U.S. Department of Labor

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Date: June 8, 1999

Case No.: 1999-CAA-0002

In the Matter of :

SHARYN A. ERICKSON,
Complainant,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Appearances:

Edward A. Slavin, Jr., Esq.
For the Complainant

Karol L. Smith, Esq.
For the Respondent

RECOMMENDED DECISION AND ORDER
GRANTING MOTION FOR SUMMARY DECISION

This case arises under the whistleblower provisions of the Clean Air Act, 42 U.S.C. § 7622, Safe Drinking Water Act, 42 U.S.C. § 300j-9, Solid Waste Disposal Act, 42 U.S.C. § 6971, Water Pollution Control Act, 33 U.S.C. § 1367, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610, and the Toxic Substances Control Act, 15 U.S.C. § 2622. A hearing is currently scheduled for June 15-16, 1999 in Atlanta, Georgia.

The Respondent has filed a Motion to Dismiss, which I will treat as a Motion for Summary Decision, 29 C.F.R. § 18.40, and has also filed EX-A through EX-S. The Complainant has filed a response and attached CX-1. For the following reasons, I will recommend that the Motion for Summary Decision be granted. 29 C.F.R. § 24.7.

STANDARD FOR MOTION FOR SUMMARY DECISION

"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." 29 C.F.R.

§ 18.40(d). "When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading." Id. at (c). Even viewed in the light most favorable to the Complainant, there is no genuine issue of material fact that the complaint is untimely.

TIMELINESS

Ms. Erickson filed her original complaint on April 8, 1998, alleging protected whistleblowing activities in 1993 and 1995. Under all six acts from which she derives her claim, this filing falls well outside the 30 day statute of limitations. The Complainant has offered several reasons why her claim should not otherwise be time-barred, but I find that the Respondent has met its burden in showing that no genuine issues of material fact exist regarding timeliness.

Discovery rule

First, Ms. Erickson argues that under the discovery rule, the statute of limitations cannot begin until she "discovered" that she had been discriminated against. However, this argument does not aid her as her first accusations of unfair treatment appear in 1993, almost five years before she filed her complaint. She made further accusations of unfair treatment in 1995, yet never filed a complaint. The evidence shows that she "discovered" the alleged mistreatment early on. Therefore, this argument will not toll the statute.

Continuing violation theory

Next, she argues that all of the alleged discriminatory conduct constitutes a pattern of continuing violations. Under this theory, "a timely charge with respect to any incident of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if they would be untimely if standing alone." Varnadore v. Secretary of Labor, 141 F.3d 625, 630 (6th Cir. 1998) (quoting Connecticut Light & Power Co. v. Secretary of Labor, 85 F.3d 89, 96 (2d Cir. 1996). To establish a continuing violation, there must be "(i) an underlying discriminatory policy or practice, and (ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint." Id.

The Complainant has presented nothing more than her "mere allegation" that there was a discriminatory policy. 29 C.F.R. § 18.40. Ms. Erickson stated in her April 8, 1998 complaint that her first protected activity occurred on June 13, 1993, when she sent an e-mail message to her union president, in which she threatened to expose the EPA's alleged environmental violations. EX-C. However, a plain reading of the message does not support this contention. In the e-mail, she simply takes issue with her supervisor, Mr. Keith Mills, after he questioned her objectivity regarding a contractor. Id.; see also EX-A, B. An internal complaint to management concerning safety and quality standards under the Clean Air Act may constitute a protected activity. Passaic Valley Sewerage Comm'rs v. Department of Labor, 992 F.2d 474 (3d Cir. 1993). However, this message does not support such a finding. Mr. Mills asked Ms. Erickson to provide him with some information regarding this contractor, which she resented. EX-B; EX-C at 3. This e-mail portrays a rankled employee upset at what she sees as an unfair characterization of her relationship to a contractor. EX-C. There is no "whistleblowing" here, let alone evidence of a discriminatory policy.

Shortly after that incident, on August 25, 1993, Mr. Mills transferred one of Ms. Erickson's assignments to another contract officer after he suspected inappropriate actions regarding another contractor. EX-K at 2. In response, she filed two grievances with her union and an unfair labor practice charge with the National Labor Relations Authority. See EX-G, H and J (EPA's responses to grievances and unfair labor practice charge). In addition, the Complainant requested a desk audit on December 2, 1993 to determine if her position should be classified upwards to a GS-13 instead of a GS-12. EX-I. In February 1994, this was denied in a detailed analysis of her job. Id. It appears that these procedures did not produce Ms. Erickson's desired outcome.

Again, in Mr. Mills' lengthy replies to the grievances and EPA's lengthy reply to the unfair labor practice charge, there is no evidence supporting a charge of discrimination or harassment. The EPA's responses illustrate a measured response to what they perceived as performance problems on the part of an employee.[1] The Complainant has not disputed these facts, other than to charge discrimination and harassment. It is noteworthy that on November 2, 1994, Ms. Erickson's own union warned her not to make unfounded accusations against the EPA. EX-F.

The second allegation of protected activity occurs in 1995. At that time, Ms. Erickson's contracting warrant was suspended and she was transferred out of her contracting section and sent to the Information Management Branch. EX-L. This occurred because Ms. Erickson called the Texas Department of Natural Resources Commission and Region 6 of the EPA (Ms. Erickson works in Region 4) and told them that a certain Superfund contract they were letting contained impossible contract specifications. (Letter from Erickson to Gingrich of , and attachment.) Believing Ms. Erickson had overstepped her authority and was trying to influence the bidding process, Region 6 complained to Region 4, which suspended her warrant and transferred her out of contracting. EX-L. She did not file a complaint at this time. It is at this time, Ms. Erickson says, that the EPA Inspector General began investigating her. See letter. In response she wrote a letter on March 23, 1995 to her Congressman, Newt Gingrich, alleging unfair treatment.

In the letter she alleged that the EPA IG was harassing her and not allowing to defend herself. It is possible that Ms. Erickson's actions in 1995 might have been a protected activity. See Passaic, supra. However, Ms. Erickson never filed a complaint at that time. Further, the EPA has demonstrated with substantial evidence that this suspension and investigation of her in 1995 is not linked to some continuing violation. A "mere allegation" of fact is not enough to sustain even a non-moving party's burden under a motion for summary decision. 29 C.F.R. § 18.40(c).

Regarding a present act of discrimination, Ms. Erickson alleges that she was denied a promotion in March 1998 (which would fall within the thirty day statute of limitations for her April 8, 1998 complaint). The Employer rebutted this charge by showing that a "Senior Contracting

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[1] EX-G, H and J contain twenty-five pages of the EPA's detailed explanations of Ms. Erickson's performance problems. These contemporaneous records are more persuasive than Ms. Erickson's allegations years later.

Specialist" was hired at the GS-13 level as the result of a competitive process. EX-S.[2] Whether or not this event occurred, let alone for its alleged discriminatory reason, is irrelevant. Ms. Erickson has presented no fact linking it to the events of 1993 and 1995.

Even if all of the facts in Ms. Erickson's sworn declaration are true, see Decl. of Complainant, there are no genuine factual issues concerning timeliness. The alleged discriminatory acts do not show continuing violations, but separate, "discrete occurrences." Huckabay v. Moore, 142 F.3d 233, 239 (5th Cir. 1998); English v. Whitfield, 858 F.2d 957, 962 (4th Cir. 1988). There is no indication that any harassment occurred in 1994, or from March 1995 to April 1998. There are essentially two discrete periods of alleged discrimination. When there is a gap of three years, there can be no "continuing" violation. Had Ms. Erickson filed her complaint in March 1995, it would have been timely. However, she waited three years to do so, and her complaint is now time-barred. Accord Dartey v. Zack Co., 82-ERA-2, n.1 (Sec'y Apr. 25, 1983).

Equitable tolling

Lastly, the complainant argues for equitable tolling. Specifically, the statute should be toled because she filed a grievance and an unfair labor practice charge in the wrong forum, which the EPA knew was the wrong forum, and she was never told that she could file a whistleblower complaint. School Dist. of Allentown v. Marshall, 657 F.2d 16, 20-21 (3d Cir. 1981). First of all, there is no indication of any concealment or misleading behavior by the EPA, which would mandate equitable tolling. Hill v. Department of Labor, 65 F.3d 1331, 1335 (6th Cir. 1995). Second, no party involved in 1993 considered Ms. Erickson to be in the wrong forum. She was not raising "the precise statutory claim" that she is raising here. Allentown, 657 F.2d at 20. Her concerns were that her employer was treating her unfairly in her work assignments and working conditions, which would naturally be handled in a grievance procedure. It is reasonable that neither party would consider that a whistleblower case. Quite simply, Ms. Erickson's real argument is that she did not know about whistleblower laws, an argument which is unavailing. "It is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling." Rose v. Dole, 945 F.2d 1331, 1335 (6th Cir. 1991). The EPA has not created any "inequitable circumstances" necessitating equitable tolling. Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998). Again, there is no genuine issue of material fact that Ms. Erickson is entitled to an equitable tolling of the statute of limitations.

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[2] In Ms. Erickson's second complaint on September 1, 1998, she alleged that the discrimination continued in August 1998, in the form of a written warning from the Chief of the Information Management Branch, Mr. Ronald Barrow. However, this warning concerned Ms. Erickson inappropriately contacting General Services Administration personnel without first consulting EPA personnel. EX-Q. It also concerned an unofficial disabilities task force which Ms. Erickson represented, on government time, to the GSA as official. For all the reasons stated above, and on the facts themselves, these allegations of continuing discrimination in August 1998 are meritless.

Because the complaint is not timely, I need not decide whether the alleged actions are protected activities under the various whistleblower acts. Furthermore, the various other pending motions are now moot. Accordingly, the hearing scheduled for June 15-16, 1999 is canceled.

RECOMMENDED ORDER

It is hereby RECOMMENDED that the Respondent's Motion for Summary Decision be GRANTED and the claim DISMISSED.

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DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/gmb

NOTICE OF REVIEW:

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).