing the filing deadline; he does not allege any debilitating injury or illness that prevented him from timely filing; and he does not allege a natural or man-made disaster." Respondent concluded that "Complainant has presented no facts that would warrant the extreme remedy of equitable tolling under OSHA's guidance or relevant case law." Respondent Stericycle moved that the court dismiss Complainant's complaint as time-barred.

FINDINGS OF FACT AND CONCLUSION

After considering the arguments of the Complainant, the Respondent, the facts, the statute, and the case law, the court agrees with the Respondent and the Secretary below, and finds that Complainant failed to meet the 180 day statute of limitations for filing his complaint. He alleged

constructive discharge on August 1, 2012, spoke with an investigator on February 26, 2013, and ultimately filed his whistleblower complaint on December 29, 2014. Complainant did not file his whistleblower complaint within 180 days. Based on the above, the doctrine of equitable tolling is applied in rare circumstances and the court finds that the facts in this case do not warrant equitable tolling. There is no evidence of a situation that would allow equitable tolling as a remedy. There is no evidence that the Complainant contacted another regulatory agency within 180 days of his alleged constructive discharge. Complainant stated he filed a complaint with the City of Indianapolis in July 2013, filed a complaint with the EEOC in September 2013, and filed a complaint with the NLRB in November 2014. These filings are well over 180 days. Complainant was represented by an attorney during the 180 days. Case law precedent holds that once an individual has an attorney, they have “constructive knowledge” of the law and “tolling ceases.” Case law precedent holds that attorney negligence is not considered an “extraordinary” circumstance and is “not grounds for equitable tolling.” Accordingly, Complainant failed to meet the 180 day statute of limitations for filing his complaint and his complaint is time-barred.

ORDER

After review of the administrative file, it is hereby **ORDERED** that the complaint in the above-captioned matter is **DISMISSED WITH PREJUDICE**.

DANA ROSEN
Administrative Law Judge

DR/ard
Newport News, Virginia

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, 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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1987.110(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. § 1987.110(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. § 1987.110(a).

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 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. §§ 1987.109(e) and 1987.110(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. § 1987.110(b).