U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 August 2009

CASE NO.: 2009-STA-45

IN THE MATTER OF

MARK ANTHONY SMITH

Complainant

v.

CES ENVIRONMENTAL SERVICES, INC.

Respondent

RECOMMENDED DECISION AND ORDER GRANTING SUMMARY DECISION AND CANCELLING FORMAL HEARING

On July 2, 2009, Respondent, CES Environmental Services, Inc., filed a Motion for Summary Judgment seeking dismissal of Complainant's complaint against it in this case arguing that: (1) Complainant has not filed his complaints timely within the statutory time requirements; (2) Complainant has absorbed significant time arguing this position to the EEOC and Texas Workforce Commission; and (3) Complainant was terminated for cause for excessive personal phone use.

On July 6, 2009, an Order issued to Complainant to show cause, by July 27, 2009, why Respondent's motion should not be granted. Since Complainant is appearing in this matter without Counsel, he was advised that:

> (1) As a pro se party he is entitled to file a response opposing the motion and that any such response must be filed by **July 27, 2009;**
>
> (2) The Court could dismiss the action on the basis of the moving party's papers if the pro se party does not file a response;

(3) The pro se party must identify all facts stated by the moving party with which the pro se party disagrees and must set forth the pro se party's version of the facts by offering affidavits (written statements signed before a notary public and under oath) or by filing sworn statements (bearing a certificate that it is signed under penalty of perjury); and

(4) The pro se party is also entitled to file a legal brief in opposition to the one filed by the moving party.

On July 23, 2009, Complainant filed a "motion to show cause" in response to the show cause order.

Complainant argues that he has met all "ordered dates, deadlines and other criterions (sic) set forth by this judiciary." He further "declares that all documentations, voice recordings (i.e. Intercepted communications), and photographs" forwarded to the undersigned on or about July 15, 2009, which is Complainant's pre-hearing exchange "supports the veracity of his timely filings, communications with enforcement agents (agencies)...."

Complainant alleges that Respondent discharged him on July 16, 2008. On February 3, 2009, Complainant filed a complaint with the Secretary of Labor alleging Respondent discriminated against him in violation of the Toxic Substance Control Act (TSCA) and the Surface Transportation Assistance Act (STAA). To be considered timely, any alleged adverse employment action under the TSCA must be filed within 30 days of the action and within 180 days under the STAA. Since Complainant filed his complaint with the U.S. Department of Labor in excess of 180 days, it was considered untimely filed and dismissed on May 5, 2009.

On July 9, 2009, Complainant also sought discovery from Respondent in the form of Requests for Production of Documents and Interrogatories, none of which would cure the Secretary's finding that his complaint was untimely filed.

DISCUSSION

The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d) (2001). See, e.g. Stauffer v. Wal Mart Stores, Inc., Case No. 99-STA-21 (ARB Nov. 30, 1999) (under the Act and pursuant to 29 C.F.R. § 18 and Federal Rule of Civil Procedure 56, in ruling on a motion for summary decision, the judge does not weigh the evidence or determine the truth of the matter asserted, but only determines whether there is a genuine issue for trial); Webb v. Carolina Power & Light Co., Case No.

93-ERA-42 @4—6 (Sec'y July 17, 1995). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." 29 C.F.R. § 18.40(d). Thus, in order for Respondent's motion to be granted, there must be no disputed material facts upon a review of the evidence in the light most favorable to the non-moving party (i.e., Complainant), and Respondent must be entitled to prevail as a matter of law. Gillilan v. Tennessee Valley Authority, Case Nos. 91—ERA—31 and 91-ERA—34 @ 3 (Sec'y August 28, 1995); Stauffer, supra.

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). It is enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. Id. at 324. Again, the determination of whether a genuine issue of material fact exists must be made by viewing all evidence and factual inferences in the light most favorable to Complainant. Trieber v. Tennessee Valley Authority, Case No. 87-ERA-25 (Sec'y Sept. 9, 1993).

The purpose of a summary decision is to pierce the pleadings and assess the proof, in order to determine whether there is a genuine need for a trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a trier of fact to find for the non-moving party, there is no genuine issue for trial. Id. 587.

In considering the appropriateness of a motion for summary decision under the employee protection provisions of the Energy Reorganization Act, provisions which are analogous to those applicable in this matter, the Secretary has noted that where there is no protected activity nor any discrimination as a result of protected activity, there is no cause of action. Richter v. Baldwin Assocs., Case No. 84-ERA-9 @ 3 (Sec'y Mar. 12, 1986). Under Richter, "any facts which are probative of whether a complainant engaged in protected activity or whether adverse action taken against the complainant was in retaliation for a protected activity are material facts. A dispute as to such probative facts demands the denial of a motion for summary decision and requires that a hearing be held to resolve the

disputed facts." Id. The Secretary amplified this standard in Bassett v. Niagara Mohawk Power Co., Case No. 86—ERA—2 (Sec'y. July 9, 1986), wherein she stated that "it is not required that every element of a legal cause of action be set forth in an employee's . . . complaint." Id. @ 4.

Lastly, the U.S. Supreme Court has cautioned that "summary procedures should be used sparingly . . . where motive and intent play lead roles . . . It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." Pollar v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 Sup. Ct. 486, 491 (1962).

Accordingly, in order to withstand Respondent's Motion, it is not necessary for Complainant to prove his allegations. Instead, he must only allege the material elements of his **prima facie** case. Bassett, @ 4. Whether the alleged acts actually occurred or whether they were motivated by the requisite animus are matters which cannot be resolved conclusively until after the parties have presented their evidence at a formal hearing.

Complainant has presented various documents which purportedly demonstrate his protected activity of which Respondent allegedly had knowledge, i.e., a May 7, 2008 letter addressed to Respondent from the U.S. Department of Labor regarding alleged hazards. He also provided a June 23, 2008 letter from U.S. Equal Employment Opportunity Commission (EEOC) transmitting to him a Charge of Discrimination Form and Mediation Information. On or about July 1, 2008, Complainant filed a Charge of Discrimination against Respondent alleging employment discrimination because of his race and in violation of Title VII.

However, Complainant has not produced any evidence that he timely filed his complaints with the Secretary of Labor. Respondent's employment decision of July 16, 2008, constituted the commencement of Complainant's filing period. Consequently, I find and conclude that Complainant failed to file his complaint with the Department of Labor in a timely manner.

Equitable Tolling

Courts have held that time limitation provisions in like statutes are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather analogous to statutes of limitation and thus may be tolled by equitable consideration. Donovan v. Hakner, Foreman & Harness, Inc., 736 F.2d 1421 (10th

Cir. 1984); School District of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981); Coke v. General Adjustment Bureau, Inc., 654 F.2d 584 (5th Cir. 1981). The Allentown court warns, however, that the restrictions on equitable tolling must be **scrupulously observed;** the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may be an otherwise meritorious cause. Rose v. Dole, 945 F.2d 1331, 1336 (6th Cir. 1991)

In Allentown, the court, relying on Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978), which interpreted Supreme Court precedent, observed that tolling might be appropriate (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 complaint has raised the precise statutory claim in issue but has **mistakenly** done so in the wrong forum. Allentown, 657 F.2d at 19—20; see also Prybys v. Seminole Tribe of Florida, Case No. 1995-CAA-15 (ARB Nov. 27, 1996); see also Halpern v. XL Capital, Ltd., Case No. 2004-SOX-54 (ARB August 31, 2005).

Complainant does not raise an equitable tolling argument but since he filed a charge of race discrimination with EEOC, the applicability of equitable tolling will be considered. In the instant case, there is no allegation or evidence that Respondent misled Complainant in any course of action. Complainant does not claim a lack of knowledge or notice of his filing requirements.

The record is also devoid of any contention or evidence that Complainant has in some extraordinary way been prevented from asserting his rights in a timely matter. Moreover, the "extraordinary circumstances" exception is premised on affirmative action/misconduct by Respondent that prevents Complainant from timely filing a complaint, which is lacking in the present case.

Complainant filed a Charge of Discrimination with EEOC raising racial discrimination. He does not argue that he invoked the wrong forum by such filing because the concerns expressed by his alleged protected activity at Respondent and the alleged July 16, 2008 discrimination which followed were purportedly fully protected by the STAA. Significantly, Complainant does not contend that he **mistakenly** filed his complaint in the wrong forum nor did he offer any evidence in support of such an allegation. Complainant's failure to offer

evidence in support of such an allegation precludes tolling. See 29 C.F.R. § 18.40(c) (a party opposing a motion for summary decision may not rest on mere allegations). Lastly, I find Complainant cannot avail himself of the principle of equitable tolling because he did not **mistakenly** file his initial complaint (with EEOC) in the wrong forum. See Prybys, Slip op. @ 5 (pursuant of alternative remedies does not toll the statute of limitations): Cox v. Radiology Consulting Associates, Inc., Case No. 1986-ERA-17 (Sec'y Nov. 6, 1986) @ 10. (relief sought through other measures does not justify the application of equitable tolling).

In light of the evidence presented and based on the foregoing jurisprudence, I find that the extant circumstances regarding equitable tolling are not persuasive. Consequently, I conclude that Complainant is not entitled to equitable tolling and it is recommended that Respondent's Motion for Summary Decision be **GRANTED.**

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion for Summary Decision be, and it is, **GRANTED.**

IT IS FURTHER ORDERED, in view of the foregoing, that the formal hearing scheduled for August 11, 2009, in Houston, Texas be, and it is hereby cancelled.

ORDERED this 4th day of August, 2009, at Covington, Louisiana.

A

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.