

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 July 2004

CASE NO. 2004-TSC-0004

In the Matter of:

BEN STEPHENS,

Complainant,

vs.

VALLEY INDUSTRIES, L.L.C.,

Respondent.

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

Ben Stephens ("Complainant") brings this claim under the Toxic Substances Control Act 15 U.S.C. § 2622 ("TSCA") whistleblower protection provisions and the implementing regulations at 20 C.F.R. Part 24, against Valley Industries, L.L.C. ("Respondent" or "Employer"). A formal hearing was held in San Francisco, California on June 25, 2004, at which both parties were present. Complainant appeared *in propria persona*, and Valley Industries was represented by Matthew J. Ruggles, Esq. The following exhibits were admitted into evidence: Administrative Law Judge's Exhibit ("ALJX") 1, Complainant's Exhibit ("CX") 1; and Respondent's Exhibits ("RX") 1, 2 and 3. Transcript ("Tr.") p.9-20.

The parties were given leave to submit written closing arguments. Employer submitted its Post-Trial Closing Argument on July 12, 2004, hereby admitted as ALJX-2.

ISSUE

The parties agree that the threshold issue of timeliness should be decided before a hearing need be held on the merits. Therefore, the sole issue to be determined is:

Should Complainant's complaint under section 2622(b) of the TSCA be dismissed for failure to file within the 30-day statute of limitations?

SUMMARY OF DECISION

Complainant is unable to show that the doctrine of equitable tolling applies to his untimely complaint with the Department of Labor. Therefore, the complaint is barred by the 30-day statute of limitations set forth in the TSCA at 15 U.S.C. § 2622(b) and must be dismissed with prejudice.

SUMMARY OF EVIDENCE

Complainant testified at trial on June 25, 2004. Complainant was terminated from employment with Valley Industries on June 8, 2001. Tr. at 14. On September 17, 2001, the State of California, Department of Industrial Relations, Division of Occupational Safety and Health (“OSHA”) received a complaint from Complainant regarding hazardous conditions at Valley Industries. CX-1 at 3. On December 6, 2001, OSHA notified Complainant that the Employer had advised OSHA that the hazards had been investigated and corrected. CX-1 at 3. Complainant then filed a complaint with the State of California Department of Industrial Relations, Division of Labor Standards Enforcement (“DLS”) on October 11, 2001. CX-1, p.12-13. Complainant testified that the DLS¹ “closed the door on my face. . . .” Tr. at 25. Subsequently, Complainant filed a civil lawsuit against Valley Industries in the San Joaquin Superior Court in May or June of 2002. Tr. at 15. Complainant’s lawsuit was dismissed by the Superior Court in an order granting Employer’s motion for summary judgment on February 9, 2004. Tr. at 15. A final judgment was entered by the Superior Court in favor of Employer on April 15, 2004. Tr. at 15. On April 6, 2004, Complainant filed a complaint with the federal Department of Labor (“DOL”) under the TSCA. Tr. at 15.

Complainant testified that he waited to file a TSCA complaint with the DOL because “all the doors were shut from everything else.” Tr. at 18. Complainant testified that he only contacted John Payne, a DOL employee, after the judgment was entered against him in San Joaquin Superior Court. Tr. at 18-19 and 25-26. Complainant testified that nothing prevented him from filing his TSCA complaint with the DOL except that he “didn’t know anything about it.” Tr. at 23-24.

ANALYSIS

The Toxic Substances Control Act’s whistleblower protection provision provides that Complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation. 15 U.S.C. § 2622(b). The doctrine of equitable tolling is applicable to the TSCA in the following circumstances:

- (1) the defendant has actively misled the plaintiff respecting the cause of action;
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights;
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

¹ At the hearing, Complainant referred to DLS as the “State Board of Labor.”

School Dist. of Allentown v. Marshall, 657 F.2d 16, 19-21 (3d Cir. 1981), citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). The Secretary of Labor has explicitly held that the *Allentown* doctrine applies to TSCA whistleblower cases. *Sawyers v. Baldwin Union Free School District*, 85-TSC-1, 3 (Sec’y Oct. 5, 1988).

The restrictions on equitable tolling must be “scrupulously observed,” *Allentown*, 657 F.2d at 19, and generally, ignorance of the filing period is insufficient to warrant equitable tolling. *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991).

In the instant case, Complainant’s testimony does not invoke the doctrine of equitable tolling. Complainant was unable to recall if he had any contact with Employer after his termination; therefore, there is no evidence that the Employer actively mislead Complainant. There is no evidence that Complainant has in some extraordinary way been prevented from asserting his rights as he has previously filed complaints with OSHA, DIR, and the San Joaquin Superior Court. Finally, Complainant’s previous complaints do not seem to have raised TSCA claims in the incorrect forum. Complainant testified that other than his ignorance of the TSCA, he has no basis for his late filing. Tr. at 24. Ignorance of the filing period is insufficient to trigger equitable tolling. *Id.* Therefore, the complaint is barred by the 30-day statute of limitations set forth in the TSCA at 15 U.S.C. § 2622(b), and must be dismissed with prejudice.

ORDER

I recommend that Complainant’s complaint be dismissed with prejudice for untimely filing.

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ANNE BEYTIN TORKINGTON
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.