



Issue Date: 13 September 2010

OALJ CASE NO.: 2010-SOX-00040

In the Matter of:

JENNIFER BOND

Complainant,

v.

THE BOEING COMPANY,

Respondent.

DECISION AND ORDER DISMISSING UNTIMELY FILED COMPLAINT

This matter arises out of a claim or complaint filed by Complainant Jennifer Bond (“Complainant”) on January 19, 2010 with the Occupational Safety and Health Administration (“OSHA”) alleging retaliation in violation of the Sarbanes-Oxley Act (“SOX”).

On May 27, 2010, OSHA issued the Secretary’s Findings (the “Secretary’s Findings”) which conclude that “[a] preponderance of the evidence indicates that the alleged adverse action of no longer being allowed to work remotely from Canada occurred more than 90 days before the complaint was filed, making the complaint untimely.” Secretary’s Findings at 2. Consequently Complainant’s complaint in this case was dismissed as it related to the adverse act of Respondent’s revocation of her employment arrangement to work remotely for Respondent from Canada.¹

On June 28, 2010, Complainant filed her objection and appeal of the Secretary’s Findings and requested a hearing with this Office (the “Objection”). The Objection contains Complainant’s recitation of relevant facts which, among other things, provides the following timeline:

- 10/16/2009: Boeing states they sent [Complainant] above letter [revoking Complainant’s employment arrangement to work from Canada and report to work in Bellevue, Washington].
- 10/17/2009: The letter arrives at Mailboxes International in Blaine, Washington. This is a Saturday. The letter is signed for by an employee at the mailbox center, not by [Complainant]. [Complainant is] not aware of this letter at this time.
- 10/20/2009: ... [Complainant] stop[s] at [her] mailbox and pick[s] up [her] mail [and consequently discovers the letter from Respondent revoking her telework privilege].

...

- 01/15/2010: [Complainant] contact[s] the Seattle OSHA office and spen[ds] 15 minutes discussing [her] case on the phone with them, telling them [she] would like

¹ Complainant has also made allegations of hostile work environment that continued up until her discharge in April 2010. These added alleged adverse acts are not part of this case and run separately as a later complaint to OSHA.

to file a complaint. [She is] advised that [she] should document what has occurred and [she] can send it in via email etc.

- 01/19/2009: [Complainant] file[s her] complaint with OSHA and receive[s] an email back verifying that the email went through ok.
- Boeing states that the trigger event was October 17th 2009.

Objection at 4-5.

On July 7, 2010, I issued a notice of trial setting trial for October 13, 2010 at a location to be determined in Bellingham or Everett, Washington.

On July 12, 2010, I issued an Order to Show Cause Why Case Should Not Be Dismissed for Failure to Timely File a SOX Complaint (the “July 12 OSC”). The July 12 OSC ordered Complainant to file her response to the July 12 OSC *no later than Thursday, August 19, 2010*. Complainant filed no response.

On August 25, 2010, Respondent filed a letter request that I dismiss this case based on Complainant’s failure to file a timely response to my July 12 OSC and for failure to file a timely complaint as set forth in the Secretary’s Findings.

To date, Complainant has not filed any response to my July 12 OSC or respondent’s August 25 letter requesting dismissal.

An employee alleging retaliation under SOX must file a complaint within ninety days of the date on which the alleged violation occurred. 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d) (“Time for filing. Within 90 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] limitations period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred.” *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982); *see also Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999) (statute of limitations begins to run “on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights”).

In whistleblower cases, statutes of limitation run from the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision. *See, e.g., Rollins, v. Am. Airlines*, ARB No. 04-140, slip op. at 2 (ARB Apr. 3, 2007); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. U.S. Envtl. Prot. Agency*, ARB No. 98-146, slip op. at 14 (ARB Feb. 28, 2003).

I find Complainant’s complaint in this case was not timely filed, nor can it be saved by the doctrine of equitable tolling. Complainant received notice of her telework privileges being revoked on October 17, 2009, but argues the date to be utilized by this Office for calculating the timeliness of her complaint should be October 20, 2009 – the date on which she stopped by her mailbox to check her mail and became subjectively aware of the revocation of such privileges. *See* Objection at 4-7. I find such an argument unpersuasive. “The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences.” *Belt v. U.S. Enrichment Corp.*, No. 02-117, slip op. at 5 (ARB

Feb. 26, 2004) (citing *Overall v. Tenn. Valley Auth.*, Nos. 98-111, 98-128 (ARB Apr. 30, 2001)); *see also Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980).

Such a determination is made by looking to “what event should have alerted the typical lay person to protect his or her rights,” not by when the complainant or plaintiff became subjectively aware of a violation of his or her rights. *Hall v. Tennessee*, No. 94-5749, 1995 WL 385112, at *2 (6th Cir. June 27, 1995); *see Ross*, No. 98-044, slip op. at 4. In this case, Complainant seeks to use the date she became subjectively aware of the revocation of her telework privileges as the date from which her ninety-day filing period should be determined, not the date she should have become aware of the letter from Respondent had she checked her mail on the date the notice arrived. By Complainant’s logic, the filing period for her SOX complaint could have been tolled indefinitely solely according to when she decided to check her mail. Such rationale is not supported by case law. *See Chardon*, 454 U.S. at 8; *Ricks*, 449 U.S. at 258; *Hall*, 1995 WL 385112, at *2; *Allen*, 665 F.2d at 692; *Belt*, No. 02-117, slip op. at 5; *Ross*, No. 90-044, slip op. at 4. Consequently, I find the date on which Complainant became aware of the revocation of her telework privileges was October 17, 2009, making the filing of her complaint ninety-four days after such a date on January 19, 2010 untimely under SOX’s ninety-day limitations period.

With respect to the doctrine of equitable tolling, I find the reasoning set forth by my colleague, the Honorable Larry W. Price, in the case of *Hyman v. KD Resources*, No. 2009-SOX-00020 (ALJ Mar. 18, 2009), to be applicable to the current situation. There, the complainant filed his objections to OSHA’s ruling and requested a hearing before a Department of Labor ALJ. *Id.*, slip op. at 1. Noting the complainant’s failure to file his initial complaint within the ninety-day limitations period prescribed by 29 C.F.R. § 1980.103, Judge Price *sua sponte* ordered the complainant to show cause as to why the complaint should not be dismissed because it was not timely filed. *Id.* In response, the complainant established through documentary evidence that he was led to believe that he would be returned to his former employment or, alternatively, given a one-year consulting contract, financially compensated for having been wrongfully terminated, and that his employer would address the SOX compliance issues that the complainant had raised. *Id.* at 2. Based on this, complainant argued his failure to timely file his complaint should be excused on equitable tolling grounds.

Judge Price noted three bases exist for equitable tolling and which were identified in *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981): (1) deceit on behalf of a respondent which misled the complainant so as to impede timely filing; (2) the existence of extraordinary circumstances preventing the complainant from timely filing; and (3) the raising of a claim in the incorrect forum. In applying these scenarios to the complainant’s circumstances in *Hyman*, Judge Price found the complainant’s submission lacked necessary evidence to support equitable tolling of the SOX ninety-day filing period in several respects:

There is no evidence or argument submitted that Complainant was unable, despite due diligence, to obtain vital information bearing on the existence of his complaint. Likewise, there is no evidence submitted that any Respondents actively mislead [sic] Complainant respecting his SOX claim, that he was in some way prevented from asserting his rights, or that he raised the precise statutory claim in another forum. Complainant only asserts that at a meeting on August 23, 2008, Respondents promised to pay him a substantial severance and that in later emails the settlement offer and terms of his reemployment with the company were discussed.

Hyman, No. 2009-SOX-00020, slip op. at 2. Accordingly, Judge Price dismissed the complainant’s SOX complaint as untimely.

The party requesting tolling bears the burden of justifying the application of equitable modification principles. *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling. *Moldauer, v. Canandaigua Wine Co.*, ARB No. 04-022, slip op. at 6 (ARB Dec. 30, 2005). In this case, Complainant has set forth no arguments for the application of equitable tolling. Furthermore, in examining the record before me, I find no bases exist for the application of such a doctrine.

In sum, since Complainant filed her complaint ninety-four days after she received final, definitive, and unequivocal notice that her employment arrangement to work remotely for Respondent from Canada had been revoked, the complaint was untimely. Furthermore, I also find the doctrine of equitable tolling to be inapplicable to the circumstances leading to such timing. I therefore recommend that the complaint be dismissed.

DECISION AND ORDER

For the reasons stated above:

IT IS ORDERED that Complainant Jennifer Bond's complaint is **DISMISSED** *with prejudice* and without cost or attorneys' fees to either party.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

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 the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or email communication; however, if you submit it in person, by hand delivery, or by other means, it is filed when the Board receives it. *See id.* § 1980.110(c). Your Petition must specifically identify the findings, conclusions, or orders to which you object. Generally, you waive any objections you do not raise specifically. *See id.* § 1980.110(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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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. § 1980.110(a). 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 id.* §§ 1980.109(c), .110(a), (b).

