U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 April 2005

CASE NO.: 2005-ERA-00014

In the Matter of

DONALD RANDY HOWELL,
Complainant,

v.

PPL SERVICES, INC.,
Respondent

Appearances: Nuria Sjolund, Esq.
For Complainant

Paul J. Zaffuts, Esq.
Lewis M. Csedrik, Esq.
Morgan, Lewis & Bockius, LLP
For Respondent

Before: Janice K. Bullard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
DISMISSING APPEAL AND REQUEST FOR HEARING

This proceeding arises under the employee protection provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851. The implementing regulations that govern this matter appear at 29 C.F.R. Part 24.1-9. The pertinent ERA provisions protect employees from discrimination and retaliation 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 statutes relating thereto. This decision and order is also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

Procedural History[1]

On February 25, 2005, Donald Randy Howell ("Complainant") filed a complaint of discrimination with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor, under Section 211 of the ERA. Complainant alleged that he was terminated from employment with PPL Services, Inc. ("Respondent") in reprisal for his safety complaints to management. Complaint at 1-2.

OSHA investigated the complaint, and on March 9, 2005, issued Findings that determined that Complainant's complaint was untimely filed. Consequently, OSHA dismissed the complaint. *See,* Secretary's Findings issued by OSHA. In its Findings, OSHA advised the Complainant that he must file an appeal with the Chief Administrative Law Judge ("CALJ") for the Department of Labor's Office of Administrative Law Judges ("OALJ"), and send copies to Respondent and the Regional Administrator within five calendar days of the receipt of the notification by facsimile, overnight/next day delivery mail, or by telegram.

In a letter filed with OALJ on March 15, 2005, Complainant advised the CALJ that he was filing an objection to OSHA's Findings and was requesting a hearing on his appeal. Complainant asserted that the timeframe within which he was required to file his complaint with OSHA should be equitably tolled. The case was assigned to me, and on March 23, 2005, I issued a Notice of Hearing and also an Order directing Complainant to show cause why his complaint and request for hearing should not be dismissed for untimeliness. I allowed Respondent to file a written statement of its position on the issue.

The parties then secured counsel, and on March 30, 2005, filed a joint motion for continuance of the hearing scheduled for April 14, 2005. By Order issued April 1, 2005, I granted the parties' joint motion and extended the time for compliance with my Order to Show Cause of March 23, 2005.

On April 4, 2005, Complainant filed his response, essentially reiterating his position that his complaint should be deemed timely under the doctrine of equitable tolling. On April 8, 2005, Respondent filed its response, asserting that OALJ has no jurisdiction over Complainant's objection because he failed to serve Respondent with notice of his objection. Respondent also argued that the complaint with OSHA was untimely and that equitable tolling was inappropriate in the instant circumstances.

ISSUES

1. Whether Complainant's failure to comply with the regulatory mandate to serve notice of his appeal and request for a hearing upon Respondent deprives OALJ of jurisdiction over Complainant's appeal.

[1] I have confined my factual review to evidence material to the question of whether Complainant's appeal may stand regardless of his failure to serve Respondent and the timeliness of his appeal, and have not addressed the facts pertinent to the merits of Complainant's allegations of retaliation.

2. Whether Complainant's untimely filing of his complaint with OSHA warrants its dismissal.

FINDINGS AND CONCLUSION

After considering all of the documentary evidence of record, and the arguments and briefs of the parties, I have concluded that the evidence is sufficient to make a determination without hearing on the limited issues of the timeliness of the Complainant's complaint with OSHA, and whether Complainant's failure to serve Respondent deprives OALJ of jurisdiction.

The controlling regulations set forth at 29 C.F.R. §§ 24.4(d)(2) and (d)(3), provide as follows:

> (2). The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of the timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.
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> (3). A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service...

29 C.F.R. §§ 24.4(d)(2)(3).

In its Findings issued on March 9, 2005, OSHA advised Complainant that he must file an appeal with the Chief Administrative Law Judge and send a copy to Respondent and the Regional Administrator within five calendar days of the receipt of the notification by facsimile, overnight/next day delivery mail, or by telegram. In his objection filed with OALJ on March 18, 2005[2], Complainant indicated that he had sent a copy of his objection to the Regional Administrator by noting at the end of his correspondence: "cc: Richard D. Soltan, Regional Administrator, USDOL, OSHA." There is no indication that Complainant sent a copy of his objection to Respondent, and Respondent has no record of receiving a copy of the objection and request for a hearing. Respondent's Opposition to Complainant's Response to Order to Show Cause, at page 9. Respondent's first notice of the filing was its receipt of my Notice of Hearing issued March 23, 2004. Id. at 4.

[2] I deem Complainant's objection to have been timely filed with OALJ.

The regulations explicitly provide that the Notice of Determination shall become the final order of the Secretary unless Complainant's appeal is filed in a timely fashion and served on the opposing party by "facsimile (fax), telegram, hand delivery, or next-day delivery service...". 29 C.F.R. §§ 24.4(d)(2)(3). The designated methods of serving notice upon Respondent clearly demonstrate that timely notice to Respondent is significant to the Secretary, and compliance must be achieved to provide Respondent the opportunity to respond to the appeal.

I find that the time and manner requirements for serving notice on Respondent are substantive and mandatory. In the absence of compliance by Complainant with the rule, the Findings by OSHA issued on March 9, 2005 constitute the final order of the Secretary, and I have no jurisdiction over Complainant's appeal. In reaching this conclusion, I am persuaded by the Decisions and Orders entered in two cases with similar facts. In Webb v. Numanco, L.L.C., 1998-ERA-00027 (ALJ July 17, 1998), Judge Daniel Roketenetz observed that the pertinent regulation, 29 C.F.R. Section 24.4, was amended to impose more stringent service requirements. Id at 5. Judge Roketenetz bound that "[t]he compulsory language of the regulation in the context of the underlying intent of the language leaves little room for interpretation." Id. (quoting 63 Fed. Reg. 6613, at 6617 (Feb. 9,1998)). In Cruver v. Burns Int'l, 2001-ERA-31 (ALJ Dec. 5, 2001), Judge Stuart Levin adopted Judge Roketenetz' reasoning and granted Respondent's motion to dismiss the complaint, noting that the lack of service defeated jurisdiction in the matter. Id. at 2. Judge Levin also observed the amendment to the regulations that made service on the opposing party on the same day as the filing of the objection mandatory. Judge Levin found that "notifications to the chief judge and the opposing party is a jurisdictional prerequisite to perfecting an appeal". Id. at 4.

I find the facts of the instant matter compel a similar conclusion to that reached in Cruver and Webb, supra. Complainant, who had some advice from counsel after his termination by Respondent, failed to meet the procedural requirements of serving Respondent. This procedural requirement is jurisdictional in nature, and without compliance therewith, I am deprived of authority to hear the merits of his complaint.

Notwithstanding the above, I note that OSHA's Findings are based on procedural grounds, namely the untimely filing of Complainant's complaint. Adopting Complainant's factual assertions, I find that Complainant was terminated by Respondent on October 23, 2002. The record reveals that he filed his complaint of discrimination under the Act with OSHA on February 28, 2005. Pursuant to the Act, "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination…". 42 U.S.C. § 5851(b)(1).

I am unpersuaded that the quality of Complainant's counsel's advice is sufficient grounds for equitable tolling of the Act's mandatory 180 day period for filing a complaint. Complainant was represented by counsel during this period, who, on his behalf, pursued state administrative and federal civil remedies against Respondent. I further reject Complainant's arguments regarding delayed discovery of his injury as grounds for equitable tolling, as the injury under adjudication relates to his alleged protected activity and reprisal therefore, and not to the tardy

discovery of procedural bars to jurisdiction. I further find it reasonable to conclude that with limited exercise of diligence, Complainant could have familiarized himself with the jurisdictional requirements of complaints of reprisal under the Act. Complainant was employed for a significant period of time at Respondent's Nuclear Power Plant. *See*, Roberts v. Tennessee Valley Authority, 94-ERA-00015 (Sec'y Aug. 18 1995).

In consideration of the aforestated, I find that because Complainant's complaint was untimely filed with OSHA, I lack jurisdiction to adjudicate the merits of his complaint.

Pursuant to 29 C.F.R. § 24.6(e)(4) Dismissal for cause:

(i) The administrative law judge may, at the request of any party, or on his or her own motion, issue a recommended decision and order dismissing a claim…
(ii) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order...

On March 23, 2005, I issued an Order to Show Cause why the instant matter should not be dismissed because of Complainant's failure to timely file his complaint with OSHA. Both parties filed written argument in support of their positions. In consideration of the filings of the parties, and the plain meaning of the pertinent regulations and statutes, I find that Complainant has not shown good cause why his appeal should not be dismissed. Complainant failed to establish that grounds exist to equitably toll the statute of limitations for filing a complaint under the Act with OSHA. In addition, Complainant failed to perfect a timely appeal to OALJ in this matter because he failed to serve his request for appeal and hearing upon Respondent in a timely or acceptable manner. Accordingly, I am without jurisdiction to hear Complainant's appeal and OSHA's determination should be the final order of the Secretary.

RECOMMENDED ORDER

It is hereby recommended that the appeal and request for hearing filed by Donald Randy Howell be dismissed and the determination rendered by OSHA be recognized as the final order of the Secretary.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. section 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. sections 24.7(d) and 24.8.