

U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)



Issue Date: 20 April 2011

Case No.: 2011-SOX-00019

In the Matter of

ELIZABETH E. HOUTON
Complainant

v.

WACHOVIA CORPORATION
WACHOVIA BANK NA
WORLD SAVIGNS BANK FSB
Respondents

RECOMMENDED
SUMMARY DECISION
DISMISSING REQUEST FOR HEARING

Pending is Respondents' motion for summary decision filed February 28, 2011.

Complainant's opposition was filed on March 28, 2011.

29 C.F.R. 1980.106(a), in pertinent part, provides that any party desiring review of findings of the Occupational Safety and Health Administration (OSHA) must, within 30 days of receipt of such findings, file objections and/or a request for hearing in respect thereof.

Complainant filed her complaint with OSHA in or about early August, 2010 (Complainant's motion to waive deadline, 12/17/10). By letter dated September 14, 2010, addressed to her then-lawyer, Eric Stern, OSHA denied her claim (id., @ EX A). This letter clearly noted the 30 day time limitation noted above. Mr. Stern e-mailed this OSHA denial letter to Complainant on September 20, 2010 (id. @ EX B). On September 27, 2010, Mr. Sack, Stern's

associate, e-mailed Complainant the erroneous advice that she had 90 days to file "...a lawsuit...[or] complaint if your care to preserve your rights." (id. @ EX C). On December 7, 2010, Complainant e-mailed her present counsel notifying him of her concerns surrounding her case (id. at EX B). That counsel then filed a motion on her behalf to waive the subject deadline with a request for hearing on December 17, 2010.

In both this motion, as well as in her opposition to the pending motion for summary decision, Complainant asks to be excused from her late filing because she was provided "...patently wrong legal advice..." from her former lawyer (Complainant's Opposition @2).^{*} She cites to 29 C.F.R. 1980.115 providing that "In special circumstances...or for good cause shown..." a waiver of the rules may be had where required by "...justice or the administration of the Act...".

Claimant invokes the protection of "equitable tolling" as recently expounded upon and refined in the decision reached in Holland v. Florida, 130 S. Ct. 2549 (6/14/10).

^{*} Also advanced is the notion that Complainant was "abandoned" by her former counsel (see Complainant's brief @ 2) "...on [9/27/10] the same day [she was given the erroneous advice]" (See EX E affidavit annexed to 12/17/10 motion for waiver).

But, on the contrary, the record clearly suggests a continuing invitation for representation beyond the 9/27/10 e-mail advice (motion for waiver @ EX C; 9/27/10 e-mail Sack to Complainant), putting aside even the diminished probative value-for reasons of ethical considerations-attendant to co-counsel's testimony on behalf of his client.

Moreover, any such "abandonment" nowhere near rises to the severity envisioned by the Holland, *infra*, decision, i.e., failure of attorney to "...communicate...or to respond [to client] ...over a period of several years", Holland, *infra*. at 2568.

There, the court enumerated the bases necessary to successfully claim such protection, i.e., diligent pursual by claimant of his/her rights and the existence of extraordinary circumstances preventing timely filing , Holland, at 2562.

Dramatically unlike the facts present in this case, in Holland, supra, the claimant sent “...many letters [to his counsel]...repeatedly emphasiz[ing] the importance of...[timely filing, some of which letters]...went so far as to identify the applicable rules.” Also, claimant’s counsel there “...failed to communicate with his client over a period of years, despite various pleas...that [he] respond to his letters”. Claimant there was also prevented from terminating his client relationship with his counsel. Holland, at 2564, 2568.

Here, apart from two terse e-mails of September 27-28, 2010 to her counsel shortly after receiving a copy of the OSHA denial (EX C to motion for waiver), Complainant did nothing from that time up until her contact with her new lawyers on December 7, 2010, a period of over two months! As earlier footnoted, the claimed abandonment by her previous counsel is neither established, nor anything like the abandonment which occurred in Holland, supra. Finally, unlike Holland, supra, Complainant experienced no restraint from terminating her previous counsel.

On the facts of this case, there exists neither the diligent pursual nor extraordinary circumstances necessary for equitable tolling relief.

RECOMMENDED ORDER

Complainant's request for hearing is DISMISSED.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey

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, 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. § 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* 29 C.F.R. § 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.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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. § 1980.109(c). 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. §§ 1980.109(c) and 1980.110(a) and (b).