U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 December 2005

CASE NO.: 2005-SOX-113

In the Matter of:

KATHERINE R. GUY,
Complainant,

v.

SBC GLOBAL SERVICES,
Respondent,

Appearances: Katherine R. Guy,
Pro Se

Richard Winegardner, Esquire
For the Respondent

Before: STEPHEN L. PURCELL
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Sarbanes-Oxley" or "the Act"). The Act prohibits discriminatory actions by publicly traded companies against their employees who provided information to their employer, a federal agency, or Congress that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (fraud by wire, radio, or television), 1344 (bank fraud) or 1348 (security fraud) or any rule or regulation of the Securities and Exchange Commission ("SEC") or any provision of federal law relating to fraud against shareholders.

Procedural History

On August 16, 2005, Katherine R. Guy ("Complainant" or "Ms. Guy"), acting *pro se*, filed a formal complaint with the Department of Labor against SBC Global Services ("Respondent" or "SBC") under the Act. On August 30, 2005, after conducting an investigation, the Director dismissed the complaint as untimely in that Complainant failed to file her complaint within 90 days of the alleged employment violation.

On September 28, Complainant filed a timely appeal of OSHA's determination with the Office of Administrative Law Judges.

On November 17, 2005, Respondent's counsel filed a motion to dismiss the complaint in which he alleged that Ms. Guy's suit was time-barred ("Resp. Mot."). SBC alleges therein that Ms. Guy was notified on December 21, 2004 that she was being laterally transferred from a Sales Manager position to a Sales Planning Manager position and that she waited until August 16, 2005 to file a formal complaint with OSHA alleging retaliation under the Act despite the fact that she had retained counsel to represent her regarding this matter on May 3, 2005. *Id.* at 1-2.

On November 25, 2005, Complainant filed a response to the motion opposing dismissal of her complaint ("Comp. Resp."). She alleges therein that her December 21, 2004 transfer to the position of Sales Planning Manager was not a lateral transfer, she responded to her reassignment "with multiple attempts to gain information from Respondent about protections and rights available to her," and her retention of counsel on May 5, 2005 regarding her transfer "was very limited in scope for financial reasons [which did not include determining her eligibility to file a claim under Sarbanes-Oxley]." *Id.* at 2-3. Ms. Guy also asserts that, while she had a general understanding that Sarbanes-Oxley regulations relate to corporate accounting practices of publicly traded companies, she could not reasonably be expected to know that the whistleblower provisions of the Act or its regulations applied to her in connection with the "Asset Protection Investigation." *Id.* at 4. According to Complainant, she first became aware that the Act might apply to her on July 5, 2005 when she discovered a posting on an SBC web site regarding a Code of Ethics put there to fulfill a requirement of the Securities and Exchange Commission. *Id*. Ms. Guy alleges that she promptly called the Department of Labor in Indianapolis thereafter to inquire about how to file a complaint and she could not reasonably have understood before then "what law would be potentially violated, or what agency would oversee a claim of such, especially when the majority of SOX claims are associated with accounting practices of publicly traded companies." *Id*.

Discussion

Respondent is seeking dismissal of this matter based on Ms. Guy's failure to file her complaint with OSHA within 90 days from the date upon which she alleges she was subjected to retaliation by Respondent for protected activity.

According to the August 10, 2005 complaint filed by Ms. Guy, she was interviewed on September 4 and 10, 2003 by an SBC "Asset Protection Investigator" in connection with an internal investigation regarding the activities of Respondent's Director of Large Business Sales, an individual who was then Complainant's supervisor. Complaint at 1. Ms. Guy further asserts therein that she provided damaging information regarding her supervisor's activities and thereafter received on December 21, 2004 a letter from SBC's Human Resources ("HR") Department stating that she was being reassigned to the position of Sales Planning Manager effective January 1, 2005. *Id*. According to Complainant, until that time she had held the position of Sales Manager, which was a salary plus commission position, and the change in jobs resulted in a reduction of her annual compensation by approximately 23 percent. *Id*. Ms. Guy's complaint further alleges that she notified SBC's HR Department on February 8, 2005 that she

viewed her reassignment as retaliation for having participated in the investigation of her supervisor. Thereafter, Ms. Guy and her subsequently retained counsel communicated in writing or verbally with various SBC employees in an attempt to resolve her concerns until August 9, 2005 when her attorney was informed by telephone that the parties were too far apart in their respective settlement positions and no further negotiations would be entertained. *Id*.

Under the Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation. 18 U.S.C. § 1514A(b)(2)(D) ("An action . . . shall be commenced not later than 90 days after the date on which the violation occurs."); *see also* 29 C.F.R. § 1980.103(d) ("Within 90 days after an alleged violation of the Act occurs (*i.e*., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.") In this case, the statute of limitations began to run when Complainant received the letter dated December 21, 2004 from Respondent, as that is the date of the alleged adverse action. *See, e.g., Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 36 (ARB Apr. 30, 2001) (date employer communicates to employee its intent to implement adverse employment decision marks occurrence of violation rather than date employee experiences consequences of decision). Complainant filed a complaint with the Secretary of Labor on August 16, 2005, approximately 238 days after the alleged violation. Therefore, her complaint, by statute, is untimely. 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

Despite the fact that her complaint was untimely under § 1514A(b)(2)(D), Complainant argues that she should be allowed to proceed in this matter under either or both of the doctrines of equitable estoppel and equitable tolling. Comp. Resp. at 2. As a result, she requests that Respondent's Motion to Dismiss be denied. *Id.*

Equitable estoppel focuses on actions taken by the respondent that prevent a complainant from filing a claim. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000). Equitable tolling, in contrast, does not depend on any wrongdoing by the respondent but instead focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of her complaint. *Santa Maria*, 202 F.3d at 1178. Thus, equitable tolling extends the statute of limitations until the complainant can gather information needed to articulate a claim. As explained below, I find that neither doctrine supports a denial of Respondent's motion to dismiss.

With respect to her reliance on the doctrine of equitable estoppel, Complainant does not allege that Respondent affirmatively prevented her from filing a complaint. On the contrary, she simply points to an alleged promise made to her during the "Asset Protection Investigation" that she would not be retaliated against as a result of her cooperation during that investigation. Comp. Resp. at 6. She also asserts that because she had "a positive experience with her employer" in an earlier unrelated discrimination matter, she expected that her current complaint would be treated similarly and did not file a complaint for that reason. *Id.* at 7. Lastly, Ms. Guy says that she spoke with an SBC attorney during her ongoing settlement negotiations who told her, regarding her complaint, that "HR is the proper place to start." *Id.*

Even assuming that Complainant's assertions are true, Complainant has not shown that Respondent should be equitably estopped from seeking dismissal of the complaint she filed in August 2005. A finding of equitable estoppel may be supported by various considerations including: "(1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied." *Santa Maria v. Pacific Bell*, *supra*., 202 F.3d at 1176.

Accepting as true Ms. Guy's recitation of the facts in this case, there is simply nothing in Respondent's actions or statements that provide any reasonable basis upon which Complainant could have relied for not filing a complaint within 90 days from the date she received the letter informing her of her transfer. Respondent neither said nor did anything "deceptive" or improper that might have reasonably lead Complainant to believe she could not, or should not, initiate a lawsuit challenging the decision to transfer her from her Sales Manager position to that of Sales Planning Manager. Indeed, Complainant specifically retained counsel on May 3, 2005 for the express purpose of negotiating a settlement with respect to her transfer to the position of Sales Planning Manager. Although Ms. Guy now alleges that such representation "was very limited in scope for financial reasons," Comp. Resp. at 3, it was clearly within the parameters of counsel's representation for the attorney to advise Complainant of her legal recourse in the event settlement negotiations were unsuccessful. Furthermore, whether her attorney advised her of her legal options or not is irrelevant to the application of equitable estoppel inasmuch as the conduct of Ms. Guy's attorney cannot be attributed to Respondent. The doctrine of equitable estoppel simply has no application in this matter given the facts presented.

Complainant also asserts that she is entitled to benefit from the doctrine of equitable tolling. Comp. Resp. at 2. Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting her rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981), *citing Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). However, courts have held that the restrictions on equitable tolling must be scrupulously observed. Equitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987-ERA-43 (Sec'y, Sept. 29, 1989).

With respect to the first possible basis for tolling the statute, as noted above, Complainant has not alleged, nor do the undisputed facts establish, that Respondent misled her in any way regarding her cause of action under the Act. Indeed, there is no evidence that SBC personnel ever did or said anything to dissuade Complainant from initiating legal action of any kind regarding what she viewed as an unlawful demotion.

Similarly, with regard to the second ground which might support application of the doctrine, Ms. Guy has failed to point to any extraordinary circumstances that may have prevented her from timely asserting her rights under the Act. Although she argues that she was

unable "despite all due diligence, to obtain vital information bearing on the existence of her complaint," Comp. Resp. at 2, she does not say what that "information" is, nor does she explain how it was "vital" to filing a timely complaint of retaliation. To the extent Complainant implies that SBC was obligated to direct her to the Department of Labor, or to any other agency as a potential entity with which to file a complaint, she cites no legal authority, and I am aware of none, that would impose such a duty on Respondent under these circumstances.[1]

Finally, regarding the third situation under which the doctrine might apply, I note that Complainant did speak with an EEOC investigator within the 90 day limitations period on February 22, 2005 regarding this matter. However, Ms. Guy never filed a formal complaint alleging discrimination by Respondent with that agency. Since no complaint was ever filed, Complainant cannot now argue that she met the statute of limitations, but initiated her lawsuit in the wrong forum.

Regarding Ms. Guy's specific responses to SBC's motion to dismiss, I also note that Complainant argues with respect to equitable tolling that "[i]f a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations until the plaintiff can gather what information she needs." Comp. Resp. at 5, *citing Parker-Reed v. Sprint Corp.*, No. CIV. S 03-2616 MCE PAN, slip op. at 4, 2005 WL 2648028 (E.D. Cal. Oct. 14, 2005). However, Complainant clearly knew on December 21, 2004 that she was being transferred to what she believed was an inferior position, and she believed then that the transfer was wrongful and in retaliation for her participation in SBC's internal investigation of her supervisor. She thus knew at that time that she had a possible claim against SBC for unlawful retaliation.

Ms. Guy further asserts that "it is not reasonable to expect client [sic] to know what statute to turn to for protection from alleged retaliatory actions." Comp. Resp. at 5-6. However, Complainant's professed ignorance of the applicability of Sarbanes-Oxley to her situation is simply not an "extraordinary circumstance" which might justify application of the doctrine of equitable tolling. A party invoking that doctrine must show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control. *See, e.g.*, *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (plaintiff's mental incapacity warranted equitable tolling); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (*pro se* inmate's lack of knowledge "until it was too late" of one-year limitation period for filing habeas corpus petition insufficient to warrant equitable tolling); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999), *cert. denied*, 531 U.S. 1164 (2001) ("ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing."). Complainant has neither shown nor alleged that she was physically or mentally incapacitated within the 90 day period following her transfer, nor is there any evidence, for example, that she was traveling outside the country or tending to urgent matters which might have hampered her ability to consult counsel or otherwise determine her

1 In fact, according to Ms. Guy's original complaint in this case, she contacted Betsy Wright in SBC's HR Department on February 8, 2005 to report that her reassignment was in retaliation for having participated in the 2003 investigation. Thereafter, Ms. Wright arranged a telephone conversation with Julie Howard, an Equal Employment Opportunity Commission ("EEOC") investigator, during which Complainant, Ms. Wright, and Ms. Howard, discussed the circumstances surrounding Ms. Guy's transfer. Thus, it is clear that SBC attempted to aid, rather than impede, Complainant in her quest for review of the facts and circumstances surrounding her reassignment.

legal rights. Indeed, Ms. Guy ultimately retained counsel to assist her with respect to her alleged demotion on May 3, 2005, more that 90 days before she ultimately filed her complaint with OSHA on August 16, 2005. Thus, even if I were to find that the doctrine of equitable estoppel applied in this case, which I do not, its availability would have ceased on that date because Complainant had "gained the 'means of knowledge' of her rights and can be charged with constructive knowledge of the law's requirements." *Stallcop v. Kaiser Found. Hosps*., 820 F.2d 1044, 1050 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987).

For all the foregoing reasons, I find that Complainant failed to file a claim of discrimination under the Act within 90 days from the date of the alleged violation, that the doctrines of equitable estoppel and equitable tolling are inapplicable in this case, and that Ms. Guy's claim under the Sarbanes-Oxley Act is thus time-barred under § 1514A(b)(2)(D).

RECOMMENDED ORDER

IT IS HEREBY RECOMMENDED that SBC Global Services' Motion to Dismiss the complaint of Katherine R. Guy under the Sarbanes-Oxley Act be GRANTED.

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board (.Board.), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. 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 by person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed.