U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 04 October 2007

In the Matter of:

Richard Cante,

Complainant, **Case No. 2007-CAA-0004**

v.

New York City Department of Education,

Respondent

DECISION AND ORDER DISMISSING COMPLAINT AS UNTIMELY

The instant claim arises under the employee protection provisions of Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 USC § 2651; Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 USC § 660(c); Section 322 of the Clean Air Act, Amendments of 1977 (CAA), 42 USC § 7622; Section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 USC § 9610; Section 507 of the Federal Water Pollution Control Act of 1972 (FWPCA), 33 USC § 1367; Section 7001 of the Solid Waste Disposal Act of 1976 (SoWDA), 42 USC § 6971; Section 1450 of the Safe Drinking Water Act of 1974 (SaWDA), 42 USC § 300j-9(i); and Section 23 of the Toxic Substances Control Act of 1976 (TSCA), 15 USC § 2622. These provisions protect employees against discrimination for attempting to carry out the purposes of the Acts and are governed by 29 CFR Part 24.

Procedural History

Complainant filed his claim with the Department of Labor's Occupational Safety and Health Administration (OSHA) on September 11, 2006. On April 9, 2007, OSHA dismissed the claims under OSHA, CAA, CERCLA, FWPCA, SoWDA, SaWDA, and TSCA as untimely.[1] Complainant filed a timely appeal with the Office of Administrative Law Judges (OALJ) on April 13, 2007. On May 11, 2007, this tribunal issued an order directing the parties to brief the

[1] OSHA found that although the AHERA claim was timely filed, Complainant had already received the remedy available under AHERA. Accordingly, OSHA dismissed the AHERA claim because there was no adverse employment action. The AHERA claim is not part of this appeal because it is beyond the scope of OALJ's jurisdiction. *See* 15 USC § 2651; 29 USC § 660(c).

issue of whether the complaint was timely filed with OSHA.[2] On June 29, 2007, Respondent filed its Motion to Dismiss and supporting brief. Complainant's Brief in Support of Appeal was received on July 6, 2007. Both parties filed replies on July 31, 2007. Respondent contends that the complaint is untimely. Complainant responds with two arguments. First, he alleges a timely filing within thirty days of actionable events consisting of the issuance of paychecks with discriminatory intent.[3] Complainant also contends that a written admonition by Mr. Baker to the effect that he should not contact Respondent and should contact his union only would invoke equitable estoppel and extend the charging period. No hearing has been held.

Standard of Review

Although Respondent's motion is entitled "Motion to Dismiss," the motion must be treated as a motion for summary decision under 29 C.F.R. § 18.40 because both parties attached to their motions and relied upon evidence outside the pleadings. *See Erickson v. Environmental Protection Agency*, ARB Case No. 99-095, ALJ Case. No. 999-CAA-2, en. 3 (ARB July 31, 2001) (citing *High v. Lockheed Martin Energy Sys.*, ARB No. 98-075, ALJ No. 96-CAA-8 (ARB Mar. 13, 2001); *Hall v. Dep't of Labor*, 198 F.3d 257 (10th Cir. 1999) (unpub.). Summary decision may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 29 C.F.R. §18.40; *Amax Coal Co. v. United Mine Workers of America Intern.*, 92 F.3d 571 7th Cir. 1996). A dispute about a material fact is "genuine" if the evidence is such that a reasonable ALJ could find in favor of the non-moving party. *See Hall*, 198 F.3d 257 (holding that in reviewing an ALJ's summary decision, it is useful to reason from Federal Rule of Civil Procedure 56 and interpretive federal case law); *Coll v. PB Diagnostic Systems*, 50 F.3d 1115 (1st Cir. 1995) (interpreting Federal Rule of Civil Procedure 56's use of the term "genuine"). Neither the motions nor the documents attached to the motions in this case suggest that the parties dispute any of the material facts alleged. Thus, no genuine issues of material fact in this case and the issue of timeliness is ripe for determination.

Factual Background

Complainant was employed as a fireman at P.S. 181, a public school in Queens, New York, and has been a member of Local 74 of the Service Employees International labor union since approximately 1995. Sometime in the spring of 2006, Complainant's direct supervisor, Robert Baker, directed Complainant to remove asbestos tiles from a room at P.S. 181. Complainant refused because of the asbestos involvement, and Mr. Baker proceeded to remove

[2] This order was issued pursuant to a telephone conference conducted on May 10, 2007, in which Counsel for Complainant and Counsel for Respondent participated. Counsel for Robert Baker, Complainant's supervisor, entered a special appearance and also participated in the telephone conference. In addition to the issue of the timeliness of the complaint, the issue of whether Respondent was correctly named as Complainant's employer was discussed. The parties were directed to brief the timeliness issue before addressing the issue of whether the Respondent was correctly named as Respondent. Mr. Baker's attorney was given the opportunity to submit an amicus brief on the issue of timeliness; however, no brief was submitted on Mr. Baker's behalf.

[3] In Complainant's Brief in Support in Support of Appeal, he alleges that after Complainant filed his complaint with OSHA on September 11, 2006, Mr. Baker continued to harass Complainant. However, Complainant does not argue that the allegedly harassing actions constituted actionable adverse employment action which would trigger the limitations period. Rather, Complainant argues only that that the issuance of the paychecks constituted actionable adverse employment action that triggered the limitations period.

the tiles himself. Complainant immediately filed a grievance with his union, complaining that Mr. Baker had harassed him in response to his refusal to remove the asbestos tiles, and that Mr. Baker had violated the law by removing and disposing of the tiles.

A grievance hearing was held on May 5, 2006. Dissatisfied with the results of the grievance hearing, Complainant wrote a letter to the Environmental Health and Safety division of the New York City Department of Education and requested a "second step" hearing with his union regarding Mr. Baker's handling of the asbestos. That hearing was rescheduled on at least two occasions, and did not take place until September 12, 2006.

On June 15, 2006, Mr. Baker gave Complainant a letter which stated that a contract between Local 891 and Local 94 required that Complainant switch from Local 74 to Local 94 if he was to remain employed as a fireman at P.S. 181. The letter further stated that if Complainant refused to join Local 94, he would be terminated effective July 1, 2006. In fact, the contract between Local 891 and Local 94 does not contain such a requirement. Rather, the contract merely permits firemen to become members of Local 94.

Despite Mr. Baker's interpretation of the union contract, Complainant refused to join Local 94. Following his refusal, he was demoted from fireman to cleaner on July 1, 2006. Also on that date, Mr. Baker sent a letter to Complainant which stated

> This letter is to inform you that you are not to write letters to the school staff or any one in [the] Department of Education Administration regarding any matter. . . You are to contact your union only.

After receiving this letter, Complainant filed another grievance with his union and but did not file protests with any other agencies until he hired a lawyer. Eleven days after hiring the lawyer, on September 11, 2006, Complainant filed the instant claims with OSHA.

On September 12, 2006, the same date that the "second step" grievance procedure took place, Mr. Baker addressed another letter to Complainant, informing him that the position of fireman was being offered to him. The letter notified Complainant that the position was to be filled immediately, and that if Complainant did not accept it, "there [was] a possibility of a layoff of the cleaner with the least amount of time in the building." Because Complainant was the cleaner with the least amount of seniority, the letter insinuated that if he did not accept the fireman position immediately, he would be terminated from P.S. 181 entirely.

On September 27, 2006, Mr. Baker addressed a third letter to Complainant, informing him that he would be restored to the title of Fireman Local 74 as of the date of the letter. However, the letter went on to state that the reinstatement was valid only 30 days, at which time Complainant was required to join Local 94. In a letter dated October 5, 2006, Mr. Baker's lawyer advised Complainant's lawyer to disregard Mr. Baker's September 27, 2006 letter. Mr. Baker's lawyer further stated that "[Complainant] may join, or not join, any labor organization he chooses." Sometime during this period, Complainant was awarded back pay in an amount equal to the difference between a fireman's rate of pay and a cleaner's rate of pay for the

duration of Complainant's tenure as a cleaner. However, Complainant has refused to accept the check which has been issued to him.

Discussion

Limitations Period – Adverse Employment Action

Each of the statutes invoked in this appeal requires that a complaint be filed with OSHA within 30 days of the alleged adverse employment action. *See* 42 USC § 7622, 42 USC § 9610, 33 USC § 1367, 42 USC § 6971, 42 USC § 300j-9(i), 15 USC § 2622. The limitations period begins to run when the complainant is notified of the adverse action, not when it actually takes effect. *Devine v. Blue Star Enter.*, ARB No. 04-109, ALJ 2004-ERA-10 slip op. at 5 (ARB Aug. 31, 2006); *Erikson v. EPA*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001). Notification of the adverse action occurs when the complainant "receives final, definitive, and unequivocal notice of an adverse employment decision." *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53, slip op. 34 (ARB Apr. 30, 2001).

The limitations period in the instant case began to run on June 15, 2006, the date that Complainant received Mr. Baker's letter informing him that if he did not join Local 94, he would be demoted to cleaner.[4] This letter can be deemed to constitute "final, definitive, and unequivocal notice of an adverse employment decision" because Complainant did not join Local 94 and was demoted to cleaner on July 1. *Overall*, ARB Nos. 98-111, 98-128, slip op. 34. Although the effect of the employment decision was not felt until Complainant was demoted on July 1, 2006, the notification of the decision occurred on June 15; thus, the limitations period began to run on that date. *See Devine*, ARB No. 04-109; *Erikson*, ARB No. 99-095. Since Complainant did not file his complaint with OSHA until September 11, 2006, 88 days after receiving notice of the adverse employment decision, the complaint is untimely.

Complainant argues that his complaint is timely because additional adverse employment action occurred with discriminatory intent each time he was issued a paycheck at the cleaner's rate of pay, and he was issued paychecks within the 30-day charging period. Complainant contends that because Mr. Baker continued to attempt to force Complainant to switch unions and had implied that he would be terminated if he did not immediately accept the position of Fireman Local 74, each time he was issued a paycheck at a cleaner's rate of pay, Mr. Baker exhibited the requisite discriminatory intent. However, Complainant does not allege that the pay checks received deviated from the rate usually paid to cleaners.

In response, Respondent relies on the United States Supreme Court's recent decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007). In *Ledbetter*, 127 S.Ct. at 2165-66, the complainant filed a Title VII sex discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") alleging that she had received unfavorable performance reviews and had therefore been denied pay increases because of her gender. Among her arguments, the complainant contended that the paychecks which resulted from the denial of a pay increase were discriminatory because they would have been larger if she had been

[4] The June 15 letter was received after Complainant refused to remove the asbestos tiles and filed a grievance with his union and contacted the Respondent regarding Mr. Baker's removal of the tiles.

evaluated in a nondiscriminatory manner prior to the EEOC charging period, i.e., the 180 days before the filing of her EEOC complaint. *Id.* at 2167. The employer responded that because no pay decisions had been made during the charging period, no adverse action had taken place during the charging period; therefore, according to the employer, the complaint was untimely. *Id.* at 2166.

The Court agreed with the employer, holding that

> The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

Ledbetter, 127 S.Ct. at 2169 (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). The Court further stated that

> Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

Id.

Complainant's argument that the issuance of each paycheck at a cleaner's rate of pay constituted discrete discriminatory action cannot be reconciled with *Ledbetter*. Applying the reasoning of *Ledbetter* to the instant claim, the discriminatory action occurred on June 15, 2006, when Mr. Baker informed Complainant that if he did not join Local 94, he would be terminated as of July 1. The effects of the discriminatory action occurred on July 1, when Complainant was demoted to cleaner. The paychecks that he received as a result of the demotion reflected the hours he worked at a nondiscriminatory cleaner's rate of pay. Because there is no allegation that the cleaner's rate of pay was discriminatorily set, the issuance of the paychecks at that rate constituted what the Court called "subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Ledbetter,* 127 S.Ct. at 2169.

Complainant's contention that Mr. Baker's actions during the period that Complainant was being paid at a cleaner's rate of pay makes the issuance of the paychecks discrete discriminatory actions taken with discriminatory intent is without merit. Complainant is essentially urging this tribunal to take the arguably discriminatory intent associated with Mr. Baker's continuing attempts to force Complainant to join Local 94 and his threat to fire Complainant if he did not immediately accept the Fireman Local 74 position and impute it to the

issuance of the paychecks at a nondiscriminatory cleaner's rate of pay.[5] However, in *Ledbetter*, 127 S.Ct at 2170, the Court pointed out that

> [S]hift[ing] intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive . . . would be to impose liability in the absence of the requisite intent.

Although in this case, the arguably discriminatory actions occurred during the same time period as the issuance of the paychecks, the Court's reasoning in *Ledbetter* applies and is dispositive. The fact that possible adverse action occurred during the period when Complainant received paychecks at the cleaner's rate of pay does not turn that nondiscriminatory action into actionable discriminatory activity. *See id.* Therefore, because Complainant did not file his complaint within the 30 days following his receipt of Mr. Baker's June 15 letter notifying him that he would be terminated effective July 1, his complaint is untimely. It would also be untimely if the July 1 demotion were treated as the discriminatory act and deemed to be the triggering date.

Equitable Estoppel

Alternatively, Complainant argues that Respondent should be estopped from raising the limitations defense. Equitable estoppel is available where "'failure to file results from a deliberate design by the employer or from actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.'" *Larry v. The Detroit Edison Co.*, ALJ No. 86-ERA-32, slip op. 8 (Sec'y June 28, 1991), *aff'd* 960 F.2d 149 (6th Cir. 1992) (unpub.) (quoting *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 308 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984)). *See also Prysbys v. Seminole Tribe of Florida*, ARB No, 96-064, ALJ No. 95-CAA-15 (ARB Nov. 27, 2996); *Felty v. Graves-Humphreys Co.*, 785 F.2d 516 (4th Cir. 1986); *Fleischhaker v. Adams*, 481 F.Supp. 285, 292 (D.C.D.C. 1979). A complainant's subjective fear of reprisal or feeling of intimidation is not sufficient to evoke the doctrine of equitable estoppel. *Fleischhaker*, 481 F.Supp. at 292. Rather, "there must be some clear objective basis for the complainant to have felt intimidated, threatened, or otherwise dissuaded from asserting [his or] her rights." *Id.*

Complainant contends that Mr. Baker's July 1, 2006 letter, directing Complainant not to write letters to the school staff or the Department of Education, and to contact his union "only," was intended to dissuade him from filing an OSHA complaint. However, the letter does not mention OSHA. It purports to prohibit writing letters to school staff or anyone in the Department of Education and directs Complainant to contact his union only. It does not refer to any punitive action. Thus, the letter, on its face, is not enough to invoke equitable estoppel.

For instance, the letter does not rise to the level of the employer's Equal Employment Opportunity (EEO) scheme in *Larry*, ALJ No. 86-ERA-32, which involved a deliberate scheme by the employer to mislead the complainant. In that case, the employer posted notices that

[5] At this stage of the proceedings, this tribunal has no opinion regarding the discriminatory or nondiscriminatory nature of these actions. The complaint alleges only that the demotion and subsequent paychecks constituted adverse action. Thus, any other allegedly discriminatory actions are beyond the scope of the complaint and of this analysis.

advised employees that whistleblower discrimination complaints should be directed to the employer's EEO office. *Id.* at slip op. 10. When the complainant did just that, she was assured by an employee of the company "that [the complainant] was in the right place," and that the EEO employee "functioned as a mediator between employees and management for purposes of complaint resolution." *Id.* In fact, the EEO employee was "responsible for representing the company, preparing the company's position statement, and representing the company at any fact finding or resolution conferences that [were] conducted." *Id.* The employee further informed the complainant that if the complainant filed a formal discrimination complaint with any external agency, the mediation process would be immediately ceased. *Id.* at slip op. 10-11. Based on these facts, the Secretary found that "[h]ere, [the employer] engaged in 'misleading [and] confusing representations [and] conduct.'" *Id.* at 12 (quoting *Kale v. Combined Ins. of America*, 861 F.2d 752 (1st Cir. 1988). Moreover, "[i]n this circumstance, [the employer] 'should unmistakably have understood' that its 'deliberate design' to delude [the complainant] and to divert her attention and energies would cause delay." *Id.* (citing *Meyer v. Riegel Products Corp.*, 720 F.2d 308 (3d Cir. 1983). On appeal, the Sixth Circuit agreed with the Secretary, finding that the "facts are sufficient to support the Secretary's conclusion that [the employer's] conduct caused [the complainant] to delay her filing." 960 F.2d 149.

Unlike the EEO scheme in *Larry*, the letter in the instant case was a simple admonishment to contact only the union and not school staff or the Department of Education. Mr. Baker did not misrepresent himself in any way in the letter. Nor did Mr. Baker indicate that any particular adverse consequences would result if Complainant communicated with any outside agencies. In *Felty*, 785 F.2d at 520, the Fourth Circuit held that "a generous severance arrangement conditioned upon compliance with a code of silence would be a powerful inducement that might well lure an older worker into failing to defend his rights." *Felty* involved an EEOC claim that the complainant had been discriminated against because of his age. *Id.* at 518. The complainant contended that equitable estoppel applied because when he was informed of his pending termination, he was told that he would be subject to instant dismissal and would forfeit his severance package if he discussed the termination. *Id.* at 519. The court found that this threat, which was designed to prevent a particular communication, was sufficient to invoke the doctrine of equitable estoppel.

Mr. Baker's July 1 letter does not come close to the level of intimidation, threat, or dissuasion of the scenarios in *Larry* and *Felty*. While it may be true that Complainant initially may have followed Mr. Baker's direction to contact his union only, his attempt to resolve his issues through the union procedures does not affect the time period in which he is statutorily required to file his whistleblower claim with OSHA. *See Prysbys*, ARB No, 96-064. Accordingly, because the tolling period commenced on June 15, 2006, when Complainant received notice of the adverse employment action, and because Complainant did not file his complaint with OSHA until September 11, 2006, the claim must be dismissed as untimely.

ORDER

The complaint of Richard Cante pursuant the several Federal Employee Protection Statutes under 29 C.F.R. Part 24 as enumerated is dismissed as untimely.

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Edward Terhune Miller
Administrative Law Judge