U.S. Department of Labor

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Issue Date: 07 July 2006

CASE NO.: 2006-SOX-00082

In the Matter of

PHYLLIS RICHARDSON,
Complainant,

v.

JPMORGAN CHASE & CO.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT AS UNTIMELY FILED

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, ("the Act") enacted on July 30, 2002. Codified at 18 U.S.C. § 1514A et seq., the Act allows employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [certain provisions of the Act], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders..." to bring a civil action to protect against retaliation for their actions. 18 U.S.C. § 1514A(a)(1). The Act extends such protection to employees of companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l)["SEA of 1934"] or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d))". 18 U.S.C. § 1514A(a).

I. INTRODUCTION

Procedural History

On February 27, 2006, Phyllis Richardson ("Complainant") filed a complaint under the Act with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging that JPMorgan Chase & Co. ("Respondent") had violated the employee protection provisions of the Act by terminating her employment with the company in retaliation for her engaging in protected activity. On March 25, 2006, OSHA dismissed Complainant's complaint as untimely filed. On May 5, 2006, Complainant filed an appeal of OSHA's determination with the Office of Administrative Law Judges ("OALJ"). The case was

assigned to me, and by Notice issued May 8, 2006, I scheduled a hearing to commence on August 3, 2006 in New York, New York.

By Pre-hearing Order issued with my notice of May 8, 2006, I directed the parties to provide to me a written statement of jurisdiction and position. Complainant filed her statement on May 17, 2006[1], and Respondent filed its statement on May 18, 2006[2]. In its statement, Respondent asserted that Complainant had failed to timely file her complaint with OSHA, and asserted that OSHA's determination should be upheld. As *de novo* review applies in appeals of OSHA determinations under the Act, affirmance or denial of OSHA's determination is not the appropriate standard. 29 U.S.C. § 1980.107(b). Accordingly, by Order issued on June 7, 2006, I directed Complainant to Show Cause in writing by not later than June 23, 2006 why her complaint should not be dismissed as untimely filed, and directed Respondent to file a brief supporting its contention that OALJ lacks jurisdiction because the complaint was untimely filed.

On June 23, Complainant filed her pleadings[3] in compliance with my Order, and on June 27, 2006, Respondent filed its response[4], together with a motion for summary decision and dismissal of the complaint.

Accepting all of Complainant's assertions on this issue as true, I have concluded that the evidence is sufficient to make a determination without hearing on the limited issue of whether the complaint was timely filed.[5]

II. ISSUE

1. Whether summary decision may be entered dismissing Complainant's complaint as untimely filed.

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

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[1] Complainant's statement shall be referred to as "CS" herein.
[2] Respondent's statement shall be referred to as "RX" herein.
[3] Complainant's response shall be referred to as "CR" herein. I note that Complainant's Response to my Order to Show Cause is almost identical to Complainant's Statement of Jurisdiction, and is identical in all parts pertinent to the issue of timeliness of the complaint.
[4] Respondent's response shall be referred to as "RR" herein.

[5] I have confined my factual review to evidence material to the question of whether jurisdiction lies for Complainant's action under the Act, and have not addressed the facts pertinent to the merits of Complainant's allegations of retaliation.

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). 477 U.S. 262 (1986).

2. Timeliness of complaint to OSHA

On or about September 30, 2005, Complainant was notified that her employment with Respondent would be terminated effective November 30, 2005. CS at ¶22, CR at ¶22; RS at ¶4, RR at page 1; Complainant at ¶20; Letter of September 30, 2005, attached to Complaint. Plaintiff filed her SOX complaint with the Department of Labor ("DOL") on February 27, 2006.

Pursuant to 18 U.S.C. § 1514(b)(2)(D) a complaint brought under the Act must be filed not later than 90 days after the date on which the violation occurs. The Act at 18 U.S.C. § 1514A(b)(2)(D) states:

> **Statute of Limitations.** 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.
>
> The regulations at 29 C.F.R. § 1920.103 states:
>
> **Filing of discrimination complaint.**
>
> (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…

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).

As the foregoing clearly demonstrates, the Act imposes a statute of limitations within which a complaint must be filed, the violation of which deprives OALJ of jurisdiction over the action. The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him. *Lawrence v. AT&T Labs,* 2004-SOX 00065 (ALJ Sept. 9, 2004). It has been established that 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 36 (ARB Apr. 30, 2001). 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); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment was terminated).

In the instant matter, Complainant was unequivocally notified by Respondent in writing on September 30, 2005, that her employment would be terminated on November 30, 2005. She did not file her complaint with OSHA until more than 150 days after the date of notice of her impending discharge. Complainant asserts that Respondent "continued to marginalize her role as an Auditor and discriminate and retaliate against her from the date of notification up until and including the day of her termination on November 30, 2005." CS, CR ¶23. Complainant argues that such actions constitute retaliation that operated to "restart[ ] the clock" with respect to the Act's statute of limitations. Complainant relies upon the Court's holding in *McClendon v. Hewlett-Packard Co*., 2004 WL 1421395 (D. Idaho June 9, 2005) as supporting her contention.

I acknowledge that the Court in *McClendon,* supra., applied the holding by the United States Supreme Court that "each separate and discrete discriminatory employment act starts a new clock for the filing of an administrative claim". *McClendon*, 2004 WL supra., at 3 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S. Ct. 2061 (2002)). The *Morgan* case held that the existence of past acts and the employee's prior knowledge of their occurrence does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. *Morgan* at 113. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Id. at 114. However, as the Court made clear, only incidents that take place within the timely filing period are actionable. Id. All other discrete discriminatory acts are untimely filed and no longer actionable. Id. at 115.

The rationale of the holdings in *McClendon* and *Morgan* does not support Complainant's contention that her complaint was timely filed under any circumstances. After reviewing Complainant's complaint, I find that other that the effective date of her discharge, none of the retaliatory acts alleged by Complainant occurred within the 90-day filing period. The Complaint asserts that in June 2005, Christina Peri, the new Audit Partner at JPMorgan Chase & Co. ("JPMC"), began excluding Complainant from meetings with management from the Real Estate Business Services ("REBS") department of JPMC. Complaint at ¶17. Complainant was also excluded from any new activities with REBS. Id. In July 2005, the new Audit Partner requested the deletion of all of Complainant's audits. Complaint at ¶19. These acts of marginalizing Complainant's role as an auditor all occurred prior to the date of the notification of her termination. They are therefore outside the time for filing the complaint.

Complainant raised retaliatory acts that post-dated her notice of termination letter for the first time before OALJ, and therefore, they were not timely filed with OSHA. Complainant raised in her complaint "retaliation" by the Respondent in its actions that "marginaliz[ed] her role as an auditor" and that "exclud[ed] her from audit planning meetings". These references address Respondent's actions before her notice of termination. However, the references to being "marginalized" that Complainant made in subsequent pleadings before OALJ, specifically cited Employer's October, 2005 request that she return her work badge, computer, and work papers, as well as Respondent's deactivation of her access to work locations, email and bank systems. These acts were not raised in her complaint, and therefore were not timely filed with OSHA. Even if I were to construe Complainant's generalized language in her complaint with OSHA as referencing the more specific acts described later before OALJ, the acts occurred more than 90 days before she filed her complaint, and are, therefore, time barred.

Complainant has cited one communication with Respondent that falls within the 90 day period, and which she alleges constitutes a discriminatory act. She alleges that in December 2005, she was contacted by Respondent's Human Resource liaison, Joyce Heckman, who wanted to know whether or not the Complainant would be signing a "Release Severance" form. CS at page 6. The Second Circuit Court of Appeals has held that a complainant suffers an "adverse employment action" if she endures a "materially adverse change in the terms and conditions of employment." *Richardson v. New York State Dept. of Correctional Service*, 180 F.3d 426, 446 (2d Cir. 1999); *See, Torres v. Pisano*, 116 F.3d 625, 640. In applying this standard, the Court observed that "because there are no bright-line rules, courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse.'" *Torres,* supra. at 640 Id. (citing *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997)). I find that the phone call made to Complainant in December 2005 does not rise to the level of adverse action. Complainant was already fully aware that her termination was inevitable, or, indeed, had already occurred. There is no evidence that the phone call affected any terms or conditions of Complainant's employment with Respondent, because it is clear that the employment relationship had been severed. Moreover, this charge was first raised before OALJ, and was not raised with OSHA, and therefore, though the incident fell within 90 days before the complaint was filed, a complaint about the incident was not timely made.

I find that the evidence in this case demonstrates that the statute of limitations for filing a complaint commenced when Complainant received notice on September 30, 2005, that her employment would be terminated as of November 30, 2005.

Complainant has raised no argument defending her decision to wait until February 27, 2006 to file her complaint with OSHA. Although no argument for equitable tolling has been made, I have nevertheless considered whether Complainant's complaint may be deemed timely filed on the basis of that principle. There is no evidence of intentional or misleading conduct on the part of the Respondent that would have impeded Complainant's ability to file her complaint within the statutory period. Nor do I find the statute of limitations is tolled by the period between the time of notice of termination of employment and the date that discharge was effected. See, *Spearman v. Roadway Express, Inc.,* 92-STA-1 (Sec'y Aug. 5, 1992), citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Irwin v. Veterans Administration*, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990). Furthermore, there is no statutory mandate for such tolling.

In consideration of the evidence, I find it appropriate to grant Respondent's motion for summary judgment. The record supports finding that Complainant's complaint before OSHA was not timely filed.

IV. CONCLUSION

Based on the foregoing, I find that Complainant's action is barred because it was not timely filed within the 90-day statute of limitations imposed by 18 U.S.C. § 1514A(b)(2)(D).

ORDER

IT IS HEREBY ORDERED that Respondent's motion for Summary Decision be GRANTED, and the instant complaint be DISMISSED with prejudice.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

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).