U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 January 2008

CASE No.: 2008-SOX-00007

In the Matter of:

ROBERT L. TRAFTER,
Complainant,

v.

AKZO NOBEL COATINGS, INC.,
Respondent.

DECISION AND ORDER DISMISSING THE COMPLAINT

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 ("the Act" or "SOX") enacted on July 30, 2002. The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employees reasonably believe constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders.

I. PROCEDURAL HISTORY

Robert L. Trafter ("Complainant"), acting *pro se*, filed a complaint with the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") on August 20, 2007. Complainant alleged that AKZO Nobel Coatings, Inc. ("the Employer" or "Respondent") retaliated against him in violation of the Act by terminating his employment in January, 2003, after Complainant informed management that he had contacted OSHA and the Environmental Protection Agency ("EPA").

After conducting an investigation, OSHA dismissed Complainant's complaint as untimely. OSHA determined that Complainant had failed to file his complaint within 90 days of the alleged discriminatory employment action. Complainant disagreed with OSHA's findings, and his appeal to the Office of Administrative Law Judges ("OALJ") was received on October 22, 2007. The case was assigned to me, and on November 8, 2007, I issued an order directing the parties to show cause why jurisdiction stands under the Act ("Order to Show Cause"). I received various letters from Complainant dated November 19, 2007, December 11, 2007,

December 21, 2007, and January 9, 2008.[1] On November 20, 2007, the Employer requested a one week extension for filing its response, which was filed on December 7, 2007.[2]

II. ISSUE

1. Timeliness of Complainant's Complaint.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Summary Judgment Standard

An Administrative Law Judge with OALJ may enter summary judgment for a party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. 29 C.F.R. section 18.40; Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way or an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. Schwartz v. Brotherhood of Maintenance Way Employees, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477, U. S. 317, 323-34 (1986).

The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case". Celotex Corp., supra. at 587. If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial. Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. Alder, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 793 (10th Cir. 1988). In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

I find it appropriate to resolve this matter in summary decision. As I am resolving this case without an oral hearing, I shall accept all of Complainant's factual allegations at this time as being true. Complainant's pleadings constitute his evidence for purposes of determining whether

[1] In this decision and order Complainant's letters will be referred to as "Compl't Lttr. [Date]." Complainant's five exhibits attached to his letter dated December 11, 2007, will be referred to as "Compl't Ex. [#]" in the order that they are attached as if they were sequentially numbered by Complainant.

[2] The Employer's letter dated December 5, 2007, will be referred to as "Resp't Lttr." The Employer's five exhibits attached to its letter will be referred to as "Resp't Ex. [#]."

his complaint was timely filed. I have relied upon Complainant's complaint to OSHA (Compl't Ex. 2) and his various letters for his factual averments.

2. Factual History

Complainant began working for the Employer in October, 1990, and he was terminated from employment in January of 2003. Compl't Ex. 2. Complainant filed a complaint with OSHA on August 20, 2007. Id. In response to my Order to Show Cause, Respondent argued that Complainant exceeded the 90 day filing requirement because Complainant was aware of his termination in 2003 and filed his complaint in 2007, well over 90 days later. Resp't Lttr. Complainant argued that the Employer's retaliation was "on going" and that the time for filing his compliant should be tolled accordingly. Compl't Lttr. Dec. 11, 2007. Complainant also averred that he "filed the proper paper work with the EEOC." Id. In addition, Complainant implied that the delay in filing was caused in part by his lack of representation by referencing an inability to secure counsel in his letters and attaching correspondence with various attorneys thereto. Id.; Compl't Lttr. Nov. 19, 2007; and Compl't Lttr. Dec. 21, 2007.

3. Discussion

The Act establishes the statute of limitations for a whistleblower's complaint under SOX:

> An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

18 U.S.C. § 1514A(b)(2)(D). Likewise, the applicable regulations add:

> (d) Time for filing. 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…a complaint alleging discrimination…

29 C.F.R. 1980.103 (d). The Department of Labor's commentary on the regulations states:

> [T]he alleged violation is considered to be when the discriminatory decision has been both made and communicated to the complaint. (Citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).) In other words, the limitations period [i.e., the 90 days] commences once the employee is aware or reasonably should be aware of the employer's decision. Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001)…

69 Fed. Reg. No. 163, p. 52106 (August 24, 2004). See also Lawrence v. AT&T Labs, 2004-SOX-00065 (ALJ Sept. 9, 2004).

Complainant's continuing violation theory is misplaced. It has been recognized in SOX cases that "each retaliatory adverse employment decision constitutes a separate act and that the

plaintiff can only file a complaint to cover discrete acts that occurred within the applicable time period. The only exception to this rule is an action based on a hostile work environment." Dolan v. EMC Corp., 2004-SOX-1 (ALJ Mar. 24, 2004)(citing National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002)). This case does not involve an ongoing hostile working environment because Complainant's employment was terminated in 2003. His termination was the primary adverse employment action and therefore the statute of limitations for that act began to run in January of 2003. Complainant did not suggest that his termination in 2003 was ambiguous or unapparent in any manner. Accordingly, I find that the evidence in this case demonstrates that the statute of limitations for filing a complaint commenced when Complainant was terminated in 2003. Thus, Complainant's August 22, 2007, Complaint to OSHA unmistakably exceeded the 90 day filing requirement of § 1514A(b)(2)(D).

Complainant may avoid dismissal of his August 22, 2007, SOX complaint only if some equitable reason exists to relieve Complainant of the 90 day time limit for filing a SOX complaint.

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 his 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 (2nd Cir. 1978)). See also Harvey v. Home Depot U.S.A., Inc., ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36 (ARB June 2, 2006). Courts have held that the restrictions on equitable tolling must be scrupulously observed, and it 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 53 (Sec y, Sept. 29, 1989). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984).

There is no evidence of intentional or misleading conduct on the part of the Respondent that would have impeded Complainant's ability to file his complaint within the statutory period. Thus, Complainant can not establish the first possible basis for tolling the statute.

With regard to the second ground which might support equitable tolling, Complainant has failed to point to any extraordinary circumstances that may have prevented him from timely asserting his rights under the Act. There is evidence that Complainant battled cancer and was admitted into a mental institution. See Compl't Ex. 1; Compl't Lttr. Jan. 9, 2008. Neither of these situations, however, prevented Complainant from filing a claim during the period immediately following his termination in 2003. According to a report from Complainant's doctor, Complainant received cancer treatment in 1999 and did not have a recurrence of the disease until 2006. Compl't Ex. 1. Complainant's involvement with the mental hospital was brief; he was admitted only during August of 2002, prior to his discharge from the company. Compl't Lttr. Jan. 9, 2008; Compl't Ex. 2. Furthermore, the fact that Complainant was able to timely file a disability discrimination claim with the United States Equal Employment Opportunity Commission ("EEOC") (Compl't Ex. 4), suggests that Complainant was not

prevented from filing a SOX claim because of an extraordinary personal situation occurring at that time. Consequently, Complainant has not established the second ground for equitable tolling.

Regarding the third situation under which the doctrine might apply, Complainant filed a complaint in 2003 with the EEOC alleging discrimination. Compl't Ex. 4. After the EEOC issued Complainant a Notice of Right to Sue in September, 2003, Complainant filed a complaint in the United States District Court for the District of Kansas on February 11, 2004. Id. Complainant alleged violations of the Americans with Disabilities Act and Title VII of the Civil Rights Act "to correct unlawful employment practices on the basis of disability." Id. Complainant's disability discrimination complaint is not sufficient to establish equitable tolling of the SOX statute of limitations because Complainant did not allege a SOX-protected activity. See Carter v. Champion Bus, Inc., ARB No. 05-076, ALJ No. 2005-SOX-23 (ARB Sept. 29, 2006)(stating that "[t]o be considered the 'precise complaint in the wrong forum,' the EEOC complaint must demonstrate that [the complainant] engaged in SOX-protected activity prior to his discharge")(citations omitted). Here, Complainant's EEOC complaint involved disability discrimination, and it was void of any argument that Complainant provided management with information regarding conduct that Complainant reasonably believed constituted mail, wire, radio, television, bank, or securities fraud, or a violation of any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.

Even if I were to find that Complainant alleged a SOX violation to the EEOC, his complaint was filed in September of 2003, more than 90 days after his termination in January of that year. See Compl't Ex. 4 (EEOC statement that it received Complainant's information on September 22, 2003, 252 days after the date of harm). Accordingly, Complainant can not establish that it is appropriate to modify the statute of limitations in this case based on the EEOC complaint he filed in 2003. Accordingly, Complainant has failed to establish the three traditional equitable reasons for disregarding the statute of limitations.

Regarding alternative arguments for equitable relief, it has been established that failure to secure counsel in order to pursue a claim under the Act is an insufficient reason, in and of itself, to justify equitable tolling of the limitations period for filing a complaint. Barker v. Perma-Fix of Dayton, Inc., 2006-SOX-1 (ALJ Jan. 11, 2006). Accordingly, Complainant's lack of counsel is not dispositive on the issue of timeliness.

In addition, ignorance of the law is not an adequate excuse for accepting an otherwise untimely complaint, unless the complainant can demonstrate that his or her ignorance of the limitations period was caused by circumstances beyond the party's control. Guy v. SBC Global Services, 2005-SOX-113 (ALJ Dec. 14, 2005)(citing 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."). As discussed above, Complainant has not established any circumstances beyond his control which prevented him from learning the statute of limitations in a SOX case.

I find that Complainant's SOX cause of action is barred because the complaint was untimely filed. Complainant's complaint was filed four years after his termination, and Complainant was not able to state a sufficient legal ground to justify equitable modification of the statute of limitations. Accordingly, Complainant's complaint will be dismissed.

IV. CONCLUSION

Based on the foregoing, I find that the complaint filed on August 20, 2007, is barred by the 90-day statute of limitations in 18 U.S.C. § 1514A(b)(2)(D). The statute of limitations began to run four years before the complaint was filed when, in January, 2003, Complainant was terminated.

ORDER

It is hereby ORDERED that Complainant's Complaint be DISMISSED.

A

Janice K. Bullard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties 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 20001-8002. The Petition must also be served 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 decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).