U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 July 2005

Case No.: 2005-LCA-0034

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION,
Complainant,

v.

IEM SERVICES,
Respondent.

ORDER OF DISMISSAL

This proceeding involves a complaint under the Immigration and Nationality Act as amended by the Immigration Act of 1990 and 1991, 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n) and 1184(c) (hereinafter the Act), and the regulations promulgated thereunder at 20 C.F.R. Part 655, Subparts H and I, brought by Nalinabai P. Chelladurai (Complainant) against IEM Services, Inc. (Respondent).

PROCEDURAL BACKGROUND

On October 5, 2000, Complainant filed a grievance with the Department of Labor alleging H-1B Violations under the Act. An investigation was conducted pursuant to 20 C.F.R. 655.815. On June 29, 2004 the Administrator of the Wage and Hour Division of the U.S. Department of Labor (Administrator) issued a written determination that Respondent owed back wages to Complainant. A copy was mailed to Complainant's last known address, which was in Vancouver, British Columbia. On July 26, 2004, the determination letter was returned to the Area Office as undeliverable. Also on July 26, 2004, a demand letter was sent to Respondent. On August 11, 2004, back wages were received by the Area Office from Respondent and the case file was concluded on August 20, 2004.

On March 20, 2005, Complainant notified the Department of Labor of her new address in India. In response a WH-60 form was sent to Complainant's new address. This form requested Complainant to provide her address in order to facilitate the delivery of her payment. After receiving the form, Complainant wrote across the top "I prefer to appeal to the Chief Administrative Law Judges." On May 31, 2005, Complainant sent a letter to the District Director requesting a hearing with an Administrative Law Judge.

A complainant may request a hearing on a determination no later than 15 calendar days after the date of that determination. Complainant's May 31, 2005 request is more than 15 calendar days after the date of the determination. Accordingly, on June 23, 2005, this Court issued an Order to Show Cause requiring Complainant to demonstrate why this matter should not be dismissed as untimely. On July 14, 2005 Complainant submitted a Reply.

DISCUSSION OF LAW AND FACTS

Under 20 C.F.R. § 655.820(a), any interested party desiring review of the Administrator's determination "shall make a request for such an administrative hearing in writing to the Chief Administrative Law Judge." Pursuant to 20 C.F.R. § 655.820(c), no particular form is required. The regulations only necessitate that the request be signed, dated and clearly specify the issues giving rise to the request for a hearing, as well as, the reasons why the requesting party believes the determination is in error.[1] However, 20 C.F.R. § 655.820(d) does require that this request be made no later than 15 calendar days after the date of the determination. Specifically, the regulations state:

> The request for such hearing shall be received by the Chief Administrative Law Judge, at the address stated in the Administrator's notice of determination, no later than 15 calendar days after the date of the determination. An interested party which fails to meet this 15-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the administrative law judge, either through intervention as a party pursuant to 29 C.F.R. 1810(b) through (d) or through participation as an *amicus curiae* pursuant to 29 C.F.R. 18.12.

In the instant case, the Administrator issued the determination concerning Respondent's violations of INA wage requirements on June 29, 2004. Complainant, however, did not request a hearing until she sent a letter to the District Director on May 31, 2005. Thus, Complainant did not timely request a hearing to review the Administrator's determination pursuant to § 655.820(d). Complainant asserts that she was unable to meet the request deadline because she was hospitalized from June 22, 2004 until September 13, 2004. Complainant claims that due to this hospitalization she was unable to update her mailing address with the Administrator and she did not receive the notice of determination.

Prescriptive periods are subject to equitable doctrines such as estoppel, tolling and waiver. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The standard for equitable tolling of limitations, however, is a high one. Restrictions on equitable tolling must be "scrupulously observed." Williams v. Army & Air Force Exchange Serv., 830 F.2d 27, 30 (3rd Cir. 1987); see also Mohasco Corp. v. Silver, 447

[1] The Court notes that neither the March 24, 2005 note nor the May 31, 2005 letter specifies the issues giving rise to the request for a hearing or the reasons why the determination is in error.

U.S. 807, 825-26 (1980) (stating "it is not our place simply to alter the balance struck by Congress in procedural statues by favoring one side or the other in matters of statutory construction"). This Court is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. See Herchak v. American West Airlines, Inc., 2002-AIR-0012 (ARB May 14, 2003); Gutierrez v. Regents of the Univ. of Cal., 1998-ERA-0019 (ARB Nov. 15, 2002).

The Administrative Review Board (Board) has recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively mislead the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Wakileh v. Western Kentucky Univ., 2003-LCA-0023 (ARB Oct. 20, 2004) (citing School Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 18 (3rd Cir. 1981)). The complainant bears the burden of demonstrating one of these situations and thus, justifying the application of equitable tolling principles. Wilson v. Secretary, Dep't of Veteran Affairs, 65 F.3d 402 (5th Cir. 1995). While complainant's inability to satisfy one of these elements is not necessarily fatal to his claim, courts are generally much less forgiving in receiving late filings when the complainant has failed to exercise due diligence in preserving his legal rights. Wakileh, 2003-LCA-0023 (citing Herchak, 2002-AIR-0012). Furthermore, the Board has stated the "absence of prejudice to the other party 'is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.'" Id. (quoting Baldwin County Welcome Ctr. v. Brown, 446 U.S. 147, 151, 152 (1984).

Complainant does not argue Respondent actively misled her or that she filed the request for hearing in the wrong forum. Instead, Complainant argues that the delay in receiving the determination letter constitutes an extraordinary circumstance that prevented her from timely filing her request for hearing. Complainant's affidavit states she was hospitalized on or about June 8, 2004, for one day and returned on June 22, 2004, remaining hospitalized until September 13, 2004. The affidavit also states Complainant moved from her Canadian address to her current address in India on September 13, 2004, where she has since remained. Complainant argues that due to her illness and hospitalization she was unable to notify the Administrator of her change in address and was unable file a request for a hearing within the statutory time period.

Equitable tolling does permit a complainant to avoid the bar of the statute of limitations if, despite all due diligence, she was unable to obtain vital information bearing on the existence of her claims. Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) (discussing equitable tolling as "appropriate only in 'extraordinary circumstances'

such as those 'that are beyond the plaintiff's control and unavoidable even with diligence'"); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990). However, while this Court is sympathetic to the difficulties that can occur due to an illness, Complainant has failed to exercise due diligence and demonstrate a level of physical or emotional disability during the relevant statutory period to dictate equitable tolling.

In analogous cases concerning statutory-mandated filing deadlines relevant in whistleblower litigation, the courts have declined to allow equitable tolling for reasons of ill health unless the party was adjudicated, or institutionalized, as mentally incompetent. In Ellis v. Ray A. Schoppert Trucking, 1992-STA-28 (Sec'y Sept. 23, 1992), the Secretary found a complainant's bare assertion that he could not timely file his STAA complaint because he had been under extreme duress, on medication for spinal stenosis, a collapsed disc, and spinal obstruction, and had suffered a severe memory loss in the months after being discharged, was not sufficient grounds for equitable tolling. The Secretary specifically held that the complainant did not allege that he was mentally incompetent because of his ill health, and he could have had someone (either a lay person or attorney) file a complaint on his behalf. Id.

A complainant's lack of diligence was also the basis for the court denying equitable tolling in Lee v. Schneider National, Inc., 2002-STA-25 (ALJ July 26, 2002). The complainant in *Lee*, argued that he could show cause for a late filing because of lingering ailments, including phobias and insomnia, derived from an automobile accident. The court did not find this argument persuasive since the level of mental, emotional, or physical incapacity did not "warrant the tolling of the statutory period." Id. Similarly, in Trechak v. American Airlines, Inc., 03-AIR-0005 (ALJ Aug. 8, 2003), a complainant's evidence of mental impairment was deemed inadequate to toll the relevant statutory time period because the complainant did not demonstrate that the impairment rendered her unable to read, open mail, or function in society. These decisions clearly exhibit that physical and mental incapacity are not additional categories for tolling time limitations, but must reach a level of an extraordinary event.

Complainant had not demonstrated that her illness was at such a level that she could not remain adequately up-to-date with her mail or inform the Administrator of her address as due diligence requires. While Complainant was hospitalized on the date the determination awarding her a payment was issued, as well as the subsequent fifteen days, she did not demonstrate that her illness was so incapacitating that she was unable to have her mail forwarded, to have someone read or deliver her mail, or file a request for a hearing. As the cases mentioned above illustrate, merely demonstrating an illness is not sufficient grounds for tolling the statutory limitation.

Furthermore, Complainant was released from the hospital in September, 2004, but did not inform the Administrator of her new address until March 20, 2005. Complainant's failure to keep the Administrator informed about the change of address for over seven months also constitutes a lack of diligence. In Wakileh v. Western Kentucky University, 2003-LCA-0023 (ARB October 20, 2004), the Board specifically

found that such a lack of diligence precludes the complainant from asserting that his change of address constituted an extraordinary circumstance that would warrant equitable tolling of the deadline. See e.g., St. Louis v. Alveno Coll., 744 F.2d 1314, 1316-17 (7th Cir. 1984) (finding a plaintiff's failure to tell the EEOC that he was moved was not an event beyond his control, therefore, deadline began running on the date the notice of right to sue was delivered to the most recent address plaintiff provided the EEOC). The complainant in Wakileh argued that the statutory limitation in 20 C.F.R. §655.820(d) should be tolled because he had moved across the country and consequently did not receive the letter of determination until after the fifteen day period. The Board dismissed the complainant's petition, finding that even though the complainant notified the post office, so his mail would be forwarded, he did not act diligently and inform the Administrator of his new address. In the instant case, Complainant also failed to act diligently by waiting over seven months after moving to inform the Administrator of her new address.

Accordingly, because Complainant did not timely request a hearing and because there are no grounds justifying equitable tolling of the deadline, I find Complainant's request for a hearing is untimely and the complaint should be dismissed.

ORDER

Accordingly, IT IS HEREBY ORDERED that the complaint is dismissed.

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LARRY PRICE
Administrative Law Judge

LWP/TEH
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within 30 calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.