U.S. Department of Labor

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Issue Date: 14 September 2005

Case No. 2005-ERA-00021

In the Matter of

ILYA PITIMASHVILLI
Complainant

v.

COLUMBIA UNIVERSITY MEDICAL CENTER
Respondent

RECOMMENDED DECISION AND ORDER
DISMISSING THE COMPLAINT

This proceeding arises from a complaint filed by Ilya Pitimashvilli (Complainant) against Columbia University Medical Center (Respondent) alleging that Respondent violated § 211 of the Energy Reorganization Act, as amended, 42 U.S.C. § 5851 (ERA), by terminating his employment on May 23, 2003. The complaint is contained in Complainant's letter to the Occupational Safety and Health Administration (OSHA) that is dated January 19, 2005 and was received by OSHA on January 22, 2005. The applicable regulations are at 29 C.F.R. Part 24.

No hearing has been held. On July 26, 2005 I issued an Order pointing out that on June 22, 2005 OSHA had denied the complaint based on its determination that the complaint was untimely. The Order also stated that there was a question as to whether Complainant's request for a hearing had been timely filed, pursuant to the regulations at 29 C.F.R. § 24.4(d)(2). The Order requested that the parties file responses addressing these two issues. In a letter dated July 30, 2005 Complainant replied and submitted evidence indicating that the request for a hearing was filed within five days after he received OSHA's determination and that it was served on Respondent. However, Complainant's letter did not address the issue of the timeliness of the complaint. In a response dated August 5, 2005 (Response) Respondent argues that the complaint was untimely and moves for dismissal of the complaint for that reason.[1] On August 10, 2005 I issued an Order advising Complainant that he could file a response to Respondent's motion to dismiss the complaint. However, Complainant has not filed a response.

[1] Respondent also argues that Complainant's request for a hearing was untimely. However, as the instant determination dismisses the complaint because it was untimely, there is no need to resolve the question of the timeliness of the request for a hearing or the substantive merits of the case.

The sole question considered and determined herein is whether the complaint was timely filed.

I. FACTUAL BACKGROUND

There are no facts in dispute with regard to the occurrence of the events preceding the filing of the complaint dated January 19, 2005 and received by OSHA on January 22, 2005.

The parties agree that Respondent discharged Complainant from his job on May 23, 2003. The complaint states that Complainant "worked at [Respondent's] Radiation Safety Office . . . from 1/31/1998 to 5/23/2003." The complaint further states:

> In May 23, 2005 [sic] I was fired with completely false and ridiculous "reasons" for discharge.

Respondent asserts that Complainant's termination was "final" on May 23, 2003 in that on that date Complainant "stopped work and ceased receiving pay and benefits . . . . " Response, pp. 3-4. Finally, Complainant has not controverted Respondent's statement that it was on May 23, 2003 that Complainant was notified that he was discharged, he ceased working for Respondent, and Respondent stopped paying Complainant wages and benefits.

On January 6, 2004 Complainant filed an internal grievance contesting his termination.[2] The grievance, sent to Respondent by e-mail states, *inter alia*:

> I would like to file a formal complaint [i.e., grievance] regarding the termination of my employment . . . .

Response, Exhibit 4. The complaint states that a grievance hearing was held on February 25, 2004, and that the "Final Grievance decision . . . is dated November 10, 2004." [3] Respondent agrees that the grievance process commenced on January 6, 2004 and that the final grievance decision sustaining the termination of Complainant's employment was issued on November 10, 2004. Response, p. 2. The exhibits submitted with Respondent's Response are in accord with the foregoing facts.

II. DISCUSSION

As noted above, the parties are in agreement that on May 23, 2003 Respondent notified Complainant that his employment was terminated, and at that time Respondent ceased paying

[2] The record contains no explanation of why Complainant waited until January 6, 2004 to file a grievance.

[3] Complainant reiterated these statements on the first page of his request for a formal hearing dated July 5, 2005.

Complainant pay and benefits. Respondent now contends that the complaint filed by Complainant on January 19 or 22, 2003 was untimely and therefore it should be dismissed.

Respondent's request for dismissal of the complaint will be treated as a motion for summary decision, pursuant to 29 C.F.R. § 18.40. An administrative law judge may enter a summary decision for either party where "there is no genuine issue as to any material fact . . . ." Moreover, "[w]hen a motion for summary decision is made and supported as provided in [§ 18.40] a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). In deciding a motion for summary decision, the factual evidence must be viewed in the light most favorable to the non-moving party. Stauffer v. Wal-Mart Stores, Inc., ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 7 (ARB Nov. 30, 1999).

The employee protection provisions of the ERA provide, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engaged in protected activity. 42 U.S.C. § 5851(a)(1). Section 5851(b)(1) contains a statute of limitations providing that an employee who believes he has been discharged or otherwise discriminated against under the ERA may file a complaint "within 180 days after such violation occurs." The implementing regulations also provide that "any complaint shall be filed within 180 days after the occurrence of the alleged violation." 29 C.F.R. § 24.3(b)(2).

In whistleblower cases, statutes of limitation such as section 5851(b)(1) run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. Jenkins v. United States Envtl. Prot. Agency, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. Larry v. The Detroit Edison Co., No. 86-ERA-32, slip op. at 14 (Sec'y June 28, 1991).

The time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date. Riden v. Tennessee Valley Auth., No. 89-ERA-49, slip op. at 2 (Sec'y July 18, 1990). In Ross v. Florida Power & Light Co., ARB No. 98-044, ALJ No. 96-ERA-36, slip op. at 4, (ARB Mar. 31, 1999), the Administrative Review Board (ARB) held that the ERA statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights."

In determining whether a complainant timely filed the complaint, it is first necessary to identify the precise alleged unlawful action. Watson v. Eastman Kodak Co., 235 F.3d 851, 855 (3d Cir. 2000). The focus is on the time of the alleged discriminatory act, not on the point at which "the consequences of the act become painful." Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980); English v. General Elec., No. 85-ERA-2, slip op. at 6 (Sec'y Jan. 13, 1987), aff'd sub nom. English v. Whitfield, 858 F.2d 957 (4th Cir. 1988), rev'd on other grounds, 496 U.S. 72 (1990). In Ricks, a case under Title VII and the Civil Rights Act, § 1981, the Supreme

Court held that the limitations period began to run when the employee was denied tenure as a teacher rather than on the later date on which his employment terminated. Ricks, 449 U.S. at 258. See Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent). Thus, the date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences. Overall v. Tennessee Valley Auth., ARB Nos. 98-111, 98- 128, ALJ No. 97-ERA-53, slip op. at 34 (ARB Apr. 30, 2001).

In the instant case, it is uncontested that (1) Complainant was notified that he was discharged and ceased receiving pay and benefits on May 23, 2003 and (2) he filed his complaint with OSHA on January 19 or 22, 2005. Although the complaint was filed well beyond 180 days after May 23, 2003, Complainant argues that the final decision that he was discharged was not made until November 10, 2004 when his grievance was denied, and that his filing of an internal grievance with Respondent on January 6, 2004 tolled the running of the statute of limitations until November 10, 2004 when the grievance was denied by Respondent. Complainant states these contentions in the following fashion:

> I did not have any reasons to consider that my grievance to [Respondent] would be denied. Final decision regarding my firing is dated November 10, 2004. Otherwise [Respondent's] Grievance and Hearing procedures are illegal and absurd. I do not understand why it is necessary to count 180 days from May 23, 2003 but not from November 10, 2004. I did not find in ERA any basis of such consideration [sic].

Complainant's July 5, 2005 request for hearing, p. 2. I disagree with Complainant's contentions.

The courts have held that the statute of limitations begins to run at the moment an employer decides to discharge an employee and notifies the employee of that decision. In the instant case that occurred on May 23, 2003, and the 180 days within which the ERA complaint could have been filed expired on November 19, 2003, unless at least one of Complainant's contentions is correct. However, contrary to Complainant's contentions, an employer's consideration of an internal grievance filed by an employee does not render the adverse employment action tentative or equivocal, nor does the filing of a grievance toll the statute of limitations. Ricks, supra. The Supreme Court considered these questions in Ricks because the employee in that case had filed a grievance after he was informed he would not be given tenure (which ultimately resulted in the termination of his job). Ricks held that (1) the adverse action was final despite the fact that the employer later reviewed the decision under the internal grievance process, and (2) the pendency of the employee's grievance did not toll the statute of limitations. 449 U.S. 250 at 260-61.

First, Ricks stated:

> [E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative.

> The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.

Second, the Court stated:

> As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976).
>
> The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made. Cf. id., at 234-235 (footnote omitted).

Ricks, 449 U.S. 250 at 261 (emphasis in original).

In the instant case, there is no evidence that the May 23, 2003 decision by Respondent to discharge Complainant was ever tentative or equivocal. Thus, the 180-day statute of limitations began to run on May 23, 2003 when Complainant was informed of the decision. The 180 days expired on November 19, 2003, while Complainant's grievance was not filed until January 6, 2004. Thus, the grievance process began *after* the statute of limitations had expired, and therefore the grievance was filed too late to extend or toll the statute of limitations. Further, even if the grievance had been filed before the statute of limitations expired, tolling of the statute would not be appropriate under the judicial precedents noted above.

In sum, the complaint, filed on January 19 or 22, 2005, was untimely because it was filed more than 180 days after Respondent notified Complainant that his employment was terminated. Consequently, the complaint must be dismissed.

ORDER

It is ORDERED that the complaint herein is dismissed.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).