



**Issue Date: 02 January 2020**

CASE NO.: 2019-PSI-00003

In the Matter of:

CAMILLE A. ABOUD,  
Complainant,

v.

XCEL ENERGY,  
Respondent.

**DECISION AND ORDER DISMISSING COMPLAINANT CAMILLE ABOUD'S  
COMPLAINT AS UNTIMELY FILED UNDER THE PIPELINE SAFETY  
IMPROVEMENT ACT OF 2002**

This case arises out of a complaint filed under the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129; 29 C.F.R. Part 1981. The proceedings will be held in a manner consistent with the procedural rules set forth in federal regulations at 29 C.F.R. Part 18, Subpart A (29 C.F.R. §18.10 to §18.95).

I. Issue

The issue before the court is whether Complainant timely filed his complaint within 180 days of the Respondent's alleged adverse action.

II. Summary

On January 31, 2013, Respondent Xcel Energy laid off Complainant and terminated his employment. On November 26, 2018, more than five years after his termination, Complainant filed a complaint against Respondent under the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 et seq. ("the Act"). Complainant alleged Respondent blacklisted him from jobs within the energy industry. Complainant asserted that this was retaliation for whistleblowing on safety issues with Respondent's natural gas distribution systems. Complainant asserted that his January 31, 2013 termination and alleged blacklisting violated the Act. On May 31, 2019, the Occupational Safety and Health Administration ("OSHA") Acting Regional Administrator dismissed Complainant's complaint on the grounds that it was not timely filed within 180 days of Respondent's alleged violation of the Act and also found that Respondent did not violate the Act.

On June 17, 2019, Complainant appealed to the Office of Administrative Law Judges. He argued that his claim was timely as it was filed within 180 days of: (1) an explosion involving Respondent's gas distribution system; and (2) multiple application rejections from other employers. Complainant acknowledged that Respondent's alleged violation of the Act occurred on January 31, 2013. The Pipeline Safety Improvement Act of 2002 requires that all complaints must be filed within 180 days of the alleged adverse action. Based on the evidence in the record, Complainant's complaint, filed more than five years after January 31, 2013, was not timely filed and is hereby dismissed.

### III. Background and Procedural History

On November 26, 2018, Complainant filed a complaint with the Secretary of Labor pursuant to the employee protection provisions of the Pipeline Safety Improvement Act of 2002. In his complaint, Complainant alleged that Respondent violated the Act claiming it improperly terminated Complainant's employment and blacklisted him. Complainant alleged he was "organized out in January 2013" coupled with "harassment/intimidation" and "disparagement" which caused Complainant "extreme financial and emotional hardship after applying, over the past 5 years, to over 3000 positions within my field and NOT a single job offer." Whistleblower Application Online Complaint of Camille Abboud, OSHA Case No. 8-0600-19-030, November 26, 2018. Complainant alleged Respondent's adverse action occurred after Complainant expressed concern about Respondent's potentially unsafe natural gas distribution system and "lodg[ed] multiple complaints within Xcel Energy for its fraud against the ratepayers." Id.

On May 31, 2019, the Occupational Safety and Health Administration, Region VIII Acting Regional Administrator, issued the Secretary's Findings. The Administrator stated an investigation was conducted. The Administrator stated in the Secretary's Findings:

In brief, you alleged Respondent terminated your employment and engaged in blacklisting activities in retaliation for your voicing safety concerns to management regarding what you believed were potentially unsafe natural gas distribution pipelines. Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region VIII, finds there is no reasonable cause to believe Respondent violated the above statute and issued the following findings.

Secretary's Findings from Rita Lucero, Acting Regional Administrator, to Mr. Camille Abboud, OSHA Case No. 8-0600-19-030, May 31, 2019.

The Administrator stated in the Secretary's Findings:

On January 31, 2013, Respondent eliminated Complainant's job position, and laid him off effectively terminating his employment. Complainant filed a complaint with the Secretary of Labor on November 26, 2018; (2,064 days from alleged adverse action) alleging Respondent terminated his employment and blacklisted him in retaliation for voicing safety concerns to management about potentially

unsafe natural gas distribution pipelines. Because this complaint was not filed within 180 days of the alleged adverse action, it is deemed untimely and equitable tolling does not apply. Therefore, this complaint is hereby dismissed.

Id.

On June 17, 2019, Complainant objected to the finding that his claim was untimely filed and requested a hearing before an Administrative Law Judge. On July 17, 2019, this court issued a Notice of Assignment. On September 5, 2019, this court issued an Order to Complainant to Show Cause Why This Claim Should not be Dismissed for Being Untimely Filed, to be Received by Friday, 9/20/19. Noting the Secretary's findings, the court stated:

A preliminary review of the complaint shows that Complainant was laid off from employment with the Respondent on January 31, 2013, and filed his complaint with the Secretary of Labor on November 26, 2018, almost 6 years later. The 180 day timeline for filing a complaint is set forth by statute.

In view of the above, IT IS HEREBY ORDERED that the Complainant show cause, in a written submission to the court, with a copy to all parties listed at the end of this Order, by September 20, 2019, as to why this claim should not be dismissed for failure to file a timely complaint.

On September 16, 2019, Complainant filed his response to the court's Show Cause Order.

#### IV. Complainant's Response to the Court's Show Cause Order

Complainant responded to the court's Show Cause Order and argued he filed his complaint in a timely manner. He stated that he filed "within 180 days of the last rejection letter received from potential employers." Complainant Camille Abboud's Response to the Court's Show Cause Order, OALJ Case. No. 2019-PSI-00003, Sept. 16, 2019. This complaint was "filed to ensure my previous employer, Xcel Energy Inc. desist from continually disparaging, blacklisting and bad-mouthing me in the industry and among potential employers." Id. Complainant stated that, "during the second half of 2012," he investigated a natural gas explosion. Id. He stated that he was terminated on 1/31/13, "soon after filing my report detailing my findings...." Id. He stated that executives "retaliated against me by disparaging, blacklisting and bad-mouthing me in the industry...." He stated that almost six years later, "I filed my complaint with OSHA on November 26, 2018 after learning of 2 gas explosions on Xcel's natural gas distribution system." Id. Complainant stated the explosions occurred on August 14, 2018, and November 23, 2018.

Based upon this timeline, Complainant argued that his November 26, 2018, "OSHA complaint against Xcel Energy was timely, well within the 180 days of the 2 explosions and over 150 applications for jobs I am well qualified for." Id. Complainant attached a summary of the applications he submitted to various employers in the energy field since his job ended with Respondent.

#### V. The Pipeline Safety Improvement Act of 2002 – Employee Protection Provisions

The provisions of the Pipeline Safety Improvement Act of 2002, found within 49 U.S.C. § 60129 (and implemented by 29 C.F.R. § 1981.103), provide whistleblower protection for employees of pipeline operators and their contractors. See 49 U.S.C. § 60129. The Act prevents an employer from discharging or otherwise discriminating “against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety.” *Id.* at (a)(1)(A).

#### VI. The Pipeline Safety Improvement Act of 2002 – Filing Requirements and Deadlines

An employee alleging he was terminated or discriminated against in violation of the Pipeline Safety Improvement Act of 2002 employee protection provisions may file a complaint under the Act. “A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) [of the Pipeline Safety Improvement Act of 2002] 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.<sup>1</sup> Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person or persons named in the complaint and the Secretary of Transportation 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 or persons under paragraph (2).” *Id.* (Emphasis added). “The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: <http://www.osha.gov>.” 29 C.F.R. § 1981.103(c).

The doctrine of equitable tolling may save an untimely complaint filed more than the 180 days required by statute. The Seventh Circuit Court of Appeals addressed equitable tolling in a similar Federal Railroad Safety Act complaint before OSHA. The court in Sparre v. United States Department of Labor, 924 F.3d 398, 402-403 (7th Cir. 2019), discussed the law in that circuit and the four situations in which the Administrative Review Board applied equitable tolling. The Seventh Circuit Court of Appeals held that:

The doctrine of equitable tolling ‘creates a defense to statutes of limitations and other nonjurisdictional filing deadlines for cases in which, despite due diligence, the plaintiff cannot sue within the statutory deadline....’ Yuan Gao v. Mukasey,

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<sup>1</sup> See also 29 C.F.R. § 1981.103. (“(d) Time for filing. Within 180 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery or other means, the complaint is filed upon receipt.”).

519 F.3d 376, 377 (7th Cir. 2008). In this circuit, '[e]quitable tolling is granted sparingly only when extraordinary circumstances far beyond the litigant's control prevented timely filing.' Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc., 782 F.3d 922, 930 (7th Cir. 2015) (quoting Simms v. Acevedo, 595 F.3d 774, 781 (7th Cir. 2010) (citations omitted)). The plaintiff bears the burden of showing he 'diligently' pursued the claim and 'some extraordinary circumstances' prevented him from filing his complaint within the statute of limitations. Blanche v. United States, 811 F.3d 953, 962 (7th Cir. 2016). *The [Administrative Review] Board has recognized four principal situations in which equitable tolling may apply: (1) when the opposing party has actively misled the movant about the cause of action; (2) when the movant has in some extraordinary way been prevented from filing his or her appeal before the Board; (3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) when the opposing party's own acts or omissions have lulled the movant into forgoing prompt attempts to vindicate his rights.* Bohanon, ARB No. 16-048, 2016 DOL Ad. Rev. Bd. LEXIS 23, slip op. at 3 (citation omitted).

Sparre, 924 F.3d at 402-403 (Emphasis added).

## VII. Findings of Fact and Conclusions of Law

Based on the evidence in the record and the Complainant's response to the court's Show Cause Order, the court finds that Complainant did not file his complaint in a timely manner as required by the Pipeline Safety Improvement Act of 2002. Respondent ended Complainant's employment when it laid him off on January 31, 2013. Complainant alleged this termination occurred due to Complainant's protected activity as a whistleblower under 49 U.S.C. § 60129(a)(1)(A). Complainant acknowledged "the adverse actions taken by Xcel Energy started in 2013 but continues to this date." Complainant was laid off on January 31, 2013. That is the date of the alleged adverse action. The 180 days to file a complaint begins with the date of the alleged adverse action, January 31, 2013. 49 U.S.C. § 60129(b)(1). Complainant filed his complaint alleging adverse action by Respondent almost six years later, on November 26, 2018.

Complainant argued that the complaint was timely filed as it was filed within 180 days of an alleged November 23, 2018 pipeline explosion. However, he did not address the filing deadline of the Act vis-à-vis the 2018 pipeline explosion. The Act requires the complaint be filed within 180 days of Respondent's alleged adverse action or violation regarding discharge or discrimination against the Complainant. 49 U.S.C. § 60129; 29 C.F.R. § 1981.103. Here, the Respondent's alleged adverse action in violation of the Act was the lay off and termination on January 31, 2013, and alleged blacklisting of Complainant – not a subsequent referenced gas explosion on November 23, 2018 when Complainant was not an employee and almost six years after Respondent's alleged violation of the Act. Complainant alleged receipt of rejection letters from later potential employers throughout 2018 and 2019, were also Respondent's alleged adverse action in violation of the Act. In a similar case, an Administrative Law Judge held that: "[c]laimant's accusations of [alleged] ongoing misconduct by the Respondent are irrelevant to his own claims of whistleblower protection. In each of his claims, the limitations period is triggered by the date of his discharge, and he would not be entitled to whistleblower protection

for any [alleged] conduct by the Respondent which followed his discharge and no way influenced it.” Gregory Kelly v. State of Alabama Public Service Commission, OALJ Case Number 2014-PSI-0002, October 23, 2014. Based on the evidence in the record, Respondent’s decision to lay off and terminate his employment, and communication about the end of his employment occurred on January 31, 2013. The alleged adverse action by Respondent occurred on January 31, 2013. Rejection letters by other employers are not an adverse action by the Respondent.

Based on the evidence in the record, the doctrine of equitable tolling does not apply to the present case. Sparre, 924 F.3d at 402-403. Complainant does not meet any of the four situations required in Sparre and by the Administrative Review Board. Complainant made no claim and presented no evidence that he was misled by Respondent about filing his complaint, presented no evidence that an extraordinary circumstance prevented him from filing his complaint, presented no evidence that he filed his complaint in the wrong forum or court, and presented no evidence that the Respondent “lulled” him into forgoing his rights to file a complaint. Based on the evidence, the statute, the law, and the 4 requirements for equitable tolling, Complainant did not file his complaint within 180 days of the alleged adverse action.

For these reasons, the court finds Complainant’s complaint was not timely filed, and must be dismissed.

### **ORDER**

It is hereby ORDERED that:

1. Complainant’s complaint under the Pipeline Safety Improvement Act of 2002 was not timely filed within 180 days of the alleged adverse action.
2. Complainant’s complaint under the Pipeline Safety Improvement Act of 2002 is DISMISSED with prejudice.

**SO ORDERED.**

Dana Rosen  
Administrative Law Judge

DR/TRL/mjw  
Newport News, Virginia

**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. See 29 C.F.R. §§ 1981.109(c) and 1981.110(a) and (b). 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](mailto: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. Your Petition must specifically identify the findings, conclusions or orders to which you object. A failure to object to specific findings and/or conclusions of the administrative law judge shall generally be considered waived. Once an appeal is filed, inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties and 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. Copies of the Petition and briefs must also be served on the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. § 1981.110(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. §§ 1981.109(c) and 1981.110(b). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1981.110(b).