U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 May 2008

Case No.: 2007-WPC-00002

In the Matter of

JONATHAN JAY,

Complainant,

v.

ALCON LABORATORIES, INC.,

Respondent.

APPEARANCES:

Jonathan Jay, *pro se*

Jerry Bradford, Esq.
For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER DISMISSING CLAIM

This proceeding arises under the employee protection provisions of the Water Pollution Control Act, 33 U.S.C. § 1267 (WPCA or the Act) and the implementing regulations at 29 C.F.R. Part 24. The Act's provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part. Specifically, the Act prevents employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of the statute.

On February 8, 2006, complainant, Jonathan Jay, filed a complaint against Alcon Laboratories, Inc. (Respondent or Alcon) alleging violations of the Act. The Regional Administrator of the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) dismissed the claim on the grounds the evidence indicated that the complainant was not

terminated due to any alleged activities protected by the Act. The complaint also was dismissed because it was untimely filed. (ALJX 2).[1]

By letter dated February 8, 2007, the complainant opposed the finding of OSHA and appealed the determination. I conducted a formal hearing on August 3, 2007, at Dallas, Texas at which time the parties were afforded the opportunity to present both documentary and testimonial evidence. The record remained open until November 5, 2007, to permit the filing of simultaneous briefs. The findings of fact and conclusions of law as set forth in this decision are based on a thorough review of the evidentiary record and consideration of the arguments of complainant and counsel.

ISSUES

1. Whether Jonathan Jay's complaint is subject to the jurisdiction of WPCA or the Sarbanes-Oxley Act of 2002;

2. Whether Mr. Jay's complaint against respondent was timely filed; and,

3. If the claim is considered timely filed, whether respondent took adverse employment action against complainant due to his protected activity.

FINDINGS OF FACT

Alcon is a company engaged in the research, development, and manufacture of medical devices and instruments in the ophthalmic field. (ALJX 7). Complainant was hired as an Associate Scientist for Alcon's Analytical Chemistry Department on April 23, 2001. Among other things, Mr. Jay was required to provide assay methodology acceptable to regulatory agencies and provide analytical support for evaluations of experimental raw materials and new product development. *Id.* Alcon provided training to Mr. Jay in order to prepare him for his position.

It is the position of Alcon that the quality of Mr. Jay's work deteriorated as his tasks became more complicated. He was placed on a Performance Improvement Plan (PIP) in March of 2005. The purpose of the PIP was to give Mr. Jay an opportunity to correct performance issues associated with his basic job functions. Regular meetings were held throughout the PIP between Mr. Jay and his supervisor, Dr. Brian Clark. These meetings were held to evaluate complainant's progress in achieving the objectives of the PIP. *Id.*

On July 7, 2005, Mr. Jay met with Dr. Clark and Vickie Stamp, Alcon's human resources representative, to discuss, among other things, a memo previously distributed by a member of Mr. Jay's team. According to Mr. Jay, the memo detailed instructions for all team members to "pour heavy metal waste down the drain, which would have been a violation of EPA and Alcon environmental policy." (ALJX 1). Prior to the meeting, Mr. Jay had confronted the author of the memo and voiced his concerns that the procedure violated company policies. However, Mr. Jay

[1] References in this decision to ALJX, CX and RX pertain to exhibits of the administrative law judge, complainant and respondent, respectively. The transcript of the hearing is cited as Tr. and by page number.

did not file an official complaint.[2] In the July 7, 2005 meeting, complainant was criticized by both Dr. Clark and Ms. Stamp for not following the instructions contained in the memo. Ms. Stamp also noted that complainant was both defensive and argumentative with his co-workers. (ALJX 7).

Mr. Jay believed that after the July 7, 2005 meeting he was treated differently by the company. (Tr. 24). He noted that Dr. Clark ignored some of his work and assigned him to tasks where his only requirement was to validate methods development work. (Tr. 25). He also received his two lowest grades from Dr. Clark and his feedback was usually about two weeks late. (Tr. 27). Complainant thought he was receiving unfair treatment from Dr. Clark because of the heavy metal waste incident. (Tr. 28). His PIP was scheduled to end in July of 2005, but was extended until September 9, 2005.

Complainant contends that he received no feedback after the PIP ended and he assumed that he had fully met the PIP criteria. At the request of Dr. Clark, complainant turned in his annual performance appraisal on December 1, 2005. (ALJX 3). In the appraisal, complainant assumed he had fully met the PIP criteria because he had received no documented feedback. He also discussed the waste incident in the appraisal. Complainant was informed of his termination and the basis of his termination on December 13, 2005. (Tr. 11). According to Mr. Jay, he was informed by Ms. Stamp that his termination was due to "skill set mismatch." (Tr. 11). On January 9, 2006, Mr. Jay contacted Ms. Stamp regarding his termination and was informed that the termination was due to failing the PIP. (Tr. 12). Complainant waited until February 8, 2006, to file his complaint.

CONCLUSIONS OF LAW

The first issue to be decided is under which jurisdiction this complaint arises. In his pre-hearing submission, complainant for the first time asserted that this claim arises under the whistleblower protections of both the WPCA and the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX).[3] SOX prohibits discriminatory actions by publicly traded companies against their employees who provided information to their employer, a federal agency, or Congress that the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud) or any rule or regulation of the Securities and Exchange Commission (SEC) or any provision of federal law relating to fraud against shareholders. In an effort to apply the facts of this particular claim to the SOX whistleblower provisions, complainant asserts that respondent's illegal disposing of hazardous waste could lower investor confidence and thus negatively affect investor returns.[4]

[2] Alcon has three communicated avenues for lodging of employee complaints: (1) Directly with the supervisor, department head, human resources or management; (2) Compliance Hotline; or (3) Environmental Management System. Mr. Jay did not use any of these avenues to lodge a complaint.

[3] The implementing SOX regulations are set forth at 29 C.F.R. Part 1980 (2006).

[4] Mr. Jay maintains that this is the basis for his SOX complaint. However, I note that SOX provides ninety days for the filing of a timely complaint. 29 C.F.R. § 1980.103(d) (2006). WPCA provides for the filing of a timely complaint only within thirty days of an alleged environmental violation. 33 U.S.C. § 1367(b).

I have interpreted complainant's assertions in his pre-hearing submission as an attempt to amend his original complaint to add SOX jurisdiction. The regulations provide that an administrative law judge may allow appropriate amendments to complaints when the amendment is reasonably within the scope of the original complaint, a determination of a controversy on the merits will be facilitated thereby, and there is no prejudice to the public interest and the rights of the parties. 29 C.F.R. § 18.5(e). Because this amendment was filed at a very late stage in the claim and the SOX claims do not reasonably relate to the scope of the original complaint, I find that amendment was not properly raised. Moreover, I conclude that the complainant only raised the SOX argument because his complaint would be considered timely under that statute. I decline to allow this amendment to the complaint and will focus only on the WPCA as the basis of the complaint.[5]

The next threshold issue that must be decided is whether this complaint was timely filed. The Act provides, in relevant part, that "[a]ny employee . . . who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, *within thirty days after such alleged violation occurs,* apply to the Secretary of Labor for a review of such firing or alleged discrimination." 33 U.S.C. § 1367(b) (emphasis added).

Complainant was notified of his termination on December 13, 2005, but did not file his initial complaint until February 8, 2006, almost two months after he was notified of his termination. Therefore, his complaint was not timely filed under the Act. However, complainant argues that equitable estoppel or equitable tolling should be applied to his complaint in order to render it timely filed.

Courts have held that the time limitation provisions under the Act are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather it is analogous to statutes of limitation and thus may be tolled by equitable consideration. *Donovan v. Hanker, Forman & Harness, Inc.,* 736 F.2d 1421 (10th Cir. 1984); *School District of Allentown v. Marshall,* 657 F.2d 16 (3rd Cir. 1981); *Coke v. General Adjustment Bureau, Inc.,* 654 F.2d 584 (5th Cir. 1981). The *Allentown* court warns, however, that the restrictions of equitable consideration must be scrupulously observed; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may otherwise be a meritorious case. *Rose v. Dole,* 945 F.2d 1331, 1336 (6th Cir. 1991). The burden is on the party seeking the benefit of equitable tolling to establish such tolling is warranted. *Bost v. Federal Express Corp.,* 372 F.3d 1233, 1242 (11th Cir. 2004).

There are two tolling doctrines that will, for equity purposes, stop the statute of limitations from running. These tolling doctrines have been applied in situations: (1) where the complainant has been actively misled by the respondent regarding the cause of action; (2) has

[5] Assuming *arguendo* that even if I were to construe complainant's actions as a timely amendment, he has not implicated the substantive law to fall under SOX protections. In a very similar case, *Portes v. Wyeth Pharmaceuticals, Inc.,* No. 06-CV-2689 (S.D.N.Y. Aug. 20, 2007), the complainant was a chemist who filed a SOX claim alleging that the defendant had violated safety regulations and faced fines and other penalties that might significantly affect share prices. The court found that the complainant did not explicitly refer to fraud, shareholders, securities, or SOX disclosures and his statements were not sufficiently related to shareholder fraud to constitute protected activity. *Id.* Similarly, Mr. Jay's allegation that respondent's waste management system could negatively affect investor returns is not specific enough to warrant SOX protections.

been prevented in some extraordinary way from asserting his or her rights; or (3) has previously raised the exact claim which by mistake was raised in an incorrect forum. *McGough v. United States Navy*, 2 OAA 3, 213, 86 ERA-18-20 (Decision and Order of Remand by the Secretary of Labor (June 30, 1988); *Gass v. Lockheed Martin Energy Systems*, 2000-CAA-22 (ALJ Apr. 29, 2003)

The first tolling doctrine, *equitable estoppel*, focuses on whether the employer misled the complainant, thereby causing a delay in filing the complaint. At least one federal circuit has articulated the burden of proof assumed by the party invoking the equitable estoppel doctrine as follows: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." *Hill v. U.S. Dep't of Labor*, 65 F.3d at 1335, *quoting Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975).

The cases that have applied equitable estoppel have been cases in which the employer was found to have misled the employee into believing he or she has no cause of action. For example, in *McConnell v. General Telephone Co.*, 814 F.2d 1311 (9th Cir. 1987), *cert. denied sub nom., General Telephone Co. v. Addy*, 484 U.S. 1059, 108 S. Ct. 1013 (1988), the employer misled the employee into believing he had been temporarily laid off rather than terminated. Similarly, in *Charles A. Kent*, 84-WPC-2, 1 O.A.A. 2, at 442 (Remand Decision and Order of Secretary of Labor, April 6, 1987), and *Reeb v. Economic Opportunity Atlanta Inc.*, 516 F.2d 924 (5th Cir. 1975), the employees were misled by the employers into believing they had not been terminated. In all of these cases, since the employees were misled into believing that no adverse action had been taken against them, they could not have been aware that a cause of action existed.

Equitable estoppel occurs only when a respondent conceals its actions, as opposed to its motives. In *Scott v. Alyeska*, complainant asserted that his complaint was timely under this doctrine. The administrative law judge found, however, that there was no evidence that respondent actively misled complainant respecting the cause of action. In regard to whether respondent actively misled complainant, the judge wrote:

> [Complainant] contends that Alyeska's notice of termination did not disclose the discriminatory reason for the termination, stating instead that the termination was for cause. But since employers rarely if ever tell employees they are being subjected to adverse action for reasons which are in violation of the law, holding that there is equitable tolling because an employer informs the employee of a different reason for an adverse action would virtually eliminate the periods of limitation in the various environmental statutes at issue in this case. Congress could not have intended such a result.

Scott v. Alyeska Pipeline Service Co., 92-TSC-2 (ALJ Jan. 29, 1993).

Nothing in the evidence submitted by both parties leads me to conclude that equitable estoppel should be applied in this case. Respondent did not wrongfully conceal any of its actions. Complainant was informed in very clear terms that his position would be terminated on December 13, 2005, and Alcon did nothing to mislead Mr. Jay regarding his termination. As the court in *Scott v. Alyeska* notes, it cannot be reasonably expected of an employer to communicate a possible discriminatory motive for termination directly to the aggrieved employee. The fact that Alcon may have possibly concealed its motive for terminating Mr. Jay has no bearing on the fact that complainant understood that he was unequivocally terminated on December 13, 2005. Equitable estoppel focuses on the actions, rather than the motives, of the employer. Therefore, I find that equitable estoppel cannot be applied in this case.

The second doctrine, *equitable tolling*, focuses on whether a complainant was excusably ignorant of his or her rights due to an extraordinary circumstance or, alternatively, when a complainant files a timely complaint raising issues sufficient to state a cause of action under environmental whistleblowing laws, but files the complaint in the wrong forum.[6] *Prybys v. Seminole Tribe of Florida*, 95 CAA 15 (ARB Nov. 27, 1996); *Biddel v. Department of the Army*, 93 WPC 9 (ALJ July 20, 1993). The equitable tolling doctrines, however, do not permit disregard of the limitation periods simply because they bar what may be an otherwise meritorious cause. *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).

The doctrine of *equitable tolling* allows a complainant to avoid the bar of the statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the issue of his claim. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). It does not assume wrongful effort by the respondent to prevent the complainant from suing; the complainant, however, is assumed to know that he has been injured, but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (1990).

Courts have considered five separate factors in determining whether equitable tolling is appropriate in a given case: (1) whether the plaintiff lacked actual notice of the filing requirements; (2) whether the plaintiff lacked constructive notice, i.e., his attorney should have known; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights. Ignorance of the law alone is not sufficient to warrant equitable tolling. *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991) (*per curiam*). The complainant must make a particularly strong showing that some extraordinary fact prevented him from timely filing. Extraordinary circumstances have included mental illness, attorney abandonment, and death of the complainant. *Ricketts v. Northeast Utilities Corp.*, 1998-ERA-30 (ALJ Oct. 29, 1998); *Hall v. EG&G Defense Materials, Inc.*, 1997-SDW-9 (ARB Sept. 30, 1998).

In *Rose v. Dole*, the complainant waited 54 days after discharge to consult an attorney, purportedly because he was waiting to hear about his unemployment application and because he went on vacation with his son. 945 F.2d at 1336. The court held that the delay was not

[6] Complainant does not allege that he filed his complaint in the wrong forum; therefore, this issue will not be addressed.

excusable. No evidence was presented that the complainant was prevented from investigating his rights within the statutory period; by his own admission he suspected that his firing was for whistleblowing activity, and he was not later made aware of any new facts which he was not previously aware of with regard to his firing. Absent some evidence that complainant was somehow deterred from seeking legal advice by his employer, equitable tolling was not warranted. *Id.*

In *Roberts v. Tennessee Valley Authority* the complainant was discharged in March of 1993. 94-ERA-15 (Sec'y Aug. 18, 1995). In October of 1993, he discovered what he viewed as proof that his position had not been eliminated. Complainant asserted that he did not know he had a claim of wrongful discharge until he found the proof in October 1993. At the hearing, the complainant testified that he noted evidence of discrimination before he was discharged and was not able to successfully apply for a job within the respondent's organization, although the positions were well below his capabilities. The Secretary of Labor found that if these rejections were discriminatory, they should have triggered the complainant to file his complaint within the filing period. *Id.*

Complainant argues that his claim was timely filed from the date that he became aware of respondent's possible retaliatory motive for his termination. In his brief, Mr. Jay states that at the time of his termination on December 13, 2005, he was told his position was ending due to a "skill set mismatch" and there was no mention of the PIP. However, in a subsequent conversation with Ms. Stamp on January 9, 2006, Mr. Jay stated that he was told the termination was due to a failed PIP. According to Mr. Jay, this drastic change in reason for his termination gave him a clear indication that something was "not right" and he began to suspect that the heavy metal incident may have played a roll in his termination. (Tr. 29).

I do not find complainant's arguments to be persuasive. First of all, the two reasons provided to Mr. Jay for his termination are actually quite synonymous and I do not think that the changes in wording are unreasonable. The PIP was essentially implemented to test Mr. Jay's skill and evaluate his ability to perform at his current position. Therefore, failure of the PIP would logically equate to a skill-set mismatch in the complainant's position.

Furthermore, nothing in the evidence indicates that complainant was extraordinarily prevented from asserting his rights under the Act. Like the complainants in *Rose* and *Roberts,* Mr. Jay noted evidence of possible discrimination well within the statutory time frame. He admits that he felt like he was being treated differently by his superiors since the heavy metal incident. He testified about specific instances of what he felt constituted unfair treatment and he admitted that he had a suspicion that the treatment was related to the heavy metal incident and the July meeting. Therefore, complainant knew, or he should have known, of a possible discriminatory motive for his termination well within the statutory limitations. The discrimination actions should have triggered the complainant to file his claim in a timely matter.

Based on the evidence as summarized above, I find that none of the three situations that may warrant a tolling of the statute of limitations is applicable in this case. As a result, Mr. Jay's complaint is dismissed because it was untimely filed under WPCA. The issue of whether

respondent took adverse employment action against the complainant due to his protected activity is moot and will not be considered.

ORDER

For the above-stated reasons, IT IS HEREBY ORDERED that the complaint filed by Jonathan Jay is dismissed.

A

DONALD W. MOSSER
Administrative Law Judge

NOTICE OF REVIEW: This Decision and Order will become the final order of the Secretary of Labor unless, pursuant to 29 C.F.R. § 24.8, a written petition for review is filed with the Administrative Review Board, United States Department of Labor, Room S-5220, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

At the same time that you file your petition with the Board, you must serve a copy of the petition on: (1) all parties; (2) the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001; (3) the Assistant Secretary, Occupational Safety and Health Administration; and. (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).