U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ROBERT J. TIERNEY, **ARB CASE NO. 00-052**

COMPLAINANT, **ALJ CASE NO. 2000-STA-12**

v. **DATE: March 22, 2001**

SUN-RE CHEESE, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert J. Tierney, *Pro se, Winfield, Pennsylvania*

For the Respondent:
David C. Shipman, Esq., *Elion, Wayne, Crieco, Carlucci, Shipman & Irwin, Williamsport, Pennsylvania*

FINAL DECISION AND ORDER

I. Background

Complainant Robert J. Tierney worked as a truck driver for Respondent Sun-Re Cheese, Inc. (Sun-Re), from 1990 until he was terminated on May 16, 1997. More than two years later, on or about August 31, 1999, Tierney filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that he had been terminated in violation of the employee protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. §31105 (West 1997). OSHA determined that Tierney's complaint had not been filed within the STAA's statutory limitations period and denied relief.

Tierney objected to OSHA's determination and requested a hearing before a departmental Administrative Law Judge (ALJ). The ALJ held a hearing during which Tierney **S** who was not represented by counsel **S** testified. At the end of Tierney's testimony Sun-Re moved to dismiss the complaint on the ground that it was not timely filed. After Sun-Re renewed that motion in writing and Tierney responded to it, the ALJ issued a Recommended Decision and Order (RD&O) in which he recommended that the complaint be dismissed as untimely. The case is now before the Board

pursuant to the automatic review procedures of the STAA implementing regulations. 29 C.F.R. §§1978.109(a) and (c)(1) (2000). Both Tierney and Sun-Re have filed briefs on review.

II. Standard of Review

Under the STAA implementing regulations, the Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3). The Board reviews the ALJ's conclusions of law *de novo*. *Johnson v. Roadway Express, Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), *citing Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

III. Discussion

The STAA provides that "[a]ny employee who believes he has been discharged . . . in violation of [the STAA's employee protection provision] may, within one hundred and eighty days after such alleged violation occurs, file . . . a complaint with the Secretary of Labor alleging such discharge. . . ." 49 U.S.C.A. §31105(c)(1). Since it is undisputed that Tierney's complaint was not filed with OSHA until over two years after his employment was terminated by Sun-Re, his complaint cannot properly be heard unless the Act's 180-day filing period can be tolled or in some other way excused. Although we reaffirm that the STAA's filing period is subject to equitable tolling, we conclude that the facts do not support tolling in this case. Therefore we dismiss Tierney's complaint.

The Secretary has held repeatedly that the STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Hicks v. Colonial Motor Freight Lines*, Case No. 84-STA-20 (Sec'y Dec. 10, 1985); *Nixon v. Jupiter Chemical, Inc.*, 89-STA-3 (Sec'y Oct. 10, 1990); *Ellis v. Ray A. Schoppert Trucking*, 92-STA-28 (Sec'y Sept. 23, 1992). The regulations implementing the STAA discuss tolling:

> (2) A major purpose of the 180-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 180 days of an alleged violation will ordinarily be considered to be untimely.
>
> (3) However, there are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, *e.g.*, where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period.

29 C.F.R. §1978.102(d)(2)and (3).

In determining whether equitable principles require the tolling of a statute of limitations such as that contained in the STAA provision, we have been guided by the discussion of equitable tolling

of statutory time limits in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, arising under the analogous whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C. §2622 (TSCA), the court articulated three principal situations in which equitable tolling may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Allentown,* 657 F.2d at 20 (internal quotations omitted). None of these justifications for tolling – nor any other – apply to this case.

Tierney has made two arguments in favor of equitable tolling. First, as the ALJ found, within the 180-day period Tierney filed a claim with the Pennsylvania Department of Labor and Industry, and contacted the Pennsylvania Human Relations Commission. RD&O at 8. However, there is nothing in Tierney's pleadings or testimony to demonstrate that before these agencies he "raised the precise statutory claim in issue" **S** *i.e.*, a complaint that he was discharged in retaliation for activity protected by the STAA whistleblower provision. Thus, Tierney's contacts with Pennsylvania agencies did not toll the running of the STAA limitations period.

Tierney also argues that Sun-Re's failure to post the STAA and its regulations and the failure of the Commercial Driver's Manual to mention the STAA should toll the filing period. Complainant's Brief at 6-7. However, the failure of Sun-Re to post the STAA whistleblower provisions does not amount to the kind of *active* misrepresentation that is required to invoke equitable tolling. *See Allentown, supra,* 657 F.2d at 20. And the fact that the STAA is not mentioned in the Manual does not excuse Tierney's late filing. Here, as in *Hicks, supra*, slip op. at 12, and *Allentown, supra,* 657 F.2d at 21, the Complainant's ignorance of the law is not a sufficient reason to toll the limitations period.

Because Complainant has failed to establish a justification for equitably tolling the STAA limitations period, we conclude that his complaint was not timely filed and **DISMISS** it.[1/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[1/] Because we dismiss the complaint on timeliness grounds we do not express any opinion on the merits of the case.