U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 January 2006

Case No. 2006-SOX-01

In the Matter of:
VALERIE BARKER,
Complainant,

v.

PERMA-FIX OF DAYTON, INC.
Respondent.

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

ORDER GRANTING MOTION TO DISMISS

This proceeding 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 ("SOX" or "Act "). 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 employee reasonably believes constitute violations 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

On August 11, 2005, Complainant submitted a letter to the Columbus area Occupational Safety and Health Administration ("OSHA") stating that she believed that she had sent her request for an investigation to the Chicago Regional office. This August letter referenced an attached July 22, 2005 letter which alleged discriminatory termination by Respondent for Complainant's protected activity.

On September 1, 2005, OSHA dismissed the complaint as "untimely," finding that Complainant's July 22, 2005 filing could not be verified, and that the August 12, 2005 filing exceeded the 90-day statute of limitations. On September 27, 2005, Complainant submitted her request for a formal hearing before the Office of Administrative Law Judges.

Respondent submitted a motion to dismiss this complaint as untimely on November 30, 2005. Complainant filed a response on December 15, 2005, and Respondent replied on December 22, 2005. This matter is set for hearing on April 4, 2006.

Background

Before the undersigned is Respondent's motion to dismiss Complainant's administrative complaint. For purposes of responding to this motion, I shall accept Complainant's factual allegations as being true.

Valerie Barker ("Complainant") was a regional controller for Perma-Fix Environmental Services, Inc. ("Respondent"). (Cl. Response at 1-2). On May 3, 2005, Respondent terminated Complainant's employment by e-mail, Complainant, however, did not receive this notice until May 5, 2005. (Cl. Response at 5). Following her termination, Complainant contacted the Ohio Civil Rights Commission and the Attorney General's Office for the State of Ohio in an attempt to determine jurisdiction for this matter. On July 22 or July 23, 2005, Complainant mailed a letter to the Chicago Regional OSHA office. (Cl. Response at 5; Cl. Aff. ¶ 28). Upon further research, Complainant submitted a second letter to the Columbus Area OSHA office on August 11, 2005. (Cl. Aff. ¶ 29-30). Complainant did not retain counsel until November 14, 2005. (Cl. Aff. ¶ 31).

DISCUSSION AND APPLICABLE LAW

Timeliness

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:

> *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, or have filed, by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing….

29 C.F.R. 1980.103 (d). Furthermore, the Department of Labor's commentary on §1980.103 states:

> [T]he alleged violation … is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision.

Lawrence v. AT&T Labs and AT&T Corp., 2004-SOX-65, 4 (Sept. 9, 2004) (citing 69 Fed. Reg. No. 163, p. 52106 (August 24, 2004))[1] (internal citations omitted).

In the instant action, Complainant was made "aware" of her termination on May 5, 2005. As a result, the 90-day statute of limitations for her SOX claim expired on August 3, 2005.

In *Roberts v. Sec'y of Labor*, 29 Fed. Appx. 225 (6th Cir. 2002), the court held that the complaint was not timely filed because there was substantial evidence to support the conclusion that the prior letter was never mailed. While I will not go so as to conclude that there is substantial evidence that Complainant's July 2005 letter was never mailed, I do find that aside from Complainant's affidavit, there is no support for the contention that the July 22, 2005 letter was ever sent. In addition, 29 C.F.R. 1980.103 (d) expressly states that "the date of the postmark … will be considered to be the date of filing." Thus, Complainant's only verifiable request for an OSHA investigation is the August 12, 2005 postmark date. This submission falls nine days after Complainant's deadline for filing, and therefore, I find that this filing was not timely.

Complainant argues that she should not be held accountable for the mishandling of her July 22, 2005 letter by the Chicago Regional OSHA office or the U. S. Postal Service. While we are only talking about a 20 day variance between the alleged filing and the verifiable filing, in future cases Complainant's reasoning could be expanded to include verifiable filings years after the expiration of the statute of limitations. Thus, even if, through no fault of her own, the letter was mishandled by the U.S. Postal Service or the Chicago Regional OSHA office, I find that it remains her responsibility to make a timely submission, or provide proof that she attempted to make such a submission. Furthermore, I do not find Complainant's sworn affirmance that she mailed her request for an investigation on July 22nd or 23rd to be sufficient to constitute proof of filing. Therefore, despite the possibility of error by third parties, I find that the only verifiable filing of record is the August 12, 2005 letter to the Columbus Area OSHA office; and I conclude, based on the facts as presented by Complainant, the Act, and the associated regulations, that this complaint is barred by the SOX statute of limitations. 18 U.S.C. §1514A(b)(2)(D).

Equitable Tolling

Complainant asserts that under the facts of this case the doctrine of equitable tolling should apply.

[1] Administrative Law Judge Kaplan notes that §1980.103 of the final regulations and the Department's associated commentary are identical to that section of the interim regulations and the associated commentary.

> The doctrine of equitable tolling may be applicable when an otherwise timely complaint is filed in the wrong forum under the identical statutory scheme. Likewise, in circumstances in which there is a complicated administrative procedure, and an unrepresented, unsophisticated complainant receives misleading information from the responsible governmental agency, a time limit may be tolled.

Mouldauer v. Canadaigua Wine Co., 2003-SOX-26 (ALJ Nov 14, 2003)(internal citations and quotes omitted). The Sixth Circuit, under whose jurisdiction this case arises, has laid out five factors for consideration in equitable tolling situations:

> 1) lack of notice of the filing requirements; 2) lack of constructive knowledge of the filing requirements; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement.

Graham Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561 (6th Cir. 2000)(citing *Truit v. County of Wayne*, 148 F.3d 644 (6th Cir. 1998). The court, however, noted that this list was not all-inclusive, and these determinations must be made on a case-by-case basis. *Id.*

Turning to the issue of pro se litigants, the Sixth Circuit stated:

> [E]ven a pro se litigant … is required to follow the law. In particular, a willfully unrepresented plaintiff volitionally assumes the risk and accepts the hazards which accompany self representations. See *McNeil v. Unites States*, 508 US. 106 (1983), wherein the Supreme Court commented that "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." *Id*. at 113. This Circuit has remarked that "it is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling." *Rose v. Dole*, 945 F.2d 1331, 1335(6th Cir. 1991)(per curiam).

Id.

Considering the two scenarios where equitable tolling is applicable, while it is true that the complainant in this case was unrepresented, it is equally apparent that this lack of representation was a discretionary desire to avoid a $750 fee. Additionally, while actually locating 29 C.F.R. 1980.103(d) may be difficult for a pro se complainant, the statute of limitations established by this section is very straight forward. Third, the diligence argued by Complainant reflects that she is not an "unsophisticated complainant." Not only did she contact the OCRC, the Ohio Attorney General's Office, and a private practioner for help with her claim, but when these sources were ultimately unable to assist her, she independently identified the Chicago Regional OSHA office, and even realized that the proper filing office for her claim was the Columbus Area OSHA office. From these facts it is clear that Complainant is not "unsophisticated," but instead, that she simply failed to meet the required deadlines. Fourth,

while the Ohio OCRC may have incorrectly directed Complainant to the Ohio Attorney General's office, neither of these governmental offices is "the responsible governmental agency" for a whistleblowers claim under the Act. Furthermore, even though the Department of Labor, Wage and Hour Division, could conceivably be considered the proper governmental forum, Complainant's request to that agency dealt entirely with Respondent's failure to pay for a day of employment, which does not appear to have anything to do with discrimination under the Act. Finally, the law firm of Altick & Corwin is not a governmental agency, so its failure to notify Complainant of the statute of limitations under the Act cannot form her basis for tolling the limitations period.

Turning to the second scenario where equitable tolling may be applicable, since 29 C.F.R. 1980.103(b) states that a complaint does not need to meet any particular form, other than that a filing be in writing and include a full statement of the acts, with pertinent dates; and even though Complainant's letter to the Ohio OCRC does not include a date of termination, I find that this letter would be sufficient to constitute a filing under the ACT. In addition, as Complainant submitted this e-mail to the Ohio OCRC, on June 7, 2005, I find that this filing was otherwise timely. Finally, Complainant's filing specifically states that she was terminated under circumstances that she believed violated provisions of the "No FEAR Whistle blower Act." The context of this e-mail clearly implicates retaliation under SOX. Therefore, I find that the circumstances surrounding Complainant's actions satisfy the threshold requirements, and thus, I may consider the factors supporting a tolling of the statute of limitations.

Assuming without deciding, that the first four factors established by the Sixth Circuit favor Complainant, based on the fifth factor – "the plaintiff's reasonableness in remaining ignorant of the particular legal requirement" – I find that her invocation of equitable tolling must fail. In her affidavit, Complainant stated that based on the information on the OSHA website, she filed her complaint by letter to the Chicago Regional[2] office on July 22nd or 23rd. I note, however, that on the OSHA website, in addition to the address for the Chicago office, a phone number is also included. Further exploration of the website reveals explicit directions as to how to file a claim under the Act, links to the applicable regulations, and a 2003 OSHA newsletter that explicitly notes the 90-day filing requirement and provides a (800) number for filing a complaint by phone. Considering Complainant's admission that she had accessed the OSHA website a full week before expiration of the limitations period, and thus had access to a variety of avenues to verify receipt of her filing, I find that her failure to retain any proof of mailing the July 22, 2005 letter and her failure to contact OSHA to verify receipt of her complaint were not reasonable considering the information available to her and the diligence she alleges. Furthermore, even if the links currently available on the OSHA website were not available in July 2005, I continue to find it unreasonable for Complainant to file a formal proceeding under the Act without retaining any proof of filing, or at least calling to check on receipt.

Finally, even assuming that Complainant did not have knowledge of the 90-day requirement under the Act, I find that she voluntarily assumed the risk of missing the deadline

[2] Even though 29 C.F.R. 1980.104 (c) states that a complainant should file with the OSHA Area Director responsible for enforcement in the geographic area where the employee resides, it also states that a complaint may be filed with "any OHSA officer or employee." As a result, despite the fact that Complainant lived within the Columbus area, a filing with the Chicago Regional office would be sufficient to initiate an claim under the Act.

when she willfully chose to remain unrepresented in the pursuit of this action. While it was not necessary for a complainant to secure counsel in order to pursue a claim under the Act, failure to do so is an insufficient reason, in an of itself, to justify equitable tolling. *Rose,* 945 F.2d at 1335.

In conclusion, since there is no proof of filing until approximately nine days after the expiration of the statute of limitations, I have determined that this claim is time-barred. In addition, I find that the statute of limitations cannot be tolled because Complainant's failure to retain or verify receipt of the alleged July 2005 letter is not a reasonable excuse for remaining ignorant of the timeliness requirement. Finally, I find that by proceeding without representation, Complainant voluntarily assumed the risk of self-representation.

ORDER

IT IS ORDERED that Respondent's motion to dismiss is GRANTED and the complaint is dismissed. IT IS FURTHER ORDERED that the hearing scheduled for April 4, 2006 is cancelled.

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THOMAS F. PHALEN, JR.
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, Room S-4309, 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).