

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 October 2012

CASE NO.: 2012-SOX-00031

In the Matter of:

JACQUELYN L. BROWN,

Complainant,

v.

TEAMSTAFF GOVERNMENT
SOLUTION,

Respondents

ORDER DISMISSING CLAIM AS UNTIMELY

This cases arises out of a complaint of retaliation filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 USC § 1514A (“Sarbanes-Oxley”) enacted on July 30, 2002.

On June 11, 2011, the Complainant filed the present complaint. On June 27, 2012, the Occupational Safety and Health Administration (OSHA) issued a determination dismissing the complaint on the grounds that it had not been timely filed. The Complainant filed an appeal of this determination with the Office of Administrative Law Judges (OALJ) on July 24, 2012. On July 31, 2012 I issued an order to show cause why the complaint should not be dismissed because of untimely filing. Counsel for both the Complainant and the Respondent filed briefs in response to this order.

BACKGROUND

The Complainant was employed by the Respondent. Her employment was terminated on December 1, 2011. On the same day she filed a complaint of violation of subsection (11)(c) of the Occupational Safety and Health Act, 29 U.S.C. §660(c) (“OSH Act”).

According to the Case Activity Worksheet prepared by OSHA, this complaint stated that “after raising concerns regarding workers’ exposure to prescription drugs at the Consolidated Mail Outpatient Facility, Murfreesboro, TN, to both Respondent and the VA, she was terminated on December 1, 2011.”

On June 11, 2012, the Complainant submitted a letter to the OSHA Area Director and the assigned investigator. This letter stated that she was amending her complaint under the OSH Act “to include violations alleged under the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A.” She asserted the Respondent had “repeatedly under-reported or completely failed to report workplace injuries and illnesses in order to contain Worker’s Compensation premiums and healthcare costs” leading to “material misrepresentations of stock value and company strength to prospective investors.” The complaint alleged that the Respondent subjected her to a hostile work environment, harassed, threatened with suspension, and ultimately discharged her in retaliation for filing a complaint with OSHA.

On June 26, 2012, the Area Director issued findings on the OSH Act complaint. This letter found that there was “no reasonable cause to believe that Respondent violated Section 11(c) of the Occupational Safety and Health Act.” It advised that the case would be closed unless the Complainant filed an appeal with the Director of the OSHA Office of Whistleblower Protection Program (OWPP), and provided the address for that office.

The Area Director’s June 26, 2012 letter confined itself to the OSH Act complaint and did not address the Sarbanes-Oxley complaint. The materials provided by the parties do not indicate whether an appeal of that letter has been filed with OWPP. The Office of Administrative Law Judges does not have jurisdiction over appeals of complaints under the OSH Act.

The Area Director’s June 27, 2012 letter did not address the merits of the Sarbanes-Oxley complaint. It dismissed that complaint on the grounds of untimeliness.

An action under the employee protection provisions of Sarbanes-Oxley must be filed “not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.” 18 USC § 1514A(b)(2)(D).

The Sarbanes-Oxley complaint noted several acts of alleged retaliation during the Complainant’s employment. Her termination is the last retaliatory act in the complaint, and it is clear that she was aware of it immediately, because she filed her OSH Act complaint the same day. Therefore the date of her termination, December 1, 2011, is the last date from which the statute of limitations could be started. The complaint was filed on June 11, 2011, more than 6 months after the Complainant was discharged.

Ordinarily this would resolve the issue, but the Complainant has asserted that the present complaint should be accepted as an amendment of the timely OSH Act complaint. In addition, the filing requirements under the Act may, under some circumstances, be relaxed under the doctrines of equitable tolling of the statute of limitations or equitable estoppel. Each of these issues warrants discussion.

AMENDMENT OF THE ORIGINAL COMPLAINT

The Complainant's brief argues that the June 11 Sarbanes-Oxley complaint should be accepted as an amendment to the timely OSH Act complaint. The Department of Labor's Rules of Practice and Procedure (DOL Rules) provide:

(e) Amendments and supplemental pleadings.

If and whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings; provided, however, that a complaint may be amended once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved.

29 C.F.R. §18.5(e).

The DOL Rules provide that "To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling. The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. § 18.1. Federal Rule of Civil Procedure 15 provides, in pertinent part, that:

(c) RELATION BACK OF AMENDMENTS.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) **the law that provides the applicable statute of limitations allows relation back;**

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

.....

(d) SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed.R.Civ.P. Rule 15(c)(1), (d). [emphasis added]

The Complainant has cited cases in which the Administrative Review Board has accepted amended or supplemental pleadings in whistleblower cases. In *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 88-ERA-33 (ARB Nov. 10, 1997) the evidence disclosed additional acts of alleged retaliation that had not been included in the original complaint. The Board held that the administrative law judge had properly permitted introduction of evidence of the additional acts over the employer's objection and that "the complaint effectively was amended to conform to the evidence."¹

The Complainant cites a footnote in the *Ruud* decision in which the Board noted that:

[C]omplaints are informal filings which need not set forth all legal causes of action or allege all elements of a discrimination case and that the fact finder is not bound by the legal theories of any party in determining whether discrimination has occurred but must review the record in its entirety for purposes of the determination. [Citations omitted] Our disposition also perpetuates the Department's general use of amendment and supplementation to promote administrative economy and convenience where fairness permits. [Citations omitted]

Rudd fn 27.

¹ The Board noted in passing that what was referred to in the record as an "amendment" of the complaint was strictly speaking a "supplemental pleading" under Fed.R.Civ.P. 15(d), since it added additional occurrences of alleged misconduct. In the DOL Rules, 29 C.F.R. §18.5(e) makes the same distinction between amended and supplemental pleadings.

The Complainant also cited *Gonzalez v. Colonial Bank*, ALJ No. 2004-SOX-39 (ALJ Aug 17, 2004). The administrative law judge in that case granted the complainant's motion to amend the complaint by adding the parent company of the original respondent as an additional respondent. He also held that, in accordance with Fed.R.Civ.P. 15(c), the amended complaint related back to the date of the original complaint.

The parent company in *Gonzalez* sought interlocutory review. The Board, citing its strong policy against piecemeal appellate litigation, dismissed the interlocutory appeal. *Gonzalez v. Colonial Bank*, ALJ No. 2004-SOX-39, ARB No. 05-060 (ARB May 31, 2005).

Ruud involved supplementing a complaint by adding new allegations of adverse employment actions. *Gonzalez* involved amending a complaint to add an additional party. In each case there was a timely filed complaint under the specific whistleblower protection statute that was involved in the case. Neither case supports the proposition that a new cause of action under a different act can be raised by amendment of a complaint after the passage of the statute of limitations for that act has passed. Furthermore, Fed.R.Civ.P. 15(c), which the judge in *Gonzalez* cited in ruling that the amendment related back to the original complaint, is expressly limited to situations in which the applicable statute of limitations permits relation back. Fed.R.Civ.P. 15(c)(1)(A). The Sarbanes-Oxley statute of limitations, 18 USC § 1514A(b)(2)(D) does not do so.

Even when they are based on the same alleged acts by the employer and employee, whistleblower complaints under Sarbanes-Oxley and under the OSH Act are distinct causes of action. Each has its own statute of limitations. Each is adjudicated differently, with administrative appeals running to OALJ and to OWPP, respectively. Neither Fed.R.Civ.P. 15(c) nor the other authorities cited permit the conclusion that an untimely Sarbanes-Oxley complaint can relate back to a timely complaint under a different statute.

EQUITABLE ESTOPPEL AND EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS

The Board noted in *Gonzalez* that the Sarbanes-Oxley statute of limitations is subject to equitable modification. A complainant seeking to relax the statute of limitations on the grounds of equitable estoppel or equitable tolling 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 of the statute of limitations 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 or allegation that the Respondent misled the Complainant concerning her rights under Sarbanes-Oxley or in any way contributed to the delay in filing the Sarbanes-Oxley complaint, so that neither equitable estoppel nor the first form of equitable tolling applies. Similarly, there has been no claim of extraordinary circumstances having prevented a timely filing.

The third basis for a finding of equitable tolling involves raising the precise statutory claim within the limitations period in the wrong forum. In this case the statutory claim (violation of the Sarbanes-Oxley whistleblower protection provision) was raised before the correct agency (OSHA), but it was done after the statute of limitations had passed. There has been no allegation or evidence that the same claim was presented to any other agency within the statutory period.

ORDER

The complaint is **DISMISSED** as untimely.

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. § 1979.110(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. § 1979.110(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 the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

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. § 1979.110. 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. §§ 1979.109(c) and 1979.110(a) and (b).