U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 July 2005

CASE NO: 2005 ERA 19

In the Matter of:

RAYMA L. BILICKI,
Complainant,

v.

ST. JOSEPH HOSPITAL,
Respondent.

**RECOMMENDED DECISION AND ORDER
DISMISSING CLAIM AS UNTIMELY FILED**

This proceeding involves a *pro se* complaint under the employee protections provisions of § 211 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (ERA). The copy of OSHA's determination dated May 10, 2005, was received by OALJ on May 16, 2005. OSHA's determination recited explicitly that Complainant and Respondent had five days from receipt of the finding to file objections and request a hearing on the record, or the findings would become final and not subject to review.

Complainant filed a letter which was dated May 14, 2005, appealing "the verdict of too much time has passed to pursue my wrongful discharge as Medical Physicist/RSO at St. Joseph Mercy Hospital." The letter was postmarked June 10, 2005, in Detroit Michigan, and actually filed with the U.S. Dept. of Labor Office of Administrative Law Judges (OALJ) on June 14, 2005, according to the OALJ date stamp on the correspondence. The date of Complainant's letter appeal, May 14, 2005, compels the inference that she received the notice of determination no later than that date. Thus her appeal was filed thirty days after receipt of notice of the adverse determination, and postmarked twenty-six days after receipt of OSHA's adverse determination. The filing is egregiously out of time, and on that basis alone, the appeal is properly dismissed. The statutory limitations for filing, though extremely brief, must be scrupulously observed under such circumstances in light of the mandate by Congress. *See Prybys v. Seminole Tribe of Florida*, 95-CAA-15 (ARB Nov. 27, 1996); *Gale v. Ocean Imaging*, ARB No. 98,143, ALJ No. 97-ERA-38 (ARB July 31, 2002)(approved method of calculating period for requesting hearing).

Complainant's appeal is from a dismissal dated May 10, 2005, by the Area Director of the Occupational Safety and Health Administration in Lansing, Michigan (OSHA). The determination concluded that the complaint filed with the Secretary of Labor on April 13, 2005,

was not timely because it was not filed within one hundred eighty days after each of the alleged adverse employment actions identified by the Complainant. OSHA recited that in her complaint the Complainant had "claimed that St. Joseph Hospital terminated her for reporting to management information regarding overexposure of a member of the general public to radiation from x-ray machines." In her complaint to OSHA, Complainant alleged that she was terminated by Respondent on July 26, 2002, nine days after her protected activity, and that subsequent efforts to find employment in her field had been futile through the fall of 2004. Thus the complaint was filed initially approximately three months short of three years after Complainant's termination by Respondent. Complainant does not contest that her complaint was filed more than 180 days after the discriminatory adverse action of which she complains, and therefore out of time under the applicable regulations.

In her appeal to the Chief Administrative Law Judge filed June 14, 2005, Complainant advanced two main justifications, and four miscellaneous developments, as justification for the delayed appeal "to the US Department of Labor." With respect to the main justifications, first, she alleged that she has been under the care of a Ph.D., Social Physiotherapist, a Psychologist and Neurophysiologist. Second, she alleged delays in processing related to her termination by Respondent. Neither is a valid excuse which would justify equitable tolling of the time limit for filing. A complainant's mental condition is not justification for equitable tolling of the filing limitations absent exceptional circumstances, such as an adjudication of incompetency or institutionalization. *See Day v. Oak Ridge Operators*, ARB No. 02,032, ALJ No. 99-CAA-23 (ARB July 25, 2003); *Foley v. Boston Edison Co.,* ARB No. 99-022, ALJ No. 97-ERA-56 (ARB Jan. 31, 2001); *Biester v. Midwest Health Services, Inc*., 77 F.3d 1264 (10th Cir. 1996). Delays caused by recourse to internal grievance or other administrative procedures do not justify equitable tolling of applicable filing times. *See Ackison v. Detroit Edison Co*., 90-ERA-38 (Sec'y Aug. 2, 1990); *Cox v. Radiology Consulting Associates*, 86-ERA-17 (Sec'y Nov. 6, 1986; ALJ Aug. 22, 1986)(recourse to hearing with executive staff of respondent did not justify equitable tolling).

The procedures for the handling of discrimination complaints under the ERA are governed by federal regulations at 29 CFR Part 24. They provide specific time limits for filing complaints and appealing findings by OSHA. Section 24.3(b)(2) provides, "Under the [ERA], any complaint shall be filed within 180 days after the occurrences of the alleged violation." No exception to this requirement is provided by the applicable regulations. Following an expedited investigation of the complaint, and notice of the determination by OSHA, which is required to be served by certified mail upon the Complainant, and served simultaneously upon the Chief Administrative Law Judge, i.e. OALJ, any party desiring review of the determination is explicitly required by § 24.4(d)(2) to file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. Such filing renders the prior OSHA determination inoperative unless the case is later dismissed, or "[i]f a request for a hearing is not timely filed." Section 24.4(d)(3) explicitly requires that "[a] request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service," and served simultaneously upon the opposing party by similar means. In addition to being tardy, Complainant's filing was by regular first class mail in this case.

An order to show cause was issued on June 23, 2005, which was amended on July 6, 2005, to require the parties no later than July 15, 2005, to show cause why the complaint should or should not be dismissed (1) because of the failure of Complainant to timely file her complaint with OSHA within one hundred eight days after the occurrence of the alleged violation pursuant to 29 CFR § 24.3(b)(2), and/or (2) because of the failure of Complainant to timely file her appeal from the OSHA findings and request for hearing.

By letter dated July 14, 205, which was filed on July 19, 2005, but which was not served on the Respondent as required, Complainant contends, in substance, and for the first time, that the 180 day filing requirement under the ERA should be waived pursuant to 29 C.F.R. § 24.2(d)(2), because Respondent had not complied with the requirements of 29 C.F.R. § 24.2(d)(1), which requires prominent posting by Respondent of the applicable notice of ERA employee rights contained in Appendix A to 29 C.F.R. Part 24. Section 24.2(d)(2) provides that if the required notice has not been posted, the 180 day filing requirement is inoperative unless the respondent establishes that the complainant had notice of the material provisions of the notice. In such circumstances, the 180 day filing requirement would run from the subsequent date of posting or the date the complainant obtained actual notice, with the Respondent having the burden of proving the subsequent posting or actual notice. Complainant asserts that not only were the posting requirements not satisfied during her employment, but that she was not provided with the information at the time of her departure or subsequent to her departure prior to her filing date in April 2005, and that "[a]s an employee I was never informed of the "whistleblowing" Department of Labor ERA rights under which my activities would have fallen." This contention had not been raised in Complainant's prior pleadings, and is not properly before this tribunal because of the Complainant's untimely appeal and request for hearing.

Respondent was not given notice by proper service of the Complainant's contention regarding the alleged failure to post notice as required under 29 C.F.R. § 24.2(d)(1), and has not addressed the issue. In response to the order to show cause Respondent contends, in substance, that Complainant was terminated on or about July 26, 2002, because she had failed to register certain imaging machines as required by law and had falsely advised the Nuclear Regulatory Commission (NRC) that the machines had been registered. Respondent also alleges that Complainant falsely stated in the letter to the NRC that she had radiation training which she did not possess. In addition, Respondent alleges that Complainant and Respondent entered into a settlement agreement on or about May 20, 2005, whereby for payment of an agreed sum of money by the Respondent Hospital, Complainant "agreed to relinquish any and all claims against the Hospital." The partially redacted form of the settlement agreement, attached as Exhibit B to Respondent's response to the order to show cause, purports to provide a comprehensive release of liability to the Respondent. However, it does not refer to the ERA specifically, though it does refer to certain other statutes. In any event, the status of the Complainant's ERA claim is not affected, because it was not submitted for approval as required to be effective under the ERA. *See Bittner v. Fuel Economy Contracting Co.*, 88-ERA-22 (Sec'y Dec. 13, 1989)(order denying request for reconsideration, dismissal, and stay).

Respondent also contends that Complainant's recital of particular excuses for the tardy filing of her complaint under the ERA does not explicitly claim ignorance of the ERA or its filing deadlines or establish misleading or confusing representations or conduct by Respondent. To the contrary, Respondent contends that "as a radiation safety officer whose duties included

strict compliance with regulations promulgated by this Act" [ERA], she should have had at least constructive knowledge of her rights under the ERA, and that ignorance of the statute's deadline for complaints would not warrant equitable tolling of those requirements. Respondent contends that Complainant's assertions that the Hospital delayed her 63 days for a internal termination hearing or that paperwork concerning her termination was 98 days past her termination date do not rise to misrepresentation or suggest deceptive conduct. They also do not begin to explain the nearly three years delay in filing the complaint. The extraordinary lapse of time between the alleged adverse action in July 2002 and Complainant's filing of her complaint in April 2005 stretches to the point of incredulity Claimant's suggestion that she had neither actual nor constructive knowledge of her rights under the ERA until she filed her claim. The doctrine of equitable tolling focuses on whether a duly diligent complainant was excusably ignorant of his or her rights.[1] *Prybys, supra*.

None of the excuses which Complainant has advanced with regard to the extreme delay of her initial filing have any bearing upon her failure to file a timely appeal with the Chief Administrative Law Judge from OSHA's adverse findings. Not only was there an explicit notice of the requirements for a timely appeal, but Complainant was implicitly on notice of the adverse consequences of an untimely appeal because of the prior rejection of her complaint by OSHA as untimely. Complainant's response to the order to show cause, which refers to the failure of the respondent to make the requisite posting of notices of employee rights under the ERA, provides

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[1] In the Sixth Circuit, five factors to be considered in determining whether equitable tolling is appropriate in a given case are:

1. whether the plaintiff lacked actual notice of the filing requirements;
2. whether the plaintiff lacked constructive notice, i.e., his attorney should have known;
3. the diligence with which the plaintiff pursued his rights;
4. whether there would be prejudice to the defendant if the statute were tolled; and
5. the reasonableness of the plaintiff remaining ignorant of his rights. Ignorance of the law alone is not sufficient to warrant equitable tolling.

In the instant case the factual issue of when Complainant actually learned of her rights is unresolved, but a nearly three year delay is compelling evidence of lack of diligence on Complainant's part, particularly for someone with Complainant's professional responsibilities. Prejudice to Respondent would seem to inhere in a delay in filing of the instant magnitude. And it would seem quite unreasonable for Complainant to have remained ignorant of her rights for so long a period under the circumstances disclosed by the instant record. There is no evidence that the complainant was prevented from investigating her rights within the statutory period, or that she was misled by Respondent or deterred from seeking legal advise by Respondent, and so equitable tolling would not be warranted. *See Rose v. Dole,* 945 F.2d 1331 (6th Cir. 1991) (per curiam); *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)(Title VII case); *Roberts v. TVA*, 94-ERA-15 (Sec'y Aug. 18, 1995)(application of the fifth factor, i.e. the reasonableness of the complainant's remaining ignorant of his rights, given his occupation experience); *Howard v. TVA*, 90-ERA 24 (Sec'y July 3, 1991).

no relevant cause for her failure to file a timely appeal with the Chief Administrative Law Judge within five business days of the receipt of the determination after dismissal of her complaint by OSHA pursuant to 29 CFR §§ 24.4(2) and (3). Wherefore, pursuant to 29 C.F.R. §§ 24.5(d) and 24.4(d)(2) and (3), it is

ORDERED that the appeal of Rayma L. Bilicki under the ERA be dismissed.

A
Edward Terhune Miller
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.