U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

DAVID W. PICKETT, **ARB CASE NO. 00-076**

COMPLAINANT, **ALJ CASE NO. 00-CAA-9**

v. **DATE: April 23, 2003**

TENNESSEE VALLEY AUTHORITY, OFFICE OF INSPECTOR GENERAL, GEORGE T. PROSSER and DONALD K. DRUMM,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:
Edward S. Christenbury, Esq., Thomas F. Fine, Esq., Brent R. Marquand, Esq., Dillis D. Freeman, Jr., Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

FINAL DECISION AND ORDER

Complainant David W. Pickett brings this complaint against his former employer the Tennessee Valley Authority (TVA), an employee of the TVA Office of Inspector General (OIG) and a TVA plant manager, under the employee protection (whistleblower) provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (1994), Clean Air Act (CAA), 42 U.S.C. § 7622 (1994), Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. § 1367 (1994), Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1994), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1994), Resource Conservation and Recovery (RCRA) or Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1994) and regulations set out at 29 C.F.R. Part 24 (2002). Pickett alleges that TVA unlawfully discriminated against him because he engaged in activity protected under the Acts. In a [Recommended] Summary Decision (Dec.), an Administrative Law Judge (ALJ) determined that

TVA's motion for summary decision should be granted and that the complaint should be dismissed. Pickett timely appealed to this Board. We agree with the ALJ for the reasons discussed below.

Procedural History

On July 20, 1999, Pickett filed a discrimination complaint; the Occupational Safety and Health Administration (OSHA) accordingly commenced an investigation. 29 C.F.R. § 24.4. On August 17, OSHA advised Pickett that the complaint could not be substantiated because of his failure to cooperate with investigators. On August 27, Pickett requested a hearing. The Department of Labor Office of Administrative Law Judges (OALJ) assigned the case Docket No. 1999-CAA-0025. Pickett subsequently moved to remand the case to OSHA for further investigation. Pickett also moved (i) that he simultaneously be permitted to proceed with discovery in order to prepare for hearing and (ii) that he be granted partial summary decision. The ALJ, on September 10, granted Pickett's motion to remand and denied his motions for simultaneous discovery and partial summary decision.

After further investigation OSHA issued recommended findings (February 18, 2000) and supplemental findings (March 16, 2000), determining that Pickett's allegations could not be substantiated. On March 27, 2000, Pickett requested a hearing, additional investigation, an order lifting the stay of discovery and an order directing TVA to respond to his motion for partial summary judgment. Pickett enclosed first notices of depositions for TVA officials. OALJ assigned the case a different case number, namely Docket No. 2000-CAA-0009. On April 5, the ALJ denied the motion for further investigation, lifted the discovery stay, directed that all "discovery motions pending as of September 10, 1999, and not otherwise resolved shall be re-filed" and ordered the parties to submit a proposed discovery schedule. Pickett responded by letter dated April 12, 2000. He stated that since he had filed discovery requests rather than discovery motions, he "d[id] not believe there is any need (or requirement under either the Court's [sic] Order or [Department of Labor] rules and precedents) to refile discovery requests, unless they ha[d] been misplaced or your Honor somehow meant to embrace requests as well as Motions."

On April 18, 2000, the ALJ directed the parties to re-file all motions filed previously in Case No. 1999-CAA-0025 as "new matters" in Case No. 2000-CAA-0009. The ALJ specified that "[m]otions not filed in this matter in accordance with this order shall be deemed abandoned." Pickett responded by letter dated April 21, 2000, requesting that pursuant to the Freedom of Information Act (FOIA) copies of his motion for partial summary judgment be provided and placed in the file associated with Case No. 2000-CAA-0009. He stated: "The Motion for Partial Summary Judgment has already been served 235 days ago and is ***not*** "withdrawn." (Emphasis in original.) Pickett also stated that he objected to the procedure whereby the ALJ "delayed" setting a date for the hearing and ordering TVA to respond to the motion for partial summary judgment.

On April 25, 2000, the ALJ issued a pair of orders vacating a previous postponement of the hearing and notified the parties that a hearing would convene on June 14-16, 2000. The ALJ

responded in detail to matters raised in Pickett's various letters and filings and explained the necessity for refiling, namely that his case file did not contain Pickett's motion for partial summary judgment, discovery requests and discovery motions. The ALJ explained further that the rules of practice were designed to ensure a fair and orderly process for all parties, the essence of this guarantee "requir[ing] fair notice of matters in dispute not only to opposing parties but the presiding judge." Order Vacating Postponement at 2.

TVA filed a motion for summary decision on May 23, 2000 (dated May 19, 2000). On May 26, it moved for a continuance of the hearing and noticed Pickett that it would depose him. Pickett joined TVA in moving for a continuance in early June. On June 5, Pickett responded to TVA's motion for summary decision and filed a cross-motion for partial summary decision. On June 12, acting at the request of both parties, the ALJ postponed the hearing. On June 16, Pickett filed a notice of filing of discovery motion, a motion to deem requests for admissions admitted, a motion to compel videotaped depositions, a motion to compel proper answers to his first and second sets of interrogatories and first requests for production of documents. TVA responded to Pickett's cross-motion for summary decision on June 22. The ALJ granted summary decision on August 9.

Pickett timely petitioned for review of the decision by the Administrative Review Board (ARB). On review, Pickett argues that the ALJ erred by remanding for investigation while disallowing simultaneous discovery, delaying or refusing to order certain procedures, refusing to order discovery, refusing to require TVA to respond to charges of destruction and spoliation of evidence, granting summary decision without affording full and fair investigation and full discovery and not granting partial summary judgment for Pickett. In rebuttal, TVA argues that the ALJ was correct. It contends specifically that Pickett's claims are barred as untimely, that Pickett failed to raise a genuine issue of spoliation, that the decision of the Office of Workers' Compensation Programs (OWCP) concerning Pickett's benefits is not subject to review in this forum, that TVA's communications to OWCP were privileged and that Pickett could maintain no cause of action against the individual respondents. TVA also contends that it is entitled to summary judgment on the additional ground that it acted pursuant to OWCP regulations and therefore is not subject to liability.

Jurisdiction and Standard of Review

The ARB has jurisdiction to review the ALJ's recommended decision under 29 C.F.R. § 24.8. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)).

We review a grant of summary decision *de novo, i.e.*, under the same standard employed by ALJs. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact. We

also must determine whether the ALJ applied the relevant law correctly. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith*, 475 U.S. 574 (1986); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099 (9th Cir. 2000) (summary judgment under Rule 56, Fed. R. Civ. P.).

Issues Considered

1. Does the decision of the Employee Compensation Appeals Board (ECAB) reinstating Pickett's benefits compel reversal of the ALJ's recommended decision (by virtue of the doctrine of collateral estoppel)?

2. Is it proper to rule on TVA's motion for summary decision prior to completion of discovery?

3. Is TVA entitled to summary judgment on the basis that Pickett failed to timely file his complaint?

4. Did the ALJ abuse his discretion by:

    a) not allowing discovery to proceed when he remanded the case to OSHA for further investigation;
    b) after OSHA made its report and the case was docketed under a new number, requiring refiling of discovery requests and motions made prior to the assignment of the new case number ; and
    c) thereafter not enforcing discovery requests made by Pickett prior to the assignment of the new case number and notices of deposition filed without a proposed schedule for discovery?

5. Is TVA subject to unfavorable inferences and sanctions because it did not provide Pickett certain information in response to requests he made under FOIA or the Privacy Act?

Background

Between 1985 and 1988, Pickett worked as an Assistant Unit Operator (AUO) at TVA's Widows Creek Fossil Plant in Stevenson, Alabama. An AUO inspects and assists in the operation of plant machinery, specifically in the boiler room, turbine room, condenser room, screen and pump house and at gas turbines and appurtenant equipment. AUO activities require an employee to lift up to ten pounds and to reach or work above the shoulder.

During his tenure at the Widows Creek plant Pickett allegedly raised concerns about unsafe working conditions including nonworking pollution equipment resulting in excessive fly ash pollution, fireworks set off in the control room, caustic burns caused by an unlabeled sink full of improperly stored and unlabeled caustic chemicals, and uncleaned traveling screen

coverage resulting in water pollution.[1]

On February 11, 1988, Pickett sustained an injury to his left shoulder due to a malfunctioning turbine. He applied for Federal Employees' Compensation Act (FECA) benefits in March 1988 and, except for a two-week period, continued to work as an AUO until July 1988 doing "light duty" subject to a five to ten pound weight-lifting restriction. In October and November 1988, TVA offered Pickett employment, approved of by his physicians, which Pickett declined. In December 1988, TVA wrote to OWCP requesting review of Pickett's entitlement to benefits in view of his refusals. In February 1989, Pickett's neurologist, Dr. James Lynch, diagnosed Pickett as subject to hand restrictions, specifically restrictions as to "simple grasping" and "fine manipulation," and he certified that Pickett could not reach or work above the shoulder. Respondent's Exhibit (RX) 5. Dr. Lynch restricted Pickett from working eight hours a day and recommended that upon reemployment he begin working four hours a day. Lynch noted that Pickett was receiving psychiatric counseling at the time of his examination. In March and May 1989, TVA offered Pickett a four-hour per day clerical position at the Widows Creek Plant. Pickett also declined that position. TVA then again wrote to OWCP questioning Pickett's entitlement to benefits. OWCP subsequently determined the clerical position unsuitable employment due to the excessive commuting distance between Pickett's residence and the plant location. (Pickett was by then living with his parents in the Knoxville area.) TVA terminated Pickett's employment in October 1993, apparently as a matter of course in that he had been off work for more than five years.

In 1991 and 1993, TVA's OIG investigated Pickett's receipt of FECA benefits, first at the request of TVA management and subsequently as the result of an anonymous report that Pickett had engaged in activities inconsistent with his claim of total disability. The OIG investigates allegations of waste, fraud and abuse at TVA. On the occasion of both investigations OIG provided TVA's Workers' Compensation Department (WCD) with a report stating that no further investigation by OIG was warranted but recommending that WCD monitor the case.

According to the 1991 OIG report, although a referee physician "found no objective findings of disability nor were any work restrictions recommended," a psychiatric evaluation "supports Pickett's claim that he cannot perform the duties of his time-of-injury position." The 1993 OIG report substantiated that Pickett engaged in physical activities (including softball, basketball, golf, jogging, and Taichi), taught karate, and coached basketball and baseball. However, it noted that Pickett claimed that he participated in the activities based on advice of Dr. Lynch. Pickett refused to sign a medical release so that the OIG could verify his explanation. The report therefore suggested that Dr. Lynch be contacted. TVA then sent a letter to another of Pickett's physicians, stating that the OIG had substantiated a complaint that Pickett was engaging in activities inconsistent with his disability (listing the activities confirmed by the OIG Report) and requesting that he complete a form which indicated whether Pickett could perform the elements of the AUO position. TVA forwarded a copy of the OIG Report and the form completed by that physician to OWCP. The physician certified that Pickett was capable of performing the regular duties of an AUO "[if] he does indeed participate in all the physical

[1] Pickett's Complaint, ¶¶ 4-9.

activities cited." RX 14.

Pickett subsequently obtained an Associate degree in Chemical/ Environmental Engineering from a community college. This job training was paid for through FECA funds.

In 1994, OWCP advised Pickett that it intended to reduce his benefits. Pickett then applied to TVA for employment, but TVA did not offer him a job because it was downsizing. In June 1994, Pickett complained to Senator James Sasser about TVA's lack of response to his applications for employment. Sasser in turn forwarded a congressional inquiry to TVA. Pickett's benefits apparently were not reduced.

In January 1999, OWCP advised Pickett of its determination that he no longer suffered a disability and of its intention to terminate his benefits. RX 25. Pickett then requested that TVA notify him of a starting date for employment. OWCP terminated Pickett's benefits in February 1999 and denied his request for reconsideration of the denial in April. RXX 26, 27. Pickett appealed the benefit termination determination to ECAB.

In July 1999, Pickett filed a complaint of unlawful discrimination against TVA. He acted within 30 days of receiving a response to FOIA and Privacy Act requests which he alleges alerted him that TVA had blacklisted him between 1991 and 1999 in retaliation for protected environmental and public health complaints.

The ALJ granted TVA's motion for summary decision on August 9, 2000. He dismissed the complaint as to the individually-named respondents, discerned no evidence of adverse action (blacklisting) or causation in the documents obtained as the result of the FOIA and Privacy Act requests and ultimately found Pickett's complaint untimely. The ALJ "deemed established in Complainant's favor" the facts that Pickett was a protected worker and TVA a covered employer based on TVA's failure to dispute this portion of Pickett's motion for partial summary decision. Dec. at 6. Pickett argues that the complaint is timely because Respondents concealed their acts and he discovered the "extent of TVA's hostility to protected activity" only upon receipt of the "secret documents." Pickett Complaint filed 7/20/99 at ¶¶ 23, 24, and 32.

In November 2000, ECAB reversed OWCP's termination of benefits decision. It found, because of a conflict in medical opinion between Pickett's attending physician and the OWCP referral physician, that OWCP had failed to meet "its burden of proof to establish by the weight of the medical evidence that physical residuals of the February 11, 1988, employment injury ha[d] ceased." *In the Matter of David W. Pickett and Tennessee Valley Authority*, ECAB No. 99-2220, slip op. at 3 (ECAB Nov. 28, 2000).[2]

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[2] In 1999, Dr. Lynch found that Pickett "continu[ed] to have problems with his left shoulder," that he could not bring [Pickett's] elbow past 90 degrees" and that Pickett tended to dislocate anteriorly on dorsal percussion of the shoulder mass." In contrast, in 1998, Dr. Lester F. Littell, III, an orthopedic surgeon and OWCP referral physician, "found nothing physically wrong with [Pickett's] right shoulder."

Discussion

Collateral Estoppel

Pickett contends, in a notice of filing dated November 30, 2000, that summary reversal of the ALJ's decision is required because "collateral estoppel establishes that OWCP's cancellation of [Pickett's] benefits was illegal" under ECAB's November 28, 2000, decision in Case No. 99-2220. We disagree.

In order for collateral estoppel to apply, the following requirements must be met: 1) The same issue must have been actually litigated, that is, contested by the parties and submitted for adjudication by the court; 2) the issue to be precluded by collateral estoppel must have been "necessary to the outcome of the first case;" and 3) preclusion of litigation of the contested second matter must not constitute a basic unfairness to the party sought to be bound by the first determination. *Otero County Hosp. Ass'n,* ARB No. 99-038, slip op. at 7-9 (ARB July 31, 2002).[3] Those criteria are not met in this case.

As discussed above, the ECAB case addressed the issue of Pickett's entitlement to continued disability benefits and the ECAB determination turned simply on OWCP's failure to meet its burden of proof given inconsistent findings of an attending physician and a referral physician. In this case, we consider whether the timely filing requirements of the environmental whistleblower laws have been met, and whether equitable modification of those requirements is justified. We also consider various other issues raised by Pickett related to his environmental whistleblower complaints, including the conduct of the proceedings before the ALJ, and the conduct of TVA. The issues before us were not addressed by the ECAB decision. In addition, TVA was not a party to the ECAB action. *See Otero County Hosp. Ass'n,* ARB No. 99-038, slip op. at 7. Therefore, since the ECAB decision did not involve the same issues or the same parties, collateral estoppel does not apply.

Issuance of Summary Decision Order Prior to Conclusion of Discovery

Pickett also contends that it is improper to issue a summary decision prior to the time that full discovery has been completed. As discussed more fully below, Pickett never indicated that discovery was required in order for him to show that there were genuine issues of material fact in response to the motion for summary decision. He filed a timely response to the summary

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[3] Some courts have adopted a slightly different formulation. The Tenth Circuit, for example, has adopted the following requirements: 1) the issue previously decided is identical with the one presented in the action in question, 2) the prior action has been finally adjudicated on the merits, 3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation,* 975 F.2d 683, 687 (10th Cir. 1992). Those requirements also would not have been met in the instant case.

decision motion and did not thereafter seek to amend it, indicating that it was complete. Therefore, we determine that it was not error for the ALJ to issue the summary decision order and that we similarly may consider whether summary decision is appropriate.

Timeliness

The ARB has held generally that the thirty-day statutes of limitation in environmental whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 96-ERA-36, slip op. at 4 (ARB Mar. 31, 1999); *McGough v. U.S. Navy*, Nos. 86-ERA-18/19/20, slip op. at 9-10 (Sec'y June 30, 1988).

Under *National Railroad Passenger Corp. v. Morgan*, "[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act." 122 S.Ct. 2061, 2072 (2002) (Title VII). This principle would require Pickett to file a complaint within thirty days of each adverse action, beginning presumably with the arguably unsuitable job offers and ending with a date by which TVA reasonably should have responded to Pickett's March 1999 request for reemployment.[4] None of these actions comes within thirty days of Pickett's complaint which he filed on July 20, 1999.

Pickett argues, however, that TVA's alleged blacklisting did not become known to him until after he received materials responding to his FOIA and Privacy Act requests and that his filing is timely because it was made within thirty days of his receipt of the FOIA and Privacy Act materials. Blacklisting assumes that an employer covertly follows a practice of discrimination over a period of time. Black's Law Dictionary 163 (7th ed. 1999) ("to put the name of (a person) on a list of those who are to be boycotted or punished"). *Cf. Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975) ("[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against"). We therefore next consider whether the existence of the alleged blacklisting was apparent or should have become apparent to Pickett prior to the time he received the materials responding to his FOIA request.

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[4] Pickett requested that TVA notify him of a starting date for employment in March 1999 shortly after OWCP stated its intention to terminate his benefits. Although TVA drafted a response to Pickett (Complainant's Exhibit (CX 9A)) referring him to TVA's Employee Service Center, TVA apparently never sent a final draft resulting in the absence of a response. The record does not show that Pickett took any action to follow up on his request given TVA's failure to respond. As the ALJ noted, Pickett's request did not identify any particular job, and Pickett was then a former employee whose employment had ended more than five years earlier. Dec. at 15. Even assuming that TVA's failure to respond to his March 9, 1999 letter constituted a form of adverse action, Pickett should have filed a discrimination complaint about it within 30 days of a reasonable period for response (30-60 days). Instead, Pickett waited until July 20, 1999, to complain. We find this delay excessive.

Even if one assumed for the purposes of argument that TVA engaged in blacklisting, Pickett should reasonably have suspected any such alleged blacklisting before June 1999. Specifically he received notice as the result of a confluence of events, for example in 1988 and 1989 when TVA made him a series of allegedly unsuitable job offers, in 1992 when he became aware of TVA's OIG investigation, in 1993 when TVA terminated his employment, and in 1994 when TVA refused to reinstate him because of alleged downsizing. That Pickett suspected "stonewalling" by TVA is apparent from his 1994 communications with Senator Sasser. RX 17. As the ALJ noted, "[t]he record . . . confirm[s] that Pickett understood TVA challenged his claim for compensation, that the IG investigated his claim, that TVA terminated his employment in 1993, that it declined to re-hire him in 1994, and that he was aware of all these actions long before he filed his complaint." Dec. at 15-16. An adverse course of conduct undertaken by TVA against Picket thus was apparent by the mid-1990's, long before Pickett filed his complaint.

Pickett also alleges that he was subject "to a hostile working environment in retaliation for his raising of these [environmental health and safety] concerns" (Complaint item 5) and that the "blacklisting activities secretly created a hostile working environment arrayed against Mr. Pickett's being re-employed or receiving DOL compensation." (Complainant's Brief at 22). A complaint alleging hostile work environment is not time-barred if all the acts comprising the claim are part of the same practice and at least one act comes within the thirty-day filing period. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 15 (ARB Feb. 28, 2003), citing *National Railroad Passenger Corp. v. Morgan.* Therefore, if Pickett had a hostile work environment claim, the time for filing would run from the last alleged act. The last act alleged by Pickett was TVA's failure to respond to his March 9, 1999 letter concerning employment. As noted above, Pickett failed to file within thirty days from a reasonable period of time in which a response might have been expected. As a consequence, even if we were to accept that Pickett had a hostile work environment claim, he did not file within the limitations period.[5]

[5] Hostile work environment claims differ from specific claims in that the former require proof of "severe or pervasive conduct." The requirements of a hostile work environment claim are that: 1) the complainant engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 et al., slip op. at 13 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2/9, slip op. at 16-17, 21-22 (ARB Feb. 29, 2000). It is unlikely that Pickett substantiated the existence of the elements necessary for a hostile work environment claim. The particular activities specified occurred long after Pickett had been in the employment situation, and were infrequent. Moreover, it is dubious that the facts Pickett set forth evidence the alteration of conditions of employment, creation of abusive working environment, and detrimental effect requirements specified above for a hostile work environment.

Equitable Modification

This Board has held that the limitations periods under the environmental whistleblower statutes are subject to equitable modification, *i.e.*, estoppel or tolling, when fairness requires. *Hill v. TVA*, Nos. 87-ERA-23/24 (Sec'y Apr. 21, 1994), *aff'd sub nom. Hill v. United States Dep't of Labor*, 65 F.3d 1331 (6th Cir. 1995). Equitable estoppel or "fraudulent concealment" would become an issue if TVA engaged in "affirmative misconduct" to mislead Pickett regarding an operative fact forming the basis for a cause of action, the duration of the filing period or the necessity for filing. Equitable tolling would become an issue if Pickett, despite due diligence, was unable to secure information supporting the existence of a claim prior to mid-1999 when he filed his complaint. Under the doctrine of equitable estoppel, the respondent has engaged in some form of wrongdoing in addition to the underlying violation; under the doctrine of equitable tolling, both parties are blameless as to the necessity for modification. *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111/128, ALJ No. 97-ERA-53, slip op. at 41-43 (ARB Apr. 30, 2001), *aff'd*, No. 01-3724, 2003 WL 93,2433 (6th Cir. Mar. 6, 2003).

We therefore will next consider whether the limitations period should be modified (until thirty days following the June 1999 FOIA and Privacy Act disclosures) under either equitable doctrine. Pickett's "verified" complaint alleges that TVA covertly lobbied OWCP to terminate compensation benefits, refused to rehire Pickett, engaged in illegal *ex parte* communications with OWCP and physicians in an attempt to terminate benefits, wrongfully withheld information in violation of the FOIA and Privacy Act, misused the TVA OIG to harass Pickett and implied to OWCP that Pickett was guilty of fraud when the OIG reports in fact exonerated him and established that his receipt of benefits was proper. *See, e.g.*, Complaint at 4 (TVA "engag[ed] in unethical *ex parte* secret communications with DOL and physicians aimed at violating Mr. Pickett's rights, despite knowing that Mr. Pickett's compensation was being properly received") (citations omitted). While Pickett cites these actions as constituting wrongdoing in the complaint, he nowhere substantiates that the actions were wrong. In fact, the FECA regulations specifically contemplate that an employer will monitor an employee's medical care, and require the employer to provide to OWCP relevant documents it obtains. (*See* 20 C.F.R. § 10.123(b); 20 C.F.R. § 10.140 (1998), superseded by 20 C.F.R. § 10.118; 20 C.F.R. § 10.506 (2002)). These regulations were in effect throughout the applicable period.

Pickett avers that TVA "has concealed its violations of Mr. Pickett's rights, tolling the statute of limitations due to the fact that Mr. Pickett obtained inculpatory documents through FOIA and Privacy Act within the past 30 days (Complainant's Exhibits (CXX) 1, 2, 3, 5A, B, C, D, E, F, G, 6, 8, 9 A & B)" (Complaint item 32 at 7). He also cites as "smoking guns" showing "the presence or absence of a retaliatory motive," CXX 1, 2, 4, 5A, B, C, D, E, F, G, 6, 7 A & B, 12 & 13 (Complainant's brief at 27). At most, the documents evidence that TVA was at times aggressive in questioning Pickett's disability status and in investigating an anonymous complaint that he engaged in activities inconsistent with his disability (CX 1, 2, 5A, 5B, 5D), that TVA's OIG suggested continued monitoring of Pickett's case (CX 5C, 5E), and that TVA stated facts found in the 1993 TVA OIG Report incompletely when requesting a report from one of Pickett's

physicians (CX 5F).[6] None of the documents in the record shows that TVA concealed Pickett's cause of action or engaged in blacklisting. (Nor do the documents indicate any connection between the activities undertaken and Pickett's alleged protected activity.)

As discussed above, Pickett was aware of the facts that formed the basis of his discrimination complaint prior to his receipt of the FOIA materials in June 1999, *i.e.*, he was aware that he engaged in protected activity by filing internal complaints while working for TVA (1985-1988) and by filing the Sasser complaint[7] (1994), that TVA failed to offer Pickett what he considered suitable employment (1988-1989), that TVA's OIG had conducted at least one investigation (1993), that TVA had terminated his employment (1993) and that OWCP had stated its intent to reduce (1994) and finally to terminate (January 1999) compensation benefits. The regulations cited above provided public notice that TVA could monitor his medical condition and gave notice to Pickett that TVA was required to provide any relevant documentation in its possession to OWCP. TVA took no action to conceal any of these facts. Until disclosure of the FOIA and Privacy Act documents in June 1999, Pickett was unaware primarily of (i) TVA management memoranda questioning whether Pickett was entitled to continued disability benefits after Pickett had declined TVA's employment offers, (ii) the details of TVA's OIG investigations, (iii) the extent of TVA's correspondence with OWCP about terminating his benefits and (iv) TVA's request for a medical opinion from one of Pickett's physicians.[8]

We are not persuaded that any of TVA's actions compel modification of the limitations period. TVA did not mislead Pickett regarding the claim, filing period or necessity for filing, nor did it conceal information supporting the existence of a claim. Additionally, the information disclosed as a result of the FOIA and Privacy Act requests was not evidence supporting the existence of a claim which Pickett, despite due diligence, was previously unable to secure.[9] Moreover, as discussed below, Pickett has provided no evidence that the materials TVA withheld from him under his FOIA and Privacy Act requests either are available or were improperly withheld, let alone that they were withheld in retaliation for his protected activity.

We therefore conclude that Pickett failed to timely file his complaint and that equitable

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[6] TVA's Workers' Compensation and Rehabilitation Department supervisor Debra Youngblood described the 1993 TVA OIG Report findings similarly in her June 1, 1993, letter to OWCP; however she enclosed the OIG report, presumably mitigating the effect of any incomplete representation.

[7] The record does not evidence that Pickett's communications with Sasser related to violations of the environmental laws; however, like the ALJ, we will assume for these purposes that the communications with Sasser constituted protected activity.

[8] The correspondence with Pickett's physician and the physician's response does not show service on Pickett. Service is required under 20 C.F.R. § 10.506.

[9] We note that none of the disclosures evidence blacklisting.

modification of the limitations period is not appropriate in this case.

Issues Relating to Discovery

As noted above, Pickett contends that the ALJ erred by granting TVA's motion for summary decision against him without providing for full discovery. 29 C.F.R. § 18.40 provides in pertinent part as follows:

> (d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

Rule 56, Fed. R. Civ. P., upon which 29 C.F.R. § 18.40 is modeled, permits a court discretion to delay discovery pending a ruling on a motion for summary judgment in the event that the party against whom judgment is sought fails to alert the court that discovery would aid in overcoming the summary judgment motion. *Jones v. Merchants Nat'l Bank & Trust Co. of Indianapolis,* 42 F.3d 1054, 1060 (7th Cir. 1994), *citing King v. Cooke*, 26 F.3d 720, 726 (7th Cir. 1994) ("when a party does not avail himself of relief under Rule 56(f) it is generally not an abuse of discretion for the district court to rule on the motion for summary judgment"). Rule 56(f) provides that "[s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Here, Pickett was clearly advised by the ALJ of the need for a proposed discovery schedule (see ALJ's April 5, 2000 Order), that he had to file motions for discovery (see ALJ's order of April 18, 2000), and again, and more specifically, that the record did not contain his earlier discovery requests and new filings would be required of all documents filed prior to September 10, 1999 (see ALJ's order of April 25, 2000). Respondents filed their motion for summary judgment on May 23, 2000. Pickett filed his response to that motion, along with his own cross-motion for partial summary judgment, on June 5, 2000. Pickett did not indicate, either prior to responding or in his summary judgment response, that discovery was required in order for him to establish that there were genuine issues of material fact.

On June 20, Pickett filed discovery requests. In that filing, Pickett (despite the ALJ's orders specifically advising the parties that prior discovery motions and requests were not of record in the newly-numbered case and requiring the parties to submit a proposed schedule for discovery) complained that TVA had not responded to interrogatories and requests for admission he had served on August 27, 1999, and had not scheduled the depositions of Drumm and Prosser. (Pickett did not ever file a proposed discovery schedule as the ALJ required.). Pickett did make a reference to the summary decision motion, to wit, "[D]epriving Mr. Pickett of any discovery

responses interferes with the docket of this Court and violates Mr. Pickett's discovery rights, depriving him of the ability to use discovery information in his partial summary judgment motion, or in response to TVA's motion." Complainant's 6/16/00 Motion to Compel Proper Answers to Complainant's First Interrogatories and First Requests for Production of Documents and Associated Second Interrogatories at 2. However, Pickett did not indicate at any point that discovery was required in order for him to establish that genuine issues of fact existed, let alone identify such undisclosed facts. Moreover, Pickett never attempted to amend his motion for partial summary decision or his response to TVA's motion, suggesting that the motion and response were complete. Further, he did not demonstrate that TVA improperly denied him access to information by means of discovery,[10] or that TVA violated any discovery order to produce information. Under the circumstances, we decline to find that the ALJ abused his discretion in deciding the motion for summary decision prior to completion of discovery.

We also find that the applicable regulation, 29 C.F.R. § 18.29, afforded the ALJ considerable latitude in ordering the proceedings and, given the posture of the proceedings, his order postponing discovery in Case No. 1999-CAA-0025 when that case was remanded, and his subsequent request that the parties refile any motions which they wished addressed in Case No. 2000-CAA-0009 and file a proposed schedule for discovery was reasonable. The ALJ made his intent and the necessity for his orders quite clear in his procedural orders. The ALJ's actions as to the process for discovery therefore also failed to constitute an abuse of discretion.

Withholding and Spoliation of Evidence

An additional question concerns the ALJ's treatment of the "withholding and spoliation of evidence" issues. Dec. at 17-20. Pickett argues that TVA withheld OIG surveillance tapes, interview reports, and trip reports that he had requested under the FOIA and Privacy Act and engaged in the spoliation of evidence, particularly AUO logs and Stack Monitor reports. According to Pickett these actions should have established that the evidence was unfavorable to TVA.

We agree with the ALJ that the FOIA and Privacy Act issues fell beyond the authority of ALJs in environmental whistleblower cases and that Pickett failed to show that TVA had engaged in improper conduct in this connection. TVA acknowledged that it destroyed AUO logs and Stack Monitoring Reports compiled in 1988. It advised that it maintained those records for six years, and then, in accordance with its records retention schedules, destroyed them. The destruction thus occurred four years before Pickett filed suit. Pickett did not show that TVA lacks a routine document destruction policy or that the documents were not destroyed and were

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[10] The ALJ notes that he issued his April 5, 2000 Order postponing the expedited hearing schedule specifically to afford Pickett time to conduct discovery. By letter dated April 21, 2000, Pickett objected, arguing that postponement was unfair and insisting on a trial date. Dec. at 16. The ALJ's April 25, 2000 Order stated: "Since Complainant's counsel objects to the finding that his efforts to conduct discovery constituted a compelling reason to postpone the scheduling of the hearing, I yield to his assessment." Neither party filed a proposed discovery schedule as required by the ALJ's April 5, 2000 Order.

being withheld in connection with this litigation. We therefore agree with the ALJ's conclusion that Pickett was not entitled to adverse inferences or sanctions under 29 C.F.R. Part 18 as a consequence of his failure to obtain information he sought under the FOIA and Privacy Acts.

Other Issues

Because of our determination that Pickett's complaint was not timely filed, it is not necessary for us to address the question of whether the regulations cited by TVA created a privilege which insulated it from liability[11] or whether Pickett was entitled to partial summary judgment.

It also is not necessary for us to address the question of whether the individual defendants were improperly dismissed. Relying predominantly on *Stephenson v. Nat'l Aeronautics & Space Admin.*, No. 94-TSC-5, slip op. at 3-5 (Sec'y July 3, 1995), the ALJ dismissed individual respondents George T. Prosser, an employee of TVA's OIG, and Donald K. Drumm, a TVA plant manager, because they failed to constitute "employers" within the meaning of the environmental whistleblower statutes. While in his brief before us Pickett refers to Prosser and Drumm and to "multiple" respondents generally, he fails to address the issue of individual liability specifically. Since Pickett has failed to brief the issue, we see no need to consider it in addition to the issues discussed above. *White v. The Osage Tribal Council*, ARB No. 00-078, ALJ No. 95-SDW-1, slip op. at 3 (ARB Apr. 8, 2003).

Conclusion

For the foregoing reasons, we adopt the ALJ's recommended order of summary decision.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[11] We also note that the ALJ found, and we agree, that Pickett failed to produce any link between his alleged protected activity and the adverse actions. TVA did not, however, move for summary judgment on the basis of inability to establish an essential element of proof.