

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)	CASE NO. OSAB 96-037
JOE LOUNSBURY,)	(Discrimination/96-013)
Complainant,)	
)	
vs.)	
)	
RAINBOW ROOF MAINTENANCE,)	
Respondent,)	
)	
and)	
)	
DIRECTOR, DEPARTMENT OF LABOR)	
AND INDUSTRIAL RELATIONS.)	

FILED
 NOV 27 1996
 P 2:29

DECISION AND ORDER

This occupational safety and health case is before the Board on appeal by JOE LOUNSBURY ("Complainant") from the decision of the DIRECTOR, DEPT. OF LABOR AND INDUSTRIAL RELATIONS ("Director"), dated June 10, 1996, rejecting his complaint for discrimination due to untimeliness.

Complainant timely appealed the Director's decision on June 26, 1996.

On October 11, 1996, the Director filed a motion to dismiss Complainant's appeal, which we construe to be a motion for summary judgment based on the evidence and arguments presented.

For the reasons stated below, we grant the Director's motion.

The following facts are undisputed.

FINDINGS OF FACT

1. Complainant was employed by RAINBOW ROOF MAINTENANCE ("Respondent") whose work site in March of 1996, was located at the Kahana Keys Restaurant in Kihei, Maui.

2. On March 10, 1996, Complainant walked off the job because he refused to work under alleged dangerous conditions without adequate safeguards.

3. On April 4, 1996, Complainant made a safety complaint against Respondent over the telephone with an inspector of the Hawaii Occupational Safety and Health (HIOSH) Division of the Department of Labor and Industrial Relations.

4. According to the inspector's written telephone log, Complainant alleged that Respondent required him to perform certain roofing work without fall protection.

5. On April 18, 1996, Complainant filed with HIOSH a formal written safety complaint, alleging that Respondent violated certain "fall protection" standards of the Occupational Safety and Health law by requiring employees to walk on 1-1/2 by 5 inch "toe boards around the cone entry area" without "any scaffolding [sic] or safty [sic] rails."

6. On June 4, 1996, Complainant filed with HIOSH a written discrimination complaint against Respondent.

7. According to Complainant's discrimination complaint, Respondent allegedly discriminated against him on March 10, 1996 by requiring him to work under unsafe conditions. This led Complainant to walk off his job.

8. Complainant's discrimination complaint was filed more than 60 days after the date of the alleged discrimination.

9. Complainant does not rely on and did not allege any facts to support a defense of equitable tolling of the time for filing a discrimination complaint.

CONCLUSIONS OF LAW

Hawaii Revised Statutes §396-8(e) reads, in relevant part, as follows:

(e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

(1) No person shall discharge, suspend, or otherwise discriminate in terms and conditions of employment against any employee by reason of:

(A) The employee's failure or refusal to cooperate or handle any machine, device, apparatus, or equipment which is in any unsafe condition; or

(B) The employee's failure or refusal to engage in unsafe practices in violation of this chapter or of any standard, rule, regulation, citation or order issued under the authority of this chapter;

* * *

(4) Any employee who believes that there has been a discharge or discrimination against the employee by any person in violation of this subsection may, within sixty days after the violation occurs, file a complaint with the director alleging unlawful discharge or discrimination and setting forth the circumstances thereof[.] (emphasis added.)

The time for filing a discrimination complaint may be equitably tolled pursuant to the Hawaii Occupational Safety and Health Administrative Rules §12-51-11(d)(2), where, for example, the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action, or where the discrimination is in the nature of a continuing violation.

We agree with the Director that the time for filing a discrimination complaint runs from the date of the alleged discriminatory act. See W.J. Usery, Secty. of Labor v. Northern Tank Line, Inc. 1976 OSHD ¶ 21,520 (A discrimination complaint

not filed within 30 days of the act complained of is untimely under §11(c)(2) of the federal Occupational Safety and Health Act.) In this case, the alleged discrimination or violation of subsection e(1), according to Complainant, occurred on March 10, 1996. The discrimination complaint was filed on June 4, 1996, more than 60 days after the date of the alleged discrimination. Since Complainant did not allege any facts or present any evidence to show that the limitations period was tolled by §12-51-11(d)(2), we conclude that Complainant's complaint was untimely.

ORDER

Summary judgment is granted in favor of the Director. The Director's decision, dated June 10, 1996, is affirmed, in accordance with the foregoing.

Dated: Honolulu, Hawaii, NOV 27 1996


FRANK YAP, JR., Chairman

EXCUSED
CAROL K. YAMAMOTO, Member

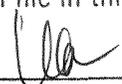

VICENTE F. AQUINO Member

Joe Lounsbury, Pro Se
Complainant

Mike Roney for
Respondent

Herbert B.K. Lau, Esq., for
Director, Department of Labor
and Industrial Relations

I do hereby certify that the foregoing
is a full, true and correct copy of
the original on file in this office.



NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.