U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 March 2005

Case No.: 2005-SOX-14

In the Matter of:

Cynthia Lotspeich,
Complainant

v.

Starke Memorial Hospital
Respondent

RECOMMENDED ORDER OF DISMISSAL

This proceeding arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002 and the procedural regulations found at 29 C.F.R. Part 18. The U.S. Department of Labor issued the Secretary's Findings on a complaint filed by Cynthia Lotspeich. A hearing has been requested by the Complainant on the determination made by the Department of Labor.

On December 20, 2004, I issued an Order to Show Cause, directing the Complainant, within fourteen days, to show cause as to why her complaint should not be dismissed for failure to file her request for appeal within thirty days of receipt of the September 14, 2004 notice of findings from OSHA. The Complainant did not submit a response, but on January 21, 2005, she contacted my law clerk, Mr. Scott Eldridge, to inquire about the status of her appeal. The Complainant stated that she had not received a copy of my December 20, 2004 Order to Show Cause, although she acknowledged that her address as listed on the Service Sheet was correct.[1] At my direction, Mr. Eldridge telefaxed a copy of the Order to Show Cause to the Complainant, and advised her that she had fourteen days to submit a response. I also issued a Supplemental Order to Show Cause, directing the Complainant to file a response.

By letter dated January 21, 2005, and received on January 31, 2005, the Complainant submitted a letter arguing that her complaint should not be dismissed. The Complainant stated that the determination letter, dated September 14, 2004 was not mailed to her, that she was not aware of the finding, and that she did not receive a copy of the letter until November 30, 2004. According to the Complainant, the determination letter was delivered by certified mail to her attorney's office. She claimed that her attorney did not forward this document to her, and that she did not become aware of the final determination until November 30, 2004.

[1] Nor has my December 20, 2004 Order to Show Cause addressed to the Complainant been returned by the postal service as undeliverable.

Although the Complainant's response indicates that a copy was provided to "Starke Memorial Hospital – CEO," there is no indication that a copy was sent to counsel for the Respondent, nor is there a service sheet indicating how or on what date any copies were transmitted. Indeed, Mr. Mark W. Peters, counsel for the Respondent, submitted a letter on February 23, 2005, indicating that he had learned of the Complainant's January 21, 2005 letter in a telephone conversation with my law clerk, and that he had not received a copy of that letter. Counsel argued that, even if the Complainant's statements are true, she is bound by the consequences of her attorney's conduct, and that she cannot escape her responsibility to see that her appeal was timely filed by relying on the acts or omissions of her attorney.

DISCUSSION

In her letter requesting an appeal, dated November 30, 2004, and received on December 7, 2004, the Complainant stated that she was represented by the law offices of Stephen Eslinger and David Mirkin, who withdrew their representation in November. She provided letters from these attorneys confirming their withdrawal. She stated that all of the correspondence in connection with her complaint was handled by her attorneys and Roy Cooper (of OSHA); she did not know that the complaint was filed and concluded, and did not have the opportunity to appeal.

The Complainant stated that she contacted Mr. Cooper to follow up on the complaint, and was "shocked" to receive a copy of the determination letter by telefax from Mr. Cooper on November 30, 2004.

On December 14, 2004, the Respondent submitted a letter arguing that the factual basis for the Complainant's request for waiver or extension of the appeal period was false and should be denied. Respondent noted that the determination letter was mailed to the Complainant at the same address on the letterhead of her November 30, 2004 letter to the Court. In response to the Complainant's claim that her attorneys did not inform her that her complaint was "filed and concluded," Respondent noted that a letter from Complainant's attorney to the U.S. Secretary of Labor, dated June 15, 2004, filing the Complainant's complaint, clearly shows that it was copied to the Complainant.[2]

Counsel for the Respondent also stated that he understood that the investigator communicated with the Complainant during the investigation, and that the Complainant informed the investigator that she planned to appeal the determination. Respondent argued that the Complainant's contention that she was not aware that the complaint had been filed, investigated, and dismissed was not credible.

In her January 21, 2005 letter, the Complainant stated that the determination letter was not mailed to her; she was not aware of the finding, and she did not receive a copy of the letter until November 30, 2004. The Claimant again stated that the determination letter was delivered to her attorney's office by certified mail; she attached a copy of the determination letter that was telefaxed to her by OSHA, which included a receipt for certified mail delivery to the office of Mr. Eslinger, the Complainant's attorney. She also provided a letter from Mr. Kenneth Gilbert,

[2] The Complainant included a copy of this letter in her November 30, 2004 request for appeal.

the Area Director of OSHA, stating that his office sent a copy of the determination letter to Mr. Eslinger by certified mail, and that their records indicated that he received it on September 17, 2004. Finally, the Complainant submitted a response from the U.S. Postal Service to her request for delivery information, confirming that the letter had been delivered to her attorney's office on September 17, 2004.

In response, the Respondent argued that even if the Complainant's claims were true, it is well-settled law that a person is bound by the consequences of her representative's conduct. The Respondent stated that the Complainant had a personal responsibility to see that her appeal was timely filed, and that she could not escape this responsibility by relying on the acts of her attorney.

DISCUSSION

Title 29 C.F.R. Section 18.29 provides, among other things, that an Administrative Law Judge may "take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts . . ."

Federal Rules of Civil Procedure 12(b)(6) provides that a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. Although the Rule refers to such dismissal on the motion of a party, it has been uniformly held that a Court may dismiss a claim for failure to state a claim upon which relief can be granted when it is patently obvious that the claimant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mirza,* 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F.Supp. 1224 (M.D.Pa. 1983); *Johnson v. Baskerville,* 568 F.Supp. 853 (E.D.Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981).

Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that the Complainant's allegations are true, she has stated a cause of action upon which relief can be granted by this Court. I find that the Complainant has failed to allege any facts that would entitle her to waiver or extension of the time period for filing an appeal of the Administrator's determination.

The Complainant has alleged that the determination letter was delivered to her attorney, and has provided documentary support for that allegation. The Respondent, while not necessarily conceding the truth of the Complainant's allegation, argues that even if it is true, the Complainant's appeal is untimely, and the appeal period cannot be waived. For purposes of this decision, I am accepting the Complainant's allegation as true. That is, I am assuming, as the Complainant alleges, that she did not receive the determination letter, and that it was instead delivered to her attorney, who failed to forward it to her or otherwise notify her. But even accepting these unsubstantiated claims as true, I find that the Complainant's request for appeal is not timely, and must be dismissed.

The statute and regulations require that an appeal from a determination by the Administrator must be filed within 30 days after issuance of the determination. Clearly, the

Complainant's appeal falls well outside that time limit, as it was filed 80 days after the determination letter.[3] In cases involving employee protection, or whistleblower statutes, the Courts and Secretary have uniformly held that the time limits for filing a complaint or requesting an appeal are not jurisdictional, and may be subject to application of the doctrine of equitable tolling. *See, School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981).

In that case, the Court recognized three situations in which tolling is proper: (1) when the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting her rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *See, Prybys v. Seminole Tribe of Florida,* 1995-CAA-15, at p. 4 (ARB 11/27196). *See also, Smith v. American President Lines, Ltd***.,** 571 F.2d 102, 109 (2d Cir. 1978); *Shelton v. Oak Ridge National Laboratories,* 1995-CAA-19 (ARB March 30, 2001) (stating that "[b]oth the Secretary and this Board have held that the time limit for filing a request for a hearing is not a jurisdictional prerequisite.")(citing *Crosier v. Westinghouse Hanford Company,* 1992-CAA-3 (Sec'y, January 12, 1994); *Degostin v. Bartlett Nuclear, Inc.,* 1998-ERA-7 (ARB, May 4, 1998); *Staskelunas v. Northeast Utilities Company,* 1998-ERA-8 (ARB, May 4, 1998)).

However, 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 cause. *Doyle v. Alabama Power Co.***,** 1987-ERA-43 (Sec'y Sept. 29, 1989) (citing *School District of the City of Allentown v. Marshall, supra,* 657 F.2d at 19-20). Nor is the absence of prejudice to the opposing party in itself an independent basis for invoking the doctrine of equitable tolling, and sanctioning deviations from established procedures. *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).

The Complainant bears the burden of justifying the application of equitable tolling principles. *See Wilson v. Sec'y, Dept. of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995)(complaining party in Title VII case bears burden of establishing entitlement to equitable tolling); *see also Ross v. Buckeye Cellulose Corp*., 980 F.2d 648, 661 (11th Cir. 1993). Ignorance of the law will generally not support a finding of entitlement to equitable tolling. *Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities,* ARB No. 00-074, ALJ Nos. 1999-ERA-014, 015, slip op. at 4-5.

The doctrine of equitable tolling is generally unavailable to a complainant who is represented by counsel. Courts have uniformly held that a complainant who consults an attorney has access to a means of acquiring knowledge of his rights and responsibilities, and cannot assert equitable tolling. *Kent v. Barton Protective Service***,** 1984-WPC-1 (Sec'y Sept. 28, 1990), citing *Smith v. American President Lines, Ltd., supra,* 751 F.2d at 102, 109. Attorneys are presumptively aware of the legal recourse available to their clients, and this constructive knowledge of the law's requirements is imputed to a complainant. *Mitchell v. EG & G (Idaho),* 1987-ERA-22 (Sec'y July 22, 1993).

For example, in *Howlett v. Northeast Utilities*, 1999-ERA-1 (ALJ Dec. 28, 1998), complainant and his attorney were both sent copies of a Letter of Determination by OSHA via

[3] I have used December 3, 2004, the date of postmark, as the filing date.

certified mail, and both received the letter shortly thereafter. Neither complainant nor his attorney timely exercised the right to appeal. Complainant's explanation was that he that understood his attorney would respond appropriately to any correspondence. Complainant's attorney, however, did not appeal because one of his employees misfiled the certified letter. The ALJ held in his recommended decision that "[w]hile this is regretful, it is not sufficient grounds to invoke the rarely exercised concept of equitable tolling. As the Second Circuit has stated, lack of due diligence on the part of a complainant or the complainant's attorney is insufficient to justify application of equitable tolling. *South v. Saab Cars USA, Inc.*, 28 F.3d 9 (2d Cir. 1994) (dismissing the complaint where plaintiff's counsel mistakenly relied on state procedure for filing of a federal complaint)." *See also, Hall v. E G & G Defense Materials, Inc*., ARB No. 98 076, ALJ No. 1997 SDW 9, slip op. at n.5 (ARB Sept. 30, 1998); *Lawrence v. City of Andalusia Waste Water Treatment Facility*, ARB No. 96 059, ALJ No. 1995 WPC 6 (ARB Sept. 23, 1996); *Tracy v. Consol. Edison Co. of New York, Inc*., 1989 CAA 1 (Sec'y July 8, 1992).

The federal circuit courts also support the general principle that "once a claimant retains counsel, tolling ceases because she has gained the means of knowledge' of her rights and can be charged with constructive knowledge of the law's requirements.' " *Leorna v. United States Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997), *citing Stallcop v. Kaiser Found. Hosps*., 820 F.2d 1044, 1050 (9th Cir. 1987); *Mercado Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 896 (1st Cir. 1992); *Daugherty v. Traylor Bros., Inc*., 970 F.2d 348, 353 n.8 (7th Cir. 1992); *Beshears v. Asbill*, 930 F.2d 1348, 1351 (8th Cir. 1991); *McClinton v. Alabama By Products Corp*., 743 F.2d 1483, 1486 n.4 (11th Cir. 1984); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012-13 (4th Cir. 1983); *Kocian v. Getty Refining & Mktg. Co.*, 707 F.2d 748, 755 (3d Cir. 1983); *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 (2d Cir. 1978); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

Here, the Claimant's argument is that the time limitations for appeal should be tolled because she did not receive a copy of the final determination letter, which was the fault of her attorney, who failed to forward it to her or to advise her that a determination had been made and that she had a limited time to appeal. As the Employer has correctly observed, the Complainant, who chose her attorney as her representative in prosecuting her complaint, is accountable for the acts and omissions of her attorney. She is considered to have notice of the Administrator's determination, by virtue of the notification to her attorney.

The Complainant has not alleged any facts that would support a conclusion that the Respondent misled her in any way regarding her right to appeal, that she was prevented in any extraordinary way from prosecuting her appeal, or that she timely but mistakenly filed her appeal in the wrong forum. Thus, I find that, even assuming the truth of the Claimant's claims regarding the delivery of the final determination letter, she has not established grounds for equitable tolling of the appeals period.

The Complainant's request for appeal, dated November 30, 2004, postmarked December 3, 2004, and received in this office on December 7, 2004, was untimely, and accordingly her complaint must be dismissed.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

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"), U.S. 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 will 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 in 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).