



In the Matter of:

HENRY W. M. IMMANUEL,
COMPLAINANT,

ARB CASE NO. 04-062

ALJ CASE NO. 02-CAA-20

v.

DATE: December 30, 2005

THE RAILWAY MARKET,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard E. Condit, Esq., Washington, D. C.

For the Respondent:

Thomas J. McAndrew, Esq., Providence, Rhode Island

FINAL DECISION AND ORDER

Henry W. M. Immanuel brought his whistleblower complaint under the following environmental statutes: Clean Air Act (CAA), 42 U.S.C.A. §7622 (West 2003); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. §9610 (West 2005); Federal Water Pollution Control Act (WPCA), 33 U.S.C.A §1367 (West 2001); Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (1994) (West 2003); Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 2003); Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998) (collectively the environmental whistleblower protection provisions), and regulations set out at 29 C.F.R. Part 24 (2005). Following a hearing on the merits, a Department of Labor (DOL) Administrative Law Judge (ALJ) issued a decision in which he recommended that we dismiss Immanuel's complaint as untimely. Recommended Order of Dismissal (R. O. D.). After a review of the record and the parties' briefs, we dismiss Immanuel's complaint.

BACKGROUND

The Railway Market hired Immanuel in June 2001 and terminated his employment on July 9, 2001. Immanuel claimed that Railway fired him because he had refused to throw four five-gallon buckets of industrial floor cleaner into a dumpster the market had on site.

Immanuel filed a complaint with the Maryland Department of Labor Division of Licensing and Regulation, Occupational Safety and Health (“MOSH”) program on July 24, 2001, asserting that Railway Market terminated his employment for refusing to perform an unsafe act. Following an investigation, MOSH notified Immanuel on or before December 13, 2001, that it was dismissing his claims for lack of evidence.

On February 26, 2002, Immanuel filed a complaint with the DOL Occupational Safety and Health Administration (OSHA). This was 73 days after dismissal of his MOSH complaint and seven months after the termination of his employment. After OSHA failed to sustain the complaint of discrimination, Immanuel requested an evidentiary hearing before an ALJ.

Although the ALJ took evidence on the merits of Immanuel’s whistleblower complaint on October 8-10, 2003, the ALJ granted Railway’s motion for judgment as a matter of law on procedural grounds: Immanuel’s OSHA complaint was untimely. R. O. D. at 5. Even assuming the MOSH complaint tolled the federal 30-day limitations period, Immanuel had no more than 30 days from the dismissal of his MOSH complaint to file with OSHA. *Id.* As we now briefly explain, we concur with the result the ALJ reached and adopt the recommendation of dismissal.

ISSUE

The question presented to us on review is: Should the ALJ have granted Railway judgment as a matter of law, when Immanuel’s OSHA complaint was filed more than 30 days after dismissal of his MOSH complaint?

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to review the ALJ’s recommended decisions pursuant to 29 C.F.R. § 24.8 and Secretary’s Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary’s authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including, inter alia, the environmental whistleblower protection provisions).

Under the Administrative Procedure Act, the ARB, as the Secretary’s designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ’s findings of fact and conclusions of law. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8;

Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Devers v. Kaiser-Hill*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 4 (ARB Mar. 31, 2005).

The rules governing hearings in whistleblower cases contain no specific standards for granting a motion for judgment as a matter of law. See 29 C.F.R. Parts 18 and 24 (2005). It is therefore appropriate to apply Fed. R. Civ. P. 50, the Federal Rule of Civil Procedure governing motions for judgment as a matter of law. Fed. R. Civ. P. 50(a)(1) provides:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Id.

The ALJ's recommended grant of judgment as a matter of law is analogous to summary decision under 29 C.F.R. §§ 18.40, 18.41, and we therefore review the decision de novo. Cf. *Farmer v. Alaska Dep't of Transp. & Pub. Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-11, slip op. at 4 (ARB Dec. 17, 2004); *Ewald v. Commonwealth of Va., Dep't of Waste Mgmt.*, ARB No. 02-027, ALJ No. 1989-SDW-1, slip op. at 4 (ARB Dec. 19, 2003).

DISCUSSION

The environmental whistleblower protection provisions prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, i.e., taking adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding or has assisted or participated in any such proceeding. See 29 C.F.R. § 24.2 (2005). See also *Powers v. Tennessee Dept. of Env't & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16, slip op. at 2 (ARB Aug. 16, 2005); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 16-17 (ARB Feb. 28, 2003). To prevail on a complaint of unlawful discrimination under these environmental whistleblower statutes, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because he engaged in protected activity. *Powers* at 2; *Jenkins* at 16-17.

But as a threshold matter, the complainant must file the complaint within 30 days of the adverse action. 42 U.S.C.A. §7622(b)(1); 42 U.S.C.A. §9610(b); 33 U.S.C.A.

§1367(b); 42 U.S.C.A. § 300j-9(i)(2)(A); 42 U.S.C.A. § 6971(b); 15 U.S.C.A. § 2622(b)(1). Because the time limit is not jurisdictional, we have recognized circumstances under which the time limit is tolled. *Immanuel v. Wyoming Concrete Indus., Inc.*, ARB No. 96-022, ALJ No. 95-WPC-03, slip op. at 3 (ARB May 28, 1997) [*Immanuel I*], citing *School Dist. v. Marshall*, 657 F.2d 16, 18-21 (3d Cir. 1981). See also *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54, slip op. at 4 (ARB Aug. 31, 2005). The parties agree that the only such circumstance pertinent here is if the complainant “has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum.” *Immanuel I* at 18.

In this case, Railway said it could be assumed only for the purpose of disposing of this case that Immanuel’s MOSH filing raised the precise statutory claim in issue, but was mistakenly filed in the wrong forum; and that, as a consequence, the MOSH filing tolled the 30-day limitations period of the environmental whistleblower acts. Brief of the Employer, the Railway Market, Inc., at 2, 4. Therefore, neither the ALJ nor we need to address whether the MOSH filing actually was the “precise statutory claim” that he later filed with OSHA. The issue before us, then, is a narrow one: Once the MOSH claim was dismissed, was Immanuel’s OSHA claim time barred because he filed it more than 30 days after the dismissal?

As Railway points out, *Immanuel I* did not establish how much time a complainant has to file in the correct forum once a complaint that has been filed in the wrong forum is dismissed. Railway Brief, at 5. Railway and the ALJ rely appropriately on *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424 (1965), which held that the timely filing of a state Federal Employers’ Liability Action (FELA), 45 U.S.C.A. § 51 et seq. (West 1986) tolled the FELA limitation provision “during the pendency of the state suit.” 380 U.S. at 435. The tolling period continues “until the state court order dismissing the state action becomes final by the running of the time during which an appeal may be taken or the entry of a final judgment on appeal.” *Id.* Merely to say the federal statute is tolled for a “reasonable time” after dismissal of the state court dismissal of plaintiff’s action “would create uncertainty as to exactly when the limitation period again begins to run.” *Id.*

In *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), which arose in the Fourth Circuit, the Supreme Court held that the commencement of a class action suspended the statute of limitations for all members, including the plaintiff, until class certification was denied. Because the action seeking class certification had been filed before the plaintiff received a 90-day notice of the right to sue from the Equal Employment Opportunity Commission (EEOC), he had a full 90 days in which to bring suit after the district court denied class certification. *Id.* at 353-354.

We apply these tolling rules to this case. MOSH notified Immanuel on or before December 13, 2001, that it was dismissing his claim for lack of evidence. Under the environmental whistleblower statutes, he had no more than 30 days within which to file his complaint with OSHA, but did not do so for 73 days, until February 26, 2002. Therefore, the ALJ properly concluded that his OSHA complaint was untimely.

We agree with Railway that Immanuel has not squarely addressed why he should have more than the statutory 30 days after dismissal of his MOSH complaint to file an OSHA complaint. Railway Brief, at 4. Instead, Immanuel makes various peripheral and non-meritorious arguments, which we briefly address.

Immanuel claims that the ALJ erred in not relying on *Immanuel I*, where the Board determined that a one-year delay between a state agency and federal filing was timely. Brief of the Complainant Henry W. M. Immanuel, at 9. But that ruling addressed only the facts of that case and did not establish a bright-line one-year limitations period.

Immanuel also asserts that the ALJ read *Burnett* too narrowly to say that tolling begins from when a substantially similar claim was filed in state court and ends when the claim is dismissed. Instead, Immanuel notes that, under *Burnett*, tolling continues until the entry of final judgment on the expiration of the appeal period. *Id.* at 11. While that may be so under the facts of *Burnett*, Immanuel fails to explain how the operation of that principle would affect the outcome of the instant case. First, there is no way the OSHA filing can be considered an “appeal” from a MOSH final judgment. Second, Immanuel does not proceed to explain how his application of the rule would render the 73-day filing timely. *Id.* at 12.

In his Reply Brief, Immanuel writes unpersuasively, “As there is no appeal formally recognized from a decision by MOSH in an environmental whistleblower matter to OSHA, Mr. Immanuel’s filing with OSHA cannot be deemed untimely.” Reply Brief of the Complainant Henry W. M. Immanuel, at 5. Yet, since there is no right to appeal the MOSH decision to OSHA, there is also no way his 73-day filing can be considered timely.

Immanuel asks that we consider that he diligently pursued his appeal in a confusing procedural environment. “It is certainly reasonable that the approximately seventy days it took Mr. Immanuel to file with OSHA following issuance of the MOSH decision was understandable given the confusion that exists regarding the jurisdiction of state versus federal agencies in the investigation of environmental whistleblower complaints.” *Id.* at 5-6. This argument ignores the fact that *Immanuel I* arose upon the filing of a complaint under the WPCA, one of the environmental statutes under which Immanuel sought relief in this case. After the ARB’s 1997 decision in *Immanuel I*, it should have been eminently clear to Immanuel that federal environmental whistleblower complaints must be filed with OSHA. Therefore, the only “confusion” that exists is with Immanuel. No tolling principle would lead him to believe that he had more than the statutory 30 days to file once his MOSH complaint was dismissed. *See Allentown*, 657 F.2d 16 at 18-21.

Finally, we need not consider Immanuel’s argument that bringing his claim in the wrong forum, MOSH, was a “constructive filing,” since it is raised initially on appeal. Immanuel Brief, at 12. *See Farmer v. Alaska Dep’t of Transp. & Public Facilities*, ARB No. 04-002, ALJ No. 2003-ERA-11, slip op. at 6 (ARB Dec. 17, 2004).

CONCLUSION

For the foregoing reasons, we accept the ALJ's recommendation and **DISMISS** Immanuel's complaint as untimely.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge