ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
Washington, D.C.

TAMMY A. STROUD, Complainant, v. MOHEGAN TRIBAL GAMING AUTHORITY Respondent.	)	Case No. 14-013

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases - Continued

Statutes:

Code of Federal Regulations:

Miscellaneous:

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In response to the Administrative Review Board's ("ARB" or the "Board") December 18, 2013 Notice of Appeal and Order Establishing Briefing Schedule, and pursuant to 29 C.F.R. § 1984.108(a), the Assistant Secretary for Occupational Safety and Health respectfully submits this brief in *Stroud v. Mohegan Tribal Gaming Authority* to assist the Board with this case arising under the Affordable Care Act ("ACA") § 1558, codified at 29 U.S.C. § 218c. Complainant Tammy A. Stroud ("Stroud") appeals the Administrative Law Judge's ("ALJ") December 3, 2013 decision and order dismissing for untimeliness her ACA § 1558 whistleblower complaint filed on June 18, 2013.

Background

1. August 2012 Whistleblower Complaint

Stroud was terminated from her position with Respondent Mohegan Tribal Gaming Authority, doing business as Mohegan Sun Casino, on March 29, 2012.

On August 21, 2012, Stroud filed a complaint with the Occupational Safety and Health Administration's ("OSHA") whistleblower protection program alleging that she suffered a series of adverse actions that culminated in her termination in retaliation for several complaints she raised to her employer. In her complaint, Stroud principally indicated that she was a victim of employment discrimination at the Mohegan Sun Casino because she had reported health and safety related concerns, such as no air circulation in a confined workroom and a nonfunctional door in another workroom that "leaves everyone in the room trapped"; adding that the conditions were "[l]eaving we, the employees endangered and forcing other employees to have to violate OSHA safety requirements." *See* Aug. 2012 complaint, copy attached. The 2012 complaint also indicated that she reported violations of departmental policy in audit and signature control, and that she was being bullied, harassed, and was working in a hostile work environment. *Id*. The complaint added that she was a victim of "an attack against my faith and favoritism, and nepotism." *Id*. The complaint additionally

stated that Stroud "[r]eported also to a federal agency of unsecured on-line human resources which was newly implemented with Mohegan Sun, as well as company misuse of company laptop computers"; and that she "wasn't paid for the last day I worked nor, did [she] get any payment of [her] almost 2 weeks of vacation pay." Stroud's complaint also mentioned that she had filed claims with the Connecticut Department of Labor and the EEOC. *Id*.

In a subsequent email to OSHA, dated December 31, 2012, Stroud alleged that after her termination she was not advised by Respondent of her right to continuing health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). *See* Dec. 31, 2012 email, copy attached.[1] In another email, dated August 10, 2013, Stroud alleged she was the victim of defamation. *See* Aug. 10, 2013 email, copy attached.

OSHA considered the August 2012 whistleblower complaint as possibly involving claims under section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) ("OSH Act"), section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A ("SOX"), and the Consumer Financial Protection Act of 2010, 12

[1] OSHA referred the allegation that Stroud was not informed of her right to continuing health insurance coverage to the Employee Benefits Security Administration ("EBSA"), which attempted to resolve the matter. *See* February 26, 2013 Memorandum for the Executive Secretariat from U.S. Dep't of Labor, Employee Benefits Security Administration, attached to Stroud's brief.

U.S.C. § 5567 (“CFPA”). After careful consideration, OSHA dismissed the complaint for the following reasons: lack of jurisdiction over the SOX claim; lack of protected activity asserted in the CFPA claim; and untimeliness in the OSH Act claim. Stroud timely filed objections to the findings under SOX and CFPA and, on June 14, 2013, an ALJ issued a decision and order dismissing her claims. That decision and order is currently on review by the Administrative Review Board (“ARB”), Case No. 13-079.

2. June 2013 Whistleblower Complaint

On June 18, 2013, Stroud filed a second whistleblower complaint with OSHA, alleging that her March 29, 2012 termination violated the whistleblower protections in section 1558 of ACA, 29 U.S.C. § 218C. OSHA dismissed this complaint as untimely on June 24, 2013. In the findings, OSHA concluded that the June 18, 2013 ACA complaint was time barred because it was filed more than 180 days after her termination. *See* OSHA ACA findings, copy attached. The findings also concluded that Stroud’s earlier whistleblower complaint arising out of the same set of employment circumstances did not include assertions of any protected activity under ACA. *Id*.

On July 18, 2013, Stroud sent to the OSHA Regional Administrator, by facsimile, a cover sheet and 8 pages - including a letter addressed to the Chief Administrative Law

Judge - objecting to OSHA's findings. *See* July 18, 2013 Fax, copy attached. The facsimile also indicated that Stroud had copied Respondent's counsel on her letter stating her desire to object to OSHA's findings.

Also by facsimile, on September 11, 2013, Stroud sent to the Office of Administrative Law Judges 18 pages including the July 18, 2013 cover sheet with its attached 8 pages, a new cover sheet, copies of 6 cover sheets dated July 18, 2012, and a 1-page letter asking for a response to her objection to OSHA's findings that her ACA complaint was time barred. *See* Sept. 11, 2013 Fax, copy attached.

On September 19, 2013, ALJ Colleen A. Geraghty issued a Notice of Docketing and Order to Show Cause pursuant to which the parties' submitted their respective briefs in the case – including a brief on behalf of the Directorate of Whistleblower Protection Program.[2]

3. Decision of the ALJ

In her Decision and Order, the ALJ first concluded, in agreement with OSHA, that equitable tolling was appropriate with respect to Stroud's filing of objections and a request for a hearing because Stroud is a pro se litigant and she timely filed objections with OSHA, but not with the Office of Administrative

[2] In addition, ALJ Geraghty held a telephone conference with the parties in November 2013 to clarify the briefing and record requirements.

Law Judges as required by the regulations at 29 C.F.R. § 1984.106(a). (ALJ D&0 4-5). Noting that caselaw supported the equitable tolling of a filing deadline when objections and requests for hearing are timely filed in the wrong forum as a result of an inadvertent mistake, the ALJ accepted the explanation for the filing error and ruled that "Stroud's Objections and Request for Hearing are timely based on equitable tolling principles." *Id*.

Next, the ALJ upheld OSHA's decision to dismiss Stroud's ACA § 1558 whistleblower complaint as time barred, being filed more than 180 days after the alleged employment discrimination for activity protected under Section 1558. *Id*. at 6. In reaching that decision the ALJ noted that Stroud filed a June 18, 2013 whistleblower complaint alleging that her March 29, 2012 termination violated Section 1558 of ACA. She also noted that none of Stroud's earlier whistleblower complaints filed with OSHA under other statutes concerned activity protected by ACA § 1558. *Id*. at 5-6. Finally, the ALJ concluded that equitable tolling did not apply to Stroud's ACA § 1558 whistleblower complaint because, while filing various whistleblower complaints in various forums, Stroud had not raised the precise statutory claim at issue in the wrong forum. *Id*. at 6, citing *Rockefeller v. Carlsbad Area Office, U.S. Dep't*

of Energy, ARB Case No. 99-002/063/067/068, slip op. at 10-11 (Oct. 31, 2000).

Argument

1. The ALJ Correctly Ruled that Stroud's Objections and Request for Hearing Were Timely Filed

Under ACA § 1558 and its implementing regulations, parties have 30 days to file objections to OSHA's findings. *See* 29 U.S.C. § 218c(b)(1), incorporating procedures in 15 U.S.C. § 2087(b); 29 C.F.R. § 1984.106(a). Stroud sent OSHA a facsimile of her objections to OSHA's June 24, 2013 findings on July 18, 2013, well within the 30-day filing limitation. As part of the facsimile, a letter stating her objection to OSHA's findings was properly addressed to the Office of Administrative Law Judges and indicated that Respondent's counsel was also being copied on the objections. Stroud did not, however, send her letter objecting to OSHA's findings to the Office of Administrative Law Judges. In its brief, Respondent has not challenged the ALJ's conclusion that Stroud's Objections and Request for Hearing was timely filed based on equitable tolling principles and neither does OSHA. For the reasons cited in the ALJ's decision, OSHA believes that this is an appropriate case for equitable tolling of the filing deadline for objections.

2. The ALJ Correctly Dismissed Stroud's ACA Complaint as Untimely Filed

The ALJ's decision that Stroud's June 18, 2013 complaint was not timely filed should be upheld, notwithstanding Stroud's assertions.[3] Rather than being filed within 180 days of receiving notice of her termination, it is undisputed that Stroud's 2013 complaint was filed more than a year later - far outside the statutory limitations period. *See* 29 U.S.C. § 218c(b)(1), incorporating the statute of limitations in 15 U.S.C. § 2087(b)(1), 29 C.F.R. § 1984.103(d). Moreover, the ALJ's conclusion that Stroud's earlier, timely August 2012 complaint did not include a claim under ACA § 1558 should also be upheld for the reasons explained below.

Stroud's June 2013 complaint would be timely if it alleged conduct that was reasonably related to the conduct alleged in the August 2012 complaint and if the concerns in her 2012

[3] In her brief, Stroud appears to assert, contrary to the plain language of the statute, that an ACA § 1558 whistleblower complaint should not be subject to a time limitation. Compl. Brief 6, bold text; *see* 29 U.S.C. § 218c(b)(1), incorporating the 180-day statute of limitations in 15 U.S.C. § 2087(b). She also alleges, among other things, that she was misinformed about where to file EEOC complaints (*id*. at 1), and improperly denied access to her personnel files (*Id*. at 2); that Respondent violated Section 10b-5 of the Securities Exchange Act of 1934, and, through obstruction, Sections 1505 and 1518 of title 18 of the U.S. Code (*Id*. at 4). Stroud also appears to argue that OSHA should have redacted her August 2012 complaint, which includes a Sarbanes-Oxley Act whistleblower claim, for privacy and confidentiality purposes (*Id*. at 5). None of these claims have any bearing on whether the ALJ was correct in dismissing Stroud's claim as untimely.

complaint could be reasonably perceived as providing information regarding an ACA section 1558 violation.

a. Section 1558 Employs the Same Liberal Pleading Standards as the other Department-Administered Whistleblower Protection Statutes.

Under ACA section 1558, as under the other whistleblower protection statutes that the Department administers, "[n]o particular form of complaint is required. A complaint may be filed orally or in writing." See 29 C.F.R. § 1984.103(b). Furthermore, OSHA will consider the complaint together with interviews of the complainant to determine whether a complaint filed with OSHA contains a prima facie allegation of retaliation. 29 C.F.R. § 1984.104(e); *see Evans v. EPA*, ARB Case No. 08-059, 2012 WL 3255132, at *5 ("The OSHA regulations expressly allow for investigatory complaints to evolve into complaints containing a prima facie claim of [retaliation]"). The complainant need not even cite the particular whistleblower protection statute that she believes was violated. *See Evans*, 2012 WL 3255132, at *6 (ARB July 21, 2012); (requiring only that the complaint show some "relatedness" to one of the whistleblower statutes to survive a motion to dismiss); *Whistleblower Investigations Manual*, (Sept. 20, 2011), available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf ("OSHA is responsible for properly determining the statute(s) under which a complaint is filed. That is, a complainant need

not explicitly state the statute(s) in the complaint"). As the ARB and several district courts have recognized, the purpose of the complaint filed with OSHA is merely to trigger an investigation into whether retaliation in violation of one the OSHA-administered whistleblower protection statutes has occurred. *See Sylvester v. Parexel Internat'l, LLC*, ARB Case No. 07-123, 2011 WL 2165854, at *9 (ARB May 25, 2011); *see, e.g.*, *Sharkey v. JP Morgan Chase & Co.*, 805 F. Supp. 2d 45, 53 n.3 (S.D.N.Y. 2011) (citing preamble to DOL's 2004 rules under SOX, 69 Fed. Reg. 52104, 52106, (Aug. 24, 2004) (which explains that no detailed analysis is required in the complaint filed with OSHA—the purpose of which is to trigger an investigation).

Thus, to survive a motion to dismiss at the ALJ stage, a complainant need only state in the OSHA complaint or a subsequent amendment before an ALJ show "some facts about the protected activity, . . . some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction, some facts about the adverse action, a general assertion of causation, and a description of the relief sought." *See Evans*, ARB Case No. 08-059, 2012 WL 3255132, at *13 (ARB July 31, 2012) (numbering of factors omitted) (stating standard for a motion to dismiss under the environmental whistleblower statutes).

As several district courts have explained when analyzing the closely-related question of whether a SOX-complainant

properly exhausted administrative remedies so that her claim may be brought in federal court under 18 U.S.C. § 1514A(b)(1)(B), "the appropriate inquiry . . . is not whether every fact forming the basis for the belief that gave rise to a plaintiff's protected activity was previously administratively pled, but whether each separate and distinct claim was pled before the agency." *Sharkey*, 805 F. Supp. 2d at 53; *see Jones v. Southpeak Interactive Corp.*, __ F. Supp. 2d. __, 2013 WL 5837756, at *3 (E.D. Va. Oct. 29, 2013) (holding plaintiff properly exhausted her administrative remedies against individual defendants where her informal letter to OSHA made clear that she intended to hold the individuals responsible for retaliation). A complainant properly exhausts her administrative remedies where he timely files a complaint with OSHA that includes "specific adverse employment actions, protected activity, and the general nature of the facts that formed [her] belief in violations of the enumerated statutes giving rise to the protected activity." *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 418 (S.D.N.Y. 2012); *Sharkey*, 805 F. Supp. 2d at 53-54 (citing *Sylvester*).

This analysis is similar to the analysis under Title VII under which claims that are "reasonably related" to allegations contained in another administrative complaint, generally, "will not be time-barred so long as the original complaint is [timely] filed . . . ." *Rose v. New York City Bd. of Educ.*, 257 F.3d

156, 163 (2d Cir. 2001); *see also Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 177-78 (2d Cir. 2005) (concluding that a district court erred by not considering adverse employment acts not specifically raised in one EEOC charge when they were reasonably related to those raised separately with the EEOC); *Williams v. N.Y. City Housing Authority*, 458 F.3d 67, 70 (2d Cir. 2006) (considering "reasonably related" that which "would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the [earlier] charge that was made.")[4]

In determining whether two claims are reasonably related the central question is whether the earlier complaint gave the agency "adequate notice to investigate discrimination on both bases." *Williams*, 458 F.3d at 70 (quoting *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003)). Moreover, as the *Williams* court explained, the "reasonably related" exception "is essentially an allowance of loose pleading and is based on the recognition that [administrative] charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is

[4] When considering whether claims are reasonably related, "the focus should be 'on the factual allegations made in the [EEOC] charge itself, describing the discriminatory conduct about which a plaintiff is grieving.'" *Williams*, 458 F.3d at 70 (quoting *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003)).

to alert the [agency] to the discrimination that a plaintiff claims [she] is suffering." *Id*. (internal citations omitted).[5]

b. Stroud's ACA Complaint to OSHA is Untimely Even Under the Liberal Pleading Standards Applicable to OSHA Whistleblower Complaints.

Notwithstanding the relaxed pleading standards for complaints to OSHA under ACA section 1558, nothing in Stroud's 2012 complaint or any supporting materials could reasonably have given OSHA any indication that Stroud was alleging that she suffered retaliation for having engaged in activities protected by section 1558.

[5] Some district courts, in the context of considering whether a complainant has properly exhausted administrative remedies, have concluded that Title VII's reasonable-relation case law does not apply to claims under the Sarbanes-Oxley Act cases because the Title VII process is aimed at conciliation of claims whereas DOL's whistleblower proceedings are aimed at adjudication on the merits. *Roganti v. Metropolitan Life Ins. Co.*, No. 12 Civ. 0161 (PAE), 2012 WL 2324476, at *6 (S.D.N.Y. June 18, 2012); *Willis v. VIE Financial Group, Inc.*, No. Civ. A. 04-435, 2004 WL 1774575, at *5 (E.D. Pa. Aug 6, 2004). At the outset, the Assistant Secretary questions whether the purposes of the OSHA exhaustion requirement and the Title VII exhaustion requirement are really so different. Indeed one of OSHA's primary focusses during the investigation is on early settlement of the complaint. *See Whistleblower Investigations Manual* at 6-5 (discussing importance to OSHA of aiding in settlements during whistleblower investigations). At any rate, decisions rejecting analogy to Title VII case law regarding reasonable relation have only examined that question in the context of SOX whistleblower complaints where the complainant allegedly named for the first time in federal court a new defendant or raised a new adverse action. As explained above, district court decisions fully recognize that allegations with regard to protected conduct may be significantly less developed in the complaint to OSHA than they are in a subsequent federal court complaint or at hearing.

Section 1558 of ACA prohibits an employer from "in any manner discriminating against any employee" because the employee:

> (1) received a credit under section 36B of [the Internal Revenue Code of 1986] or a subsidy under section [1402] of [this Act];
>
> (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment made by this title);
>
> (3) testified or is about to testify in a proceeding concerning such violation;
>
> (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
>
> (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard, or ban under this title (or amendment).

29 U.S.C. § 218c(a).

The term "this title" throughout section 1558 refers to Title I of ACA. *See Procedures for the Handling of Retaliation Complaints Under Section 1558 of the Affordable Care Act, interim final rule*, 78 Fed. Reg. 13222, 13225 (Feb. 27, 2013); *Rosenfield v. Globaltranz Enters., Inc.*, No. CV 11–02327–PHX–NVW, 2012 WL 2572984, at *2-3 (D. Ariz. July 2, 2012). Title I of ACA relates to reforms in the private health insurance

market,[6] the establishment of healthcare marketplaces (or exchanges), and the tax credits and subsidies available for those who participate in the marketplaces. 78 Fed. Reg. at 13223 (explaining some of the provisions of ACA Title I).

None of the allegations in Stroud's August 2012 complaint or any supporting materials indicates protected activity falling within one or more of the categories listed in section 1558. In her 2012 complaint, Stroud indicated that she reported a lack of ventilation, a broken door trapping employees, and violations of departmental standards for audit and signature controls. *See* August 2012 complaint, copy attached. She also raised the existence of bullying, harassment and a hostile work environment. *Id*. These allegations do not relate to activity protected by section 1558 of ACA which, as noted above, protects employees who receive affordability assistance in the form of a tax credit or a cost sharing reduction subsidy and also protects various employee whistleblowing activities that relate to a reasonable belief of violations of Title I of ACA.

During OSHA's investigation of the August 2012 complaint, Stroud indicated in an email that her employer did not advise

[6] For example, Title I of ACA contains reforms to the individual and employer-sponsored health insurance market that prohibit health insurers from denying coverage or refusing claims based on pre-existing conditions; prohibit lifetime or annual limits on healthcare benefits; and permit the coverage of children up to 26 years of age. *See* ACA sections 1001 and 1201.

her of her right to obtain COBRA coverage following her termination. However, nothing in the email gave OSHA any indication that Stroud's termination or any of the actions taken against Stroud were in retaliation for raising concerns to her employer or anyone else regarding any conduct that Stroud reasonably believed to be in violation of the health-insurance-related provisions of ACA Title I.

Here, ACA § 1558 claims cannot reasonably be expected to grow out of the charges made in Stroud's earlier complaint and supporting materials. Thus, Stroud's 2012 whistleblower complaint failed to provide OSHA with adequate notice to investigate discrimination under ACA, and Stroud's ACA § 1558 whistleblower claim should be dismissed as untimely.

CONCLUSION

For the foregoing reasons, the decision and order of the ALJ should be upheld because Stroud's ACA § 1558 whistleblower complaint was untimely filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of the Assistant Secretary of Labor for Occupational Safety and Health as *Amicus Curiae* was served on each of the following on this ___ day of March, 2014, via overnight delivery:

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