U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 June 2008

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In the Matter of:

KENT WARNER,
Complainant,

v. *Case No.*: **2008-ERA-00002**

XCEL ENERGY,
Respondent.

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DECISION AND ORDER DISMISSING COMPLAINT

This case involves a complaint filed against Respondent Xcel Energy on September 24, 2007, under the employee protection provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 ("ERA" or "the Act").[1] The complaint was investigated by the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor ("DOL") as a complaint alleging Complainant's termination by Respondent "in reprisal for voicing concerns regarding the falsification of training records." Following investigation, the Secretary of Labor, acting through the Regional Administrator for OSHA, dismissed the complaint as untimely on November 29, 2007. Complainant did not file his complaint until September 24, 2007, over two years after his termination occurred on June 13, 2005.[2] As the complaint was filed well beyond the 180-day limitation period, OSHA deemed it untimely and dismissed it. The Secretary's Findings stated that the parties were permitted to request a hearing and/or file any objections within 30 days, pursuant to 29 C.F.R. § 24.106(a). Complainant filed objections and a request for hearing before an administrative law judge by way of letter dated January 4, 2008. The filing was postmarked January 5, 2008, and it was received on January 8, 2008.

[1] The applicable regulations, 29 C.F.R. § 24.100, *et seq*., took effect August 10, 2007, and, *inter alia*, increased the time for filing objections and a request for hearing from five to 30 days. The complaint was filed after the amended regulations became effective.

[2] In the Secretary's Findings, OSHA stated that Complainant filed his complaint on September 24, 2007. However, the complaint is marked as "received" on September 26, 2007. The regulations provide that the date of postmark or transmittal is the effective date on which a complaint is "filed." It is reasonable to assume OSHA had access to the postmarked envelope in which the Complaint arrived, which is not in the record before this tribunal. Accordingly, OSHA's determination that the complaint was filed on September 24, 2007, though not binding, is accepted.

On March 27, 2008, this tribunal issued an Order to Show Cause why the Complaint Should not be Dismissed as Untimely Filed. Complainant was directed to show cause, received by this tribunal no later April 7, 2008, why this case should not be dismissed, as his complaint was filed more than 180 days after the alleged adverse action took place, and his objections and request for hearing were apparently filed in excess of 30 days after his receipt of the Secretary's Findings. Complainant's response to the Order to Show Cause ("*Response*"), filed on April 3, 2008, establishes that his objections and request for hearing were timely filed. In his response, Complainant attests that he did not receive the Secretary's Findings and Order until December 6, 2007. (*See Response* at 1). Pursuant to 29 C.F.R. § 24.106(a), the date of filing is established as the date on which Complainant's correspondence is postmarked: January 5, 2008. Accordingly, Complainant's objections and request for hearing were filed within the appropriate 30-day time period.

Complainant's original complaint was not timely filed. The applicable law states:

> Under the Energy Reorganization Act, *within 180 days after an alleged violation of the Act occurs (i.e., when the retaliatory decision has been both made and communicated to the complainant*), an employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

29 C.F.R. § 24.103(d)(2) (emphasis added). The limitation period begins when the Complainant is notified of the adverse action, not when it actually takes effect. *Devine v. Blue Star Enterprises, Inc.*, ARB No. 04-109, ALJ No. 2004-ERA-00010 (ARB August 31, 2006). Taking the evidence in the light most favorable to Complainant, he was notified of his termination on the day it occurred: June 13, 2005. (*See Complaint* at 1).[3] Complainant did not file a related complaint with the Department of Labor until September 24, 2007 – over two years after he was notified of his termination.

There are two generally recognized exceptions to the rule that a limitations period begins to run from the date upon which a complainant learns of an adverse employment action. The first is the "continuing violation" doctrine, under which a timely charge regarding any adverse action in furtherance of an ongoing policy of discrimination renders other claims relating to that policy timely. *See Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1993). Although Complainant alleges that Respondent "had routinely been harassing me," based on material he reviewed in his personnel file, the timeliness of a claim may only be preserved under the continuing violation doctrine "where there is an allegation of a course of related discriminatory conduct' and the complaint is filed within the limitations period of the last discriminatory act." (*Response* at 1); *Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 2001-ERA-00019 (ARB Feb. 26, 2004) (internal citations omitted). Assuming the facts as Complainant alleges, the last "discriminatory" act occurred on June 13, 2005; his complaint was filed over two years later. Although he has alleged a pattern of harassment, he has no timely complaint to which he may relate any alleged previous misconduct, so

[3] In his original complaint, Complainant stated: "My termination was June 13, 2005. I was told it was for an inappropriate comment to a HR individual."

Complainant is not entitled to toll the limitations period based on the continuing violation doctrine.

The second general exception is the "equitable tolling" doctrine, under which the running of a limitation period can be tolled where a duly diligent employee is excusably ignorant of his rights under the applicable statute. This doctrine applies when: (1) the respondent has actively misled the complainant respecting the cause of action, (2) the complainant has been prevented from asserting his rights in some extraordinary way, or (3) the complainant has raised the precise statutory claim in the wrong forum. *School District of the City of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981); *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-00023 (ARB May 27, 2008). Complainant was informed of his termination, at the latest, on the date it occurred: June 13, 2005. He has made no showing that he has been meaningfully prevented from asserting his rights, and this tribunal is an appropriate forum in which to litigate this case. Accordingly, Claimant is not entitled to invoke the doctrine of equitable tolling.

As Complainant filed his complaint over 180 days after the alleged adverse employment action occurred and he is not entitled to toll the limitations period, his complaint is not timely filed. Accordingly,

ORDER

Complainant Kent Warner's complaint under the Energy Reorganization Act is dismissed as untimely filed.

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Edward Terhune Miller
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).