U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

GREGORY HANNA,

COMPLAINANT,

v.

GLOBAL NUCLEAR FUEL-AMERICAS, LLC,

RESPONDENT.

ARB CASE NO. 2023-0015

ALJ CASE NO. 2020-ERA-00002
CHIEF ALJ STEPHEN R. HENLEY

DATE: March 19, 2024

Appearances:

For the Complainant:
John T. Harrington, Esq., R. Scott Oswald, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia

For the Respondent:
Charles C. Thebaud, Jr., Esq.; *Charles C. Thebaud, Jr., LLC*; Washington, District of Columbia

Before WARREN and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

WARREN, Administrative Appeals Judge:

This case arises from a complaint filed by Gregory Hanna (Complainant) against his employer, Global Nuclear Fuel-Americas, LLC (Respondent), alleging retaliation in violation of the whistleblower protections of the Energy Reorganization Act (ERA) and its implementing regulations.[1] After issuing a show cause order asking the parties to brief why the case should not be dismissed for failure to comply with the time limits for filing an ERA-retaliation claim and conducting an evidentiary hearing on the matter, the Administrative Law Judge

[1] 42 U.S.C. § 5851; 29 C.F.R. Part 24 (2023).

(ALJ) dismissed the case. For the following reasons, the Board affirms the ALJ's Decision and Order Dismissing the Complaint as Untimely Filed (D. & O.).

BACKGROUND

Respondent hired Complainant as a shop support operator at its Wilmington, North Carolina plant on August 6, 2012.[2]

On May 31, 2017, Complainant met with his manager, John Berger (Berger), and Respondent's Human Resources Manager, Ana Garriga (Garriga), and received a termination letter dated June 1, 2017.[3] Berger advised Complainant that he committed a Category 1 offense for allegedly leaving his worksite without permission and his employment was terminated effective immediately.[4]

Garriga advised Complainant that he could pursue an internal appeal if he disagreed with the termination and provided him with a hard copy of Respondent's Employee Appeals Procedure, HEP-51.[5] She discussed Respondent's internal appeals process with him, which consisted of three levels: first, an appeal with Complainant's direct supervisor; second, an appeal with Complainant's second-level manager; and third, an appeal to the Plant Manager or a Peer Panel.[6] Garriga informed Complainant that if he pursued an internal appeal regarding his termination, he would not be paid, but he would continue to receive some benefits during the appeal process.[7]

From June 1, 2017, through July 20, 2017, Complainant received weekly deposits from Respondent reflecting his salary earned through June 1, 2017, and accrued and unused vacation, personal time, and unused floating holidays.[8]

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2 D. & O. at 3.

3 *Id.* The termination letter advised Complainant that his "employment with the General Electronic Company is terminated effective immediately, due to this failure to comply with Company policies." *Id.* at 4.

4 *Id.* at 4. The termination letter explained that Complainant committed a Category I work rule violation by "leaving the work-site or being off plant premises without permission while registered as working." *Id.*; JX 16.

5 Respondent's Response Brief (Resp. Br.) at 3; Complainant's Brief (Comp. Br.) at 8; JX 21 is a hard copy of Respondent's Employee Appeals Procedure, HEP-51.

6 D. & O. at 4; Resp. Br. at 3-4; Comp. Br. at 9.

7 D. & O. at 4; Resp. Br. at 3-4.

8 D. & O. at 5. On January 1, 2018, Complainant was placed on a leave of absence to continue receiving health benefits during the pendency of his claim. *Id.* at 7.

Respondent usually made these payments in a lump sum but made weekly payments to Complainant per his request.[9]

On June 1, 2017, and July 17, 2017, Complainant requested photographs from Respondent to use during the internal appeals process.[10] Garriga provided the photographs to Complainant within days of his requests on June 5, 2017, and July 18, 2017, respectively.[11]

On June 7, 2017, Complainant telephoned and spoke with someone at the North Carolina Department of Labor's Equal Employment Opportunity Commission (NC EEOC).[12] During the telephone conversation, Complainant communicated his belief that Respondent discriminated against him due to his disability and wrongfully terminated him.[13] But Complainant did not claim his termination was in retaliation for raising workplace safety concerns, nor did he discuss ERA whistleblower protections, and no evidence suggests that, following the call, NC EEOC opened an investigation or made a referral to another federal or state agency.[14]

On June 9, 2017, Complainant filed his first appeal through Respondent's internal appeals process with his immediate supervisor, who declined to overturn the termination.[15] On July 10, 2017, Complainant filed his second appeal through the internal appeals process with his second-level manager, who denied it on July 17, 2017.[16]

On July 19, 2017, Complainant filed a written concern with Respondent's Ombuds Program[17] voicing technical safety concerns and asserting that the

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9 *Id.* at 5.

10 *Id.*

11 *Id.*

12 *Id.* Complainant contends that he has a communication disability and requires assistance in understanding and participating in written and oral communication. *Id.* at 5 n.8.

13 *Id.* at 5. Complainant also discussed his workplace safety concerns. *Id.*

14 *Id.*

15 Resp. Br. at 4.

16 D. & O. at 5; Resp. Br. at 4.

17 Unlike Respondent's internal appeals process that allowed for employees to appeal their termination through management, the Ombuds Program used an independent investigator hired to conduct his or her own investigation and provide management with

termination of his employment was in retaliation for raising safety issues.[18] Respondent then hired an outside law firm to investigate Complainant's Ombuds complaint.[19]

Complainant contends that he contacted the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) in November of 2017 and left a voicemail detailing the circumstances of the termination of his employment.[20]

On December 8, 2017, Complainant filed a complaint with OSHA alleging that Respondent fired him on or about June 1, 2017, in retaliation for reporting safety concerns and refusing to perform unsafe tasks.[21]

PROCEDURAL BACKGROUND

On October 24, 2019, OSHA issued a final determination letter dismissing the December 8, 2017 complaint.[22] It found that Complainant filed it after the 180-day deadline for filing had expired and did not present any credible evidence to justify equitable tolling.[23] Complainant filed objections and a request for hearing on November 12, 2019.[24]

On December 2, 2019, the ALJ issued an Order to Show Cause regarding why Complainant's claim should not be dismissed for not filing a timely complaint set by

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recommendations regarding various concerns raised by employees. Tr. at 86, 96, 100, 146, 152; Resp. Br. at 5; Comp. Br. at 12.

18 D. & O. at 5; Resp. Br. at 4-5. Section 4.5 of the Employee Appeals Procedure, HEP-51, specifically provides that "employees should decide which review process to use . . . it is not appropriate to use the GE Ombuds process and the appeals process concurrently." Resp. Br. at 4-5; JX 21.

19 D. & O. at 6; Resp. Br. at 5. Tim Matthews (a partner at the outside law firm Respondent hired) debriefed Complainant on the results of the investigation on December 22, 2017. D. & O. at 6 n.10.

20 D. & O. at 6. The ALJ found that this telephone call did not occur as "there [wa]s no written record of th[e] call, despite a diligent search by OSHA personnel[.]" *Id.* An OSHA "Memorandum to File" dated October 8, 2019, details the efforts OSHA made to substantiate the telephone call, but no records documented a call by Complainant or on his behalf to OSHA. Respondent Global Nuclear Fuel-Americas, LLC's Reply Brief to Chief Administrative Law Judge Henley's Order to Show Cause (Feb. 7, 2020), Exhibit 24.

21 *Id.* at 1-2.

22 *Id.* at 2.

23 *Id.*

24 *Id.*

29 C.F.R. §24.103(d)(2).[25] Complainant filed a response to the show cause order on January 6, 2020, and Respondent filed a response brief on February 7, 2020.[26]

On February 8, 2020, the ALJ issued a Notice of Limited Pretrial Hearing notifying the parties that a hearing was appropriate to determine whether Complainant's complaint should be dismissed as untimely filed.[27] The ALJ held an evidentiary hearing on the issue on October 29, 2020, and the parties later filed timely post-hearing briefs.[28]

On December 12, 2022, the ALJ issued a Decision and Order Dismissing the Complaint as Untimely Filed. The ALJ found: (1) the 180-day statutory filing period began to run on June 1, 2017, and Complainant had until November 28, 2017 to file his ERA-retaliation complaint with OSHA; (2) Complainant filed his ERA-retaliation complaint with OSHA on December 8, 2017; and (3) Complainant did not establish a basis to equitably toll the filing deadline.[29]

This appeal followed.

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[25] *Id.* As a threshold matter, we note that a mandatory claim processing regulation, not a statutory jurisdictional requirement, establishes the regulatory time limits in 29 C.F.R. § 24.103(d)(2) and that the time limits in the statute at 42 U.S.C. § 5851(b)(2) likewise are not jurisdictional. *See Fort Bend Cnty., Tex. v. Davis,* 587 US --, 139 S. Ct. 1843, 1849 (2019); *Moreb v. Kerry Inc.*, ARB No. 2023-0048, ALJ No. 2023-FDA-00014, slip op. at 4-5 (ARB Dec. 14, 2023). As such, the parties must properly raise timeliness as an affirmative defense for those limits to come into play or they normally will be waived or forfeited. *Fort Bend Cnty, Tex.*, 587 U.S. --, 139 S. Ct. 1843 at 1849; *Moreb,* ARB No. 2023-0048, slip op. at 5. While the ALJ thus erred by raising Complainant's alleged noncompliance sua sponte without first requiring Respondent to raise it as an affirmative defense (*see Moreb,* ARB No. 2023-0048, slip op. at 5), the error does not require remand. Respondent unquestionably has sufficiently raised and developed a timeliness defense at every stage of the administrative process including raising several arguments in its initial filing at the ALJ level in response to the show cause order. Under these circumstances, the defense can categorically be said to have not been forfeited or waived below. *Hamer v. Neighborhood Hous. Servs. of Chi.,* 583 U.S. 17, 20 fn. 1 (2017) ("Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (citations omitted); *Woodson v. Allstate Ins. Co.,* 855 F.3d 628, 635 (4th Cir. 2017) (statute of limitations defense not waived or forfeited where timely raised and developed). Remand therefore would serve no purpose.

[26] D. & O. at 2.

[27] *Id.*

[28] *Id.* at 3. The ALJ bifurcated the hearing, with the October 29, 2020 proceedings limited to receiving evidence, including witness testimony, on whether Complainant's complaint should be dismissed as untimely filed. *Id.* at 2.

[29] *Id.* at 10, 14.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA.[30] The Secretary of Labor has delegated to the Board the authority to review ALJ decisions.[31] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. "[S]ubstantial evidence is a 'term of art' used throughout administrative law" denoting "more than a mere scintilla" but only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[32]

DISCUSSION

1. Substantial Evidence Supports the ALJ's Decision That Complainant's Complaint Was Untimely

A complainant pursuing a whistleblower claim under the ERA must meet certain deadlines.[33] Any employee who believes he has been discharged or otherwise discriminated against in violation of the ERA "may, within 180 days after such violation occurs," file a complaint with the Secretary of Labor.[34] The implementing regulation further specifies that such an employee may file "within 180 days after an alleged violation of the [ERA] occurs (i.e., when the retaliatory decision has been both made and communicated to the complainant)."[35]

The Board has found that the statutes of limitation in whistleblower cases begin to run on the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.[36] The claim accrues on "[t]he date that

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30 42 U.S.C. § 5851; *Clem v. Comput. Scis. Corp.,* ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 13 (ARB Mar. 10, 2021) (citing 42 U.S.C. § 5851).

31 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

32 *Biestek v. Berryhill*, 587 US --, 139 S. Ct. 1148, 1154 (2019) (citations omitted).

33 42 U.S.C. § 5851(b)(1); 29 C.F.R. § 24.103(d)(2).

34 42 U.S.C. § 5851(b)(1).

35 29 C.F.R. § 24.103(d)(2).

36 *Mehrotra v. Gen. Elec. Co.,* ARB No. 2022-0060, ALJ No. 2017-SOX-00014, slip op. at 5 (ARB Sept. 21, 2023) (quoting *Bauche v. Masimo Corp.,* ARB No. 2022-0035, ALJ No. 2022-SOX-00010, slip op. at 7 (ARB Sept. 27, 2022)); *see also Larrick v. Bechtel Nat'l, Inc.,* ARB No. 2017-0053, ALJ No. 2017-ERA-00004, slip op. at 3 (ARB Feb. 20, 2020) (citing to

an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt."[37]

The ALJ in this case found that the June 1, 2017 termination letter, received by Complainant on May 31, 2017, was final, unequivocal, and unambiguous notice of termination, clearly stating: "[y]our employment with the General Electric Company is terminated effective immediately."[38] As the ALJ found, the letter put Complainant on notice of his termination.[39] As the ALJ further noted, during their May 31, 2017 meeting, Berger explicitly told Complainant that his employment was terminated, effective immediately.[40] Thus, Complainant received final and unequivocal notice of his June 1, 2017 termination on May 31, 2017.[41]

Since Complainant filed his complaint on December 8, 2017,[42] substantial evidence supports the ALJ's conclusion that the complaint was untimely.

Swenk v. Exelon Generation Co., ARB No. 2004-0028, ALJ No. 2003-ERA-00030, slip op. at 4 (ARB Apr. 28, 2005)).

[37] *Mehrotra,* ARB No. 2022-0060, slip op. at 5 (citing *Delaware State College v. Ricks (Ricks),* 449 U.S. 250, 258 (1980) (holding that the statute of limitations starts on the date the employee receives notice of imminent discharge because "the proper focus is on the time of the *discriminatory act*, not the point at which the consequences of the act become painful")) (other citations omitted).

[38] D. & O. at 9-10.

[39] *See Larrick,* ARB 2017-0053, slip op. at 3 ("'Final' and 'definitive' notice denotes communication that is decisive or conclusive, i.e. leaving no further chance for action, discussion, or change.").

[40] D. & O. at 4.

[41] Although the ALJ stated that Complainant's employment was terminated on June 1, 2017 (at D. & O. at 10), his findings and analysis (at D. & O. at 9) support May 31, 2017 as the date Complainant received notice of termination. Regardless, any error on this issue would be harmless as using either date would still make Complainant's December 8, 2017 filing date untimely.

[42] Complainant argued that he timely filed his whistleblower claim under the ERA because he left a voicemail with OSHA on or about November 24, 2017. Tr. at 69-70. The ALJ determined that the factual evidence did not establish that Complainant filed a complaint with OSHA in November 2017, and substantial evidence, consisting of testimony to the effect that there was no record of any call by Complainant to OSHA in November 2017 after a diligent search for one, supports his factual finding.

2. Hanna Did Not Coherently Argue to the ALJ That Respondent Lulled Him into Inaction to Justify Equitable Estoppel—Regardless, the ALJ's Reasonable Factual Findings Foreclose the Argument

Under statutes where the filing period is not jurisdictional, the requirement is subject to "waiver," "equitable estoppel," and "equitable tolling."[43] Tolling and estoppel are two distinct doctrines:[44] "Equitable tolling focuses on the [employee-complainant's] excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the [employer or other] defendant's conduct and the extent to which the [complainant] has been induced to refrain from exercising his rights."[45] Complainant's appeal concerns only the latter.

Equitable estoppel applies when an employee "does not make a timely filing due to his reasonable reliance on his employer's misleading or confusing representations or conduct."[46] While deliberate attempts to mislead "generally" will justify its application, "it is [ultimately] immaterial whether the employer engaged in intentional misconduct;" the "issue is whether the employer's conduct, innocent or not, reasonably induced the employee not to file suit within the limitations period."[47] Fundamentally, "[i]t is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice."[48]

Complainant limits this appeal to a single issue: while accepting the ALJ sufficiently determined Respondent did not actively mislead Complainant, he contends the ALJ erred by not determining whether Respondent's "actions, intentional or not, lulled [him] into missing the filing deadline."[49] We find that

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[43] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982); *accord Wilkins v. United States*, 598 U.S.152, 161 (2023) (citation omitted); *see also Boechler, P.C. v. Comm'r of Internal Revenue,* 596 U.S. 199, 209 n.1 (2022) (equitable tolling is not limited to Article III courts) (citations omitted).

[44] *Mehrotra,* ARB No. 2022-0060, slip op. at 8 (citing *Martin v. Paragon Foods,* ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 8 (ARB June 8, 2023)).

[45] *Id.*

[46] *Mehrotra,* ARB No. 2022-0060, slip op. at 8 (citing *Droog v. Ingersoll-Rand Hussman,* ARB No. 2011-0075, ALJ No. 2011-CER-00001, slip op. at 3 n.6 (ARB Sept. 13, 2012)).

[47] *Jenkins v. CSX Transp., Inc.,* ARB No. 2013-0029, ALJ No. 2012-FRS-00073, slip op. at 7 (ARB May 15, 2014); *see also Hyman v. KD Res.,* ARB No. 2009-0076, ALJ No. 2009-SOX-00020, slip op. at 7 (ARB Mar. 31, 2010) (citation omitted).

[48] *Jenkins,* ARB No. 2013-0029, slip op. at 7.

[49] Comp. Br. at 21. We affirm the ALJ's finding that Respondent did not actively or intentionally lull Complainant into forgoing his rights as it is supported by substantial

remaining argument foreclosed for two independently dispositive reasons: 1) Complainant did not sufficiently raise it to the ALJ; and 2) even if he had, the ALJ's permissible findings of fact preclude its application.

First, Complainant (at most) only obliquely referenced being unintentionally lulled into inaction below; he never set forth an actual argument presenting it. While Complainant contends that he expressly raised and developed the issue, the only items he cites on appeal as evidence are isolated hearing transcript pages without any context or explanation.[50] Significantly, Complainant does not identify any portion of his extensive post-hearing brief addressing the matter. Indeed, as Respondent points out, Complainant's new inducement argument directly conflicts with his previous positions that he timely filed a verbal complaint with OSHA and another timely complaint in the wrong forum—two positions that the ALJ rejected and that Complainant has not appealed.[51] Counter to Complainant's primary contention on appeal, an ALJ cannot err by failing to address an argument not made to him. And under well-established precedent, the Board does not generally consider arguments a party raises for the first time on appeal.[52]

Second, even if Complainant had properly raised the argument, the facts as the ALJ found them belie any suggestion that Respondent lulled Complainant into forgoing his rights. Complainant contends that if the ALJ "considered lulling as a basis for tolling" he would have found the internal and external appeals processes, and Respondent's continued payment of wages and benefits Complainant earned before his termination, induced him into believing he would be reinstated.[53]

But that simply is not the case. The ALJ did consider each of those factors and definitively found they would not induce a reasonable person into thinking he was not terminated or that he would inevitably be reinstated. With regard to his initial termination and the internal appeals process, the ALJ found:

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evidence and unchallenged on appeal. *See Litt v. Republic Servs. of S. Nev.*, ARB No. 2008-0130, ALJ No. 2006-STA-00014, slip op. at 7 (ARB Aug. 30, 2010) (affirming an ALJ finding of no knowledge as supported by substantial evidence and unchallenged on appeal).

50 *Id.*

51 Resp. Br. at 12.

52 *Bauche,* ARB No. 2022-0035, slip op. at 8 n.35 ("The Board does not generally consider arguments raised for the first time on appeal . . . nor evidence submitted for the first time on appeal."); *Privler v. CSX Transp., Inc.,* ARB No. 2018-0071, ALJ No. 2018-FRS-00021, slip op. at 3 (ARB Mar. 24, 2020) (citing *Carter v. Champion Bus, Inc.,* ARB No. 2005-0076, ALJ No. 2005-SOX-00023, slip op. at 7 (ARB Sept. 29, 2006).

53 Comp. Br. at 23-29.

> . . . the June 1, 2017 written notice of termination, delivered to Complainant on May 31, 2017, was final, unequivocal, and unambiguous, clearly stating: '[y]our employment with the General Electric Company is terminated effective immediately.' I find no indication that Respondent, either verbally or in writing, communicated anything to the contrary. Instead, the evidence establishes that Respondent consistently and unmistakably communicated to Complainant on May 31, 2017 and throughout the internal appeals period, that he was fired effective June 1, 2017.[54]

The ALJ similarly found Complainant's "Ombud's concerns" did not "suspend the date of his termination or otherwise alter his status with the company."[55]

The ALJ also determined that Respondent informed Complainant he would continue to have access to his benefits if he pursued an internal appeal and that it did not affect his termination.[56] The payments that Complainant received from June 1 through July 20, 2017, reflected his salary earned through June 1, 2017, in addition to accrued and unused vacation, personal time, and unused floating holidays. According to the ALJ, they did not in any way reflect any work performed by Complainant after June 1, 2017, or otherwise imply a continued working relationship.[57] Indeed, during the appeals process, the ALJ found Complainant himself acknowledged his termination, stating "I believe my termination is without merit and should be reversed."[58] Substantial evidence supports the ALJ's factual findings that Complainant knew he was fired on June 1, 2017 and that continued receipt of pay and health benefits while participating in Respondent's internal appeals process did not suspend the effective date of termination.[59]

It is impossible to reconcile those findings with Complainant's new argument that Respondent's "actions were sufficient to lull [him] into a position he would not have otherwise taken."[60] Complainant, in effect, simply asks us to reweigh the evidence in his favor, something our standard of review does not permit. Instead,

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54 D. & O. at 9.

55 *Id.*

56 *Id.*

57 *Id.* at 4 ("Complainant has not performed any work for Respondent since June 1, 2017.").

58 *Id.* at 5.

59 *Id.* at 10.

60 Comp. Br. at 29.

when substantial evidence supports the ALJ's factual findings—as it does here—we must affirm.[61]

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Decision and Order Dismissing the Complaint as Untimely Filed.

SO ORDERED.

IVEY S. WARREN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

61 *See Clem v. Comput. Scis. Corp.,* ARB No. 2020-0025, slip op. at 16 (The Board will uphold the ALJ's factual findings if substantial evidence supports the conclusion).