U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 13 October 2006

CASE NO: 2006-SOX-115

IN THE MATTER OF

BRIAN GOODE,
Complainant

v.

MARRIOTT INTERNATIONAL INC.,
Respondent

DECISION AND ORDER DISMISSING THE COMPLAINT AND CANCELLING HEARING

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A Act and implementing regulations found at 29 C.F.R. Part 1980 (2004). Brian Goode (Complainant) mailed a complaint on April 12, 2006, alleging Marriott International, Inc. (Respondent) violated the Act when it altered Complainant's employment.

Background

1. On April 12, 2006,[1] Complainant mailed a complaint to the U.S. Department of Labor alleging he was demoted on January 20, 2006, by his Employer, Respondent, in violation of the Act.

2. By determination letter dated June 16, 2006, Complainant was advised by OSHA that his complaint of discrimination had no merit. Specifically, OSHA found that Complainant's alleged protected activity was not a contributing factor to Respondent's change in his position. OSHA also found because the change in position had occurred more than 90 days before Complainant filed his complaint, Complainant's complaint was untimely.

[1] The Complaint is dated April 10, 2006, but by Claimant's admissions was not mailed until April 12, 2006.

3. By letter dated July 16, 2006, Complainant, through counsel, appealed OSHA's decision and the matter was assigned to the Office of Administrative Law Judges.

4. A formal hearing is scheduled for November 2, 2006; however, Respondent has filed a Motion for Summary Decision on the grounds of timeliness, and Complainant has responded. It is that motion that is the subject of this decision.

Contentions of the Parties

It is Respondent's position that Complainant knew of the change in job assignment in December 2005 and acknowledged awareness in e-mails dated December 30, 2005, and January 6, 2006 (see Exhibits B and C of Respondent's motion). Therefore, because time for filing begins when the alleged discriminatory decision has been made and communicated, Respondent urges that Complainant's complaint is untimely.

Complainant, on the other hand, while agreeing to the date of his mailing maintains that time for filing did not start running until his job transfer actually took place on January 20, 2006, and/or because Complainant had a leg injury on February 13, 2006, which later required surgery, the time for filing his complaint was equitably tolled.

Discussion and Findings

The purpose of summary decision is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Green v. Ingalls Shipbuilding, Inc.,* 29 BRBS 81 (1995); *Harris v. Todd Shipyards Corp,* 28 BRBS 254 (1994). An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, materials 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 judgment as a matter of law. 29 C.F.R. § 18.40(d). "When a motion for summary decision is made and supported as provided in this section [by affidavit], a party opposing the motion may not rest upon mere allegations or denials of such pleadings. Such response must set forth specific facts showing that there is a genuine issue of material fact for hearing." 29 C.F.R. § 18.40(c). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.,* 33 BRBS 204, 207 (1999).

Filing

29 C.F.R. § 1980.103 provides that a complaint for discrimination must be filed within 90 days of "when the discriminatory decision has been both made and communicated to the Complainant." In other words, the Complainant's date of

awareness is the commencement date for the filing of a complaint. *See* in this regard *Marc Halpern v. XL Capital, LTD*, ARB Case No. 04-120 (Aug. 31, 2005).

In his response to Respondent's motion, Complainant acknowledges that discussions about the elimination of his position "begin in the fall of 2005," and the e-mails attached to Respondent's motion dated December 31, 2005, and January 6, 2006, confirm Complainant's knowledge. In fact, the e-mail dated January 6, 2006, could not be more to the point when Complainant wrote: "I was informed by Steve Cunningham that my position at the Woodlands Waterway Marriott has been eliminated."

Based on this unrefutted evidence, I find that Complainant became aware of the decision to alter his employment more than 90 days from the time that he mailed his complaint and that unless tolled Complainant's complaint was untimely.

Equitable Tolling

Confronted with the issue of tolling, in *Halpern, supra.,* the Board recognized three instances when such relief might be granted: 1) when the Respondent mislead the Complainant concerning the filing of his complaint; 2) the Complainant was in some way extraordinarily prevented from filing his claim or 3) Complainant raised the issued in the wrong forum.

In this instance, Complainant seeks tolling relief because of an extraordinary circumstance. Specifically, Complainant maintains in his response that on February 13, 2006, he fell and seriously injured his leg and foot requiring stitches and cast and ultimately reconstructive surgery on March 3, 2006, after which he took prescribed medication for pain and sleeping and for two weeks slept approximately 20 hours a day. After that time, Complainant avers that he underwent physical therapy three days a week for 1 ½ hours each session.

Complainant bears the burden of justifying the application of equitable tolling. Obviously, had Complainant suffered a mental illness and been incompetent or unable to conduct his affairs he could arguably avail himself of this relief. However, this Complainant has only stated more than 30 days after he was aware of the change in his position at work (commencement of a date for filing of his claim) he received an injury to his foot and leg which several weeks later required stabilizing surgery. After surgery, Complainant says he was on pain and sleeping medication which caused him to sleep heavily for two weeks before undergoing physical therapy three times a week. In support of his contentions, however, Complainant has offered no medical evidence as to his mental abilities nor has he alleged he could not communicate during this period. To the contrary, contained in Respondent's response are 18 e-mails from the Complainant throughout March and into April of 2006 demonstrating he was fully able to communicate during this time (see Respondent's reply brief exhibit A).

Based on the facts presented, I conclude that Complainant's excuse for not filing a timely complaint does not constitute an extraordinary circumstance warranting tolling of the limitations.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion for Summary Decision is **GRANTED**, the Complainant's complaint is **DISMISSED** and the hearing scheduled in this matter for November 2, 2006, is **CANCELLED.**

So ORDERED this 13th day of October, 2006, in Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

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).