



Issue Date: 11 April 2011

Case No.: 2011-NTS-00002

In the Matter of:

HUMBERTO R. CASTILLO,

Complainant,

v.

BAYSIDE ENGINEERING, INC.,

Respondent.

DECISION AND ORDER DISMISSING THE COMPLAINT

This matter arises under the National Transit Systems Security Act (“NTSSA” or “the Act”), Pub. L. No. 110-53 (August 3, 2007), 6 U.S.C. § 1142. The Act provides protection from discrimination to employees who report violations of federal law, rules, or regulations relating to transit safety or security; who report a hazardous safety or security condition; who refuse to work when confronted with a hazardous safety condition; or who refuse to authorize the use of any equipment in the belief that a hazardous safety condition exists. The pertinent provisions of the Act prohibit discharge, discipline, or any other discriminatory acts against covered employees.

The Complainant, Humberto R. Castillo, is an electrical engineer who was employed by the Respondent, Bayside Engineering Inc., from April to October of 2008. The Respondent terminated his employment on October 27, 2008. On December 10, 2010, Mr. Castillo filed a complaint under the Act with the Occupational Safety and Health Administration (OSHA). OSHA dismissed the complaint on the ground that it had not been timely filed.

On February 9, 2011, the Complainant requested a hearing before the Office of Administrative Law Judges. The request for a hearing was assigned to me and on March 8, 2011, I issued an order to show cause why the complaint should not be dismissed because of lack of timely filing. The Complainant and Respondent each submitted briefs in response to the show cause order.

STATUTORY PROVISION

The Act provides for a 180 day time limit for filing a complaint:

FILING AND NOTIFICATION.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation

of subsection (a) or (b) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of a complaint filed under this paragraph, the Secretary of Labor shall notify, in writing, the person named in the complaint and the person's employer of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

6 U.S.C. § 1142(c)(1).

CHRONOLOGY

For purposes of this motion I have accepted the statements and documentary evidence submitted by the Complainant as accurate. The following chronology of events is taken from the material that he has submitted:

- October 27, 2008 Respondent terminated the Complainant's employment.
- December 16, 2008 Complainant appealed the denial of state unemployment benefits. In his appeal letter he described work that he had performed and recommendations that he had made for greater efficiency. He did not allege any safety violations by the Respondent.
- April 22, 2009 Complainant filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR). In this complaint he made two claims: "I am suffering discrimination because I have reported or opposed to violate codes and regulations dictated by the State of Florida" and "I was treated different . . . because I am Hispanic." In addition he stated "I am recommending the agency National Transit Systems Security Act (NTSSA) for their investigation and the IRS also be involved in this investigation."
- May 19, 2009 The FCHR sent the Complainant a letter stating that his complaint was not appropriate for investigation because his employer was not a state agency and the Commission did not receive his complaint within 10 days of the alleged prohibited personnel action, as required by state law.
- May 26, 2009 After the FCHR dismissed his complaint, the Complainant sent a letter to the Commission opposing its action and requesting that it continue to investigate his case. In this letter he described his work on the review of highway electrical and lighting projects and stated:

“I reported immediately to the Florida Turnpike Enterprise all the problems and concerns that I found about safety, violation [of] codes or rules of the State of Florida.”

June 21, 2009 Complainant met with an OSHA Safety Specialist at the Tampa Area Office of OSHA. This was the first contact with any federal official in the documentation that he has submitted.

February 16, 2010 Complainant filed a complaint of employment discrimination with the U.S. Equal Employment Opportunity Commission (EEOC).

April 12, 2010 The EEOC issued a Dismissal and Notice of Rights and closed its file on the case.

December 10, 2010 Complainant filed a whistleblower complaint under the NTSSA with OSHA.

DISCUSSION

The latest date on which the 180 day period could begin to run was October 27, 2008, the date that the Respondent terminated the Complainant's employment. The Complainant has provided documentation of two requests for governmental action that he filed within that time period. The first was his application for unemployment benefits. The second was his discrimination complaint to the FCHR. Both were filed with Florida state agencies, requesting remedies provided for in state law.

According to the Complainant's own evidence, his first contact with a federal agency regarding this matter took place on June 21, 2009, more than 7 months after he was terminated. This contact did not lead immediately to the filing of any complaint. He filed his first federal complaint, to the EEOC, more than seven months after that contact. He filed his current NTSSA complaint with OSHA, the first one to refer explicitly to federal safety violations, more than two years after he was fired.

The complaint is far outside the 180 day statute of limitations. Ordinarily this would end the consideration of the issue. However, a late filing may be excused under the doctrines of equitable tolling of the statute or equitable estoppel. A plaintiff or complainant seeking to relax the statute of limitations has the burden of justifying the application of these doctrines. *Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26, at 20 (ALJ) (Feb. 23, 2007).

Equitable tolling may apply in three situations: (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981).

Under the doctrine of equitable estoppel, “a late filing may be accepted as timely if an employer has engaged in ‘affirmative misconduct’ to mislead the complainant regarding an operative fact forming the basis for a cause of action, the duration of the filing period, or the necessity for filing.” *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-00054 (ARB Aug. 31, 2005).

There has been no evidence, and the Complainant has not alleged, that the Respondent misled him concerning either his potential NTSSA cause of action or the time in which he had to file his claim. It is equally clear that that he was not prevented from asserting his rights. He was in fact actively seeking remedies under Florida state law before the 180 day filing period for his NTSSA claim expired. Further, although his April 22, 2009 claim was based on Florida state law and submitted to a state agency, it referenced the NTSSA. The Complainant’s documents verify that he was aware of the Act before the expiration of the 180-day period. Therefore neither equitable estoppel nor the first two bases for equitable tolling apply in this case.

The third basis for finding the statute of limitations to be equitably tolled is when a plaintiff or complainant has raised the precise statutory claim within the time limits, but has done so in the wrong forum. The only discrimination complaint that the Complainant filed within 180 days of his termination with any government agency was his complaint to the FCHR. In that complaint he alleged discrimination based on both ethnicity and safety reports. The specific safety violations that he alleged were violations of “codes and regulations dictated by the State of Florida.” A claim of violating state laws or regulations is not the same statutory claim that is involved in this case brought under the federal NTSSA.

The Complainant’s February 16, 2010 complaint to the EEOC does not cite the NTSSA. It does, however, mention safety concerns and was submitted to a federal agency. Construing that complaint in the light most favorable to the Complainant it might be accepted as the same statutory claim raised in the wrong forum, *i.e.* submitted to the EEOC rather than to the Department of Labor. However, the EEOC complaint was filed more than a year after the Complainant’s termination, long after the expiration of the NTSSA statute of limitations. Even if it were to be construed as an NTSSA claim, it was not filed within the statutory time limits, which is a requirement for a finding of equitable tolling of the statute of limitations.

ORDER

The complaint of **Humberto R. Castillo** is **DISMISSED** due to untimely filing.

A

KENNETH A. KRANTZ
Administrative Law Judge

KAK/mrc

NOTICE OF APPEAL RIGHTS:

To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(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. § 1982.110(a).

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).