U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 March 2012

Case Number: 2012-SOX-00008

In the Matter of:

AARON C. JONES,
Complainant,

v.

CB RICHARD ELLIS GROUP, INC.,
Respondent.

Before: STEPHEN L. PURCELL
Chief Administrative Law Judge

ORDER DISMISSING CASE AS UNTIMELY

This proceeding arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A ("Sarbanes-Oxley"), and the applicable regulations issued thereunder at 29 C.F.R. Part 1980. The Regional Administrator did not find a violation of the Act and issued findings to that effect on behalf of the Secretary of Labor on November 14, 2011. On January 6, 2012, Complainant objected to the findings and requested a hearing before the Office of Administrative Law Judges ("OALJ").[1] On January 12, 2012, the undersigned issued a Notice of Docketing and Order to Show Cause requiring the parties to show cause, if any, as to why Complainant's objections and request for a hearing should not be dismissed as untimely. The Notice also provided a procedural history of the current case.

Complainant filed a Response to Order to Show Cause along with a Conditional Request for Additional Time and a Motion to Extend Time on February 16, 2012.[2] In his Response,

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[1] At the time my show cause order was issued on January 12, 2012, OALJ had not received Complainant's objections and request for hearing which he purportedly sent to this office on January 6, 2012 by facsimile. However, OALJ subsequently received Complainant's objections and request for hearing in the mail on January 17, 2012. The envelope in which they were mailed bears a postmark of January 6, 2012 which, by regulation, is considered the date of filing. 29 C.F.R. §1980.106(a).

[2] Because the envelope sent January 12, 2012 was returned to OALJ and reissued January 17, 2012 to Complainant's changed address, Complainant's Response to the show cause order was timely.

Complainant indicated that due to an address change as a consequence of a foreclosure on his house, he did not receive a copy of the Secretary's Findings until December 6, 2011, and he included a copy of the certified mail receipt showing that date (Exhibit B, Complainant's Response, dated February 10, 2012). He also explained that he now knows that he should have mailed the objections and the request for a hearing by January 5, 2012 rather than January 6, 2012, which was one day late as the month of December has thirty-one days. He argued that this Court should find the motion timely because: miscalculating by one day constitutes "excusable neglect;" he attempted in good faith to comply; Respondent suffered no prejudice; and, in any case, his faxed submission was received within five days after the deadline as per the mailbox rule (Complainant's Response at 3-4).

Respondent filed a Response to Complainant's Response to Order to Show Cause on February 17, 2012, arguing that Complainant failed to show, first, that he actually filed his objections on January 6, 2012, and even if he did, that the delay warrants application of the doctrine of equitable tolling (Respondent's Response dated February 17, 2012).[3] Respondent also argues that Complainant's failure to notify the Office of Administrative Law Judges as to his change of address is not sufficient as an excuse to justify equitable tolling (Respondent's Response at 2-3).

According to 29 C.F.R. §1980.106(a), a respondent has thirty (30) days after the service of a Sarbanes-Oxley complaint to file an answer. The regulation states, in relevant part,

> Any party who desires review, including judicial review, of the findings and preliminary order…must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1980.105(b). The objections, request for a hearing, and/or request for attorney's fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or email communication is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt.

29 C.F.R. §1980.106(a). If an objection is not timely filed, the Secretary's findings or preliminary order will become final and not subject to judicial review. 29 C.F.R. §1980.106(b).

In this case, the date of the postmark, January 6, 2012, constitutes the date of filing. Because Complainant filed his Response out of time, he must make a showing of entitlement to equitable tolling, which allows an administrative law judge to relax the time limitations in a particular case where a Complainant is without fault in untimely requesting a hearing. The time limits for filing complaints and requests for hearings in whistleblower cases are not jurisdictional, and may be subject to the doctrine of equitable tolling. As recognized by the

[3] Respondent argued that Complainant only provided a copy of his self-made fax cover sheet showing January 6, 2012 as the date of faxing and not a receipt of fax. Complainant's fax does not appear in the case tracking system used at OALJ. However, January 6, 2012 is accepted here as the date of filing because of the postmark on the letter received by OALJ after the show cause order was issued.

Third Circuit in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the doctrine of equitable tolling applies when,

> (1) the defendant has actively misled the plaintiff respecting the cause of action,
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> (2) The plaintiff has in some extraordinary way been prevented from asserting his or her rights, or
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> (3) The plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

657 F.2d16, 18-20 (1981) (internal citations omitted). In the current case, Complainant argues that the doctrine of equitable tolling applies, while Respondent argues that the doctrine is inapplicable (Complainant's Response at 3-4; Respondent's Response at 2).

As a threshold matter, Complainant bears the burden of justifying application of the principles of equitable tolling. *Harvey v. Home Depot U.S.A, Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-00020 and -00036, slip op. at 16 (ARB June 2, 2006). Courts are generally less forgiving in receiving late filings where the complainant has failed to exercise due diligence in preserving his legal rights, as opposed to where the failing is not, or not entirely, his fault. *Herchak v. Am. W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003). This is true even when a complainant is unrepresented by counsel. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150, n. 4 (1984). Furthermore, an absence of prejudice to the other party "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures," although it is a relevant factor. *Id*. at 152. The Administrative Review Board has dismissed a whistleblower case as untimely because the appeal was filed one business day late. *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001 (ARB Nov. 17, 2010).

According to Complainant, he mailed and faxed his Request for a Hearing on January 6, 2012 (Complainant's Response, February 16, 2012). This was one day late regardless of whether the facsimile was actually transmitted, and consequently this case turns on Complainant's reasons for the one-day delay. First, Complainant states that he "did not record the date" that he received the denial letter, and "later misjudged the date on which [he] had received it." Second, Complainant states that he faxed his response to the denial letter on January 6, which was within five days following the deadline to permit mailing. Third, Complainant argues that his one-day delay was "excusable neglect" and did not prejudice the Respondent. Complainant is also unrepresented, and certainly due process requires that he be given adequate instruction before his case is dismissed as untimely.

Unfortunately, none of these considerations are sufficient to trigger any of the narrow grounds for equitable tolling. Equitable tolling applies when the delay is not due, or not solely due, to a complainant's own fault, or where the delay occurs because a filing was misfiled in good faith. In the present case, the late filing was not the result of the defendant's conduct or the result of circumstances that prevented Complainant from timely filing. On the contrary, by Complainant's own admission, his objections and request for a hearing were filed late due to his

failure to record the date he received the denial letter and his subsequent miscalculation of when his objections were due. While it is true that Respondent suffered no prejudice—indeed, Respondent received Complainant's Objection and Request for Hearing no later than January 10, 2012—this is not a sufficient ground for equitable tolling. Complainant had notice that failing to file a timely response could result in the dismissal of his claim, and he simply failed to exercise due diligence in preserving his right to a hearing.

Because Complainant failed to file his objections and request for a hearing within the prescribed filing period, and because he has failed to establish any grounds warranting application of the doctrine of equitable tolling, this case is **DISMISSED** as untimely.

SO ORDERED.

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STEPHEN L. PURCELL
Chief Administrative Law Judge

Washington, DC

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).