



In the Matter of:

DONNA FRED,

Complainant,

v.

ARB CASE NO. 96-178

ALJ CASE NO. 96-ERA-8

DATE: November 20, 1997

THE WACKENHUT CORPORATION

and

OMAHA PUBLIC POWER DISTRICT,

Respondents.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises pursuant to the whistleblower provisions of the Energy Reorganization Act (ERA), 42 U.S.C. §5851 (1988) and 29 C.F.R. Part 24 (1997). The decision of the Administrative Law Judge (ALJ) issued July 19, 1996, recommending dismissal of the complaint is accepted for the reasons stated below.

BACKGROUND

The Complainant, Fred, appearing *pro se*, had been employed by Respondent, Wackenhut, as a security guard at the Fort Calhoun Nuclear Power Station in Nebraska. Wackenhut was the security subcontractor to Omaha Public Power District (OPPD), the plant operator. Wackenhut fired Fred on June 8, 1989, after she had been found unfit for duty. Fred filed charges against Wackenhut and OPPD alleging discrimination, sexual harassment and retaliation. In July 1994, a trial on these allegations was held in U.S. District Court, which found against Fred. The U.S. Court of Appeals for the Eighth Circuit upheld the District Court judgment, and the U.S. Supreme Court denied *certiorari*. See *Fred v. Wackenhut Corp.*, 860 F.Supp. 1401 (D. Neb. 1994); *aff'd*, 53 F.3d 335 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 190 (1995).

Three years after Fred had been fired, on July 3, 1992, Fred wrote to the Office of the Solicitor, U.S. Department of Labor, Washington, D.C., outlining a litany of allegations of mistreatment, but nothing specifically related to any complaint which she may have made to the Omaha Wage and Hour District Office concerning a violation of the ERA. Nevertheless, Fred alleges that she filed a complaint with Wage and Hour in 1989. An investigation at the Wage and Hour District Office was initiated in response to the letter, but no documentation substantiating Fred's allegations was found, nor did any of the pertinent Department of Labor staff persons, who handled all of the office's whistleblower complaints for the State of Nebraska during the time in question, recall any communication with Fred. Subsequent personal contact with Fred by a Wage and Hour investigator did not reveal any additional support for her allegations.

Fred was advised that the law required that a written complaint alleging a violation of the ERA whistleblower provisions had to be filed within 30 days of the last complained of discriminatory act.¹ In light of that filing requirement and because Fred has not credibly explained why she waited three years after she allegedly notified the Secretary of Labor of her ERA complaint to follow up on that complaint, we cannot accept Fred's complaint for review.

In 1995, three years after her initial communication with the Omaha District Office, Fred again contacted that office inquiring as to the status of her whistleblower complaint. We note that Fred submitted a photocopy of a letter dated June 15, 1989, addressed to the Secretary of Labor, indexed 1A, as part of the documentation she sent to the Office of Administrative Law Judges (OALJ) on August 23, 1996. There is no evidence to substantiate that this letter was ever sent.

Fred apparently contacted the Omaha District Office at some still later date, and a letter dated February 13, 1996, was sent to her by Gary D. Volek, District Director. Although the stated purpose of the letter was "to provide clarification of our [the District Office's] earlier efforts on your behalf under the employee protection provisions of the Energy Reorganization Act (ERA) and of the appropriate action you should take if you wish to pursue this matter[.]" the letter in fact materially misstates what rights Fred had, and the appropriate action she could take. The letter mistakenly states that in the event Fred "overlooked the provisions regarding appealing our findings," she could appeal the finding of the previous 1992 letter by requesting a hearing with the OALJ within five days of receipt of the February 13, 1996, letter.

That information was erroneous and had no basis in either law or regulation. The time period to appeal a Wage and Hour determination to the OALJ begins running on the receipt of the original finding of nondiscrimination. Fred has no appeal rights from a letter responding to a status request regarding allegations made in 1993, which were not timely with regard to the alleged discriminatory act in 1989.

¹ The statute, at 42 U.S.C. §5851 *et seq.*, was amended in 1992 to provide a 180-day filing period, but that amendment does not apply to this case.

The Secretary has held that the ERA's limitation period begins running on the date that the employee is informed of the challenged employment decision. *Rainey v. Wayne State Univ.*, Case No. 89-ERA-8, Sec. Final Dec. and Ord., May 9, 1991, slip op. at 2; *Ray v. TVA*, Case No. 88-ERA-14, Sec. Final Dec. and Ord., Jan. 25, 1991, slip op. at 7. In this case that date was June 8, 1989, when Fred was formally served with notice that she had been terminated. *McGough v. United States Navy*, Case No. 86-ERA-18, Sec. Rem. Dec. and Ord., June 30, 1988, slip op. at 10 (the ERA limitations period begins to run when the facts which would support the complaint were apparent to a person reasonably prudent with regard to her/his rights).

The record supports the ALJ's finding that a complaint with regard to a violation of the ERA was not timely filed by Fred in 1989, and that Complainant's arguments in support of an equitable tolling of the statute of limitations are not supported by record evidence and are without merit. The case **IS DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member