U.S. Department of Labor

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

IN THE MATTER OF:

BRANDON MARTIN,

COMPLAINANT,

v.

PARAGON FOODS,

RESPONDENT.

ARB CASE NO. 2022-0058

ALJ CASE NO. 2021-FDA-00001
CHIEF ALJ STEPHEN R. HENLEY

DATE: June 8, 2023

Appearances:

For the Complainant:
Brandon Martin; *pro se*; Pittsburgh, Pennsylvania

For the Respondent:
Chloe C. Zidian, Esq.; *Lewis Brisbois Bisgaard & Smith, LLP*; Pittsburgh, Pennsylvania

Before HARTHILL, Chief Administrative Appeals Judge, and WARREN and MILTENBERG, Administrative Appeals Judges

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] Solid Waste Disposal Act (SWDA),[2] Food Safety Modernization Act (FSMA),[3] and implementing regulations.[4]

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1 42 U.S.C. § 9610.

2 42 U.S.C. § 6971.

3 21 U.S.C. § 399d.

4 29 C.F.R. Part 24 (2022) (CERCLA and SWDA); 29 C.F.R. Part 1987 (2022) (FSMA).

On July 18, 2022, the Chief Administrative Law Judge (ALJ) issued a Decision and Order Dismissing Complaint as untimely filed (D. & O.).[5] Brandon Martin (Martin or Complainant) timely petitioned the Administrative Review Board (ARB or Board) for review. For the reasons set forth below, we **AFFIRM** the ALJ's D. & O.

BACKGROUND

The ALJ determined the following facts. Paragon Foods (Paragon or Respondent), a foodservice distributor, hired Martin as a custodian in its warehouse in Warrendale, Pennsylvania on December 1, 2015.[6] On January 20, 2020, Paragon terminated Martin's employment. The company sent Martin a letter stating that, "due to organizational changes, your position as Operations Custodian is being eliminated. Therefore, your employment with Paragon Foods Is [sic] ending effective January 20, 2020."[7] During and after his employment, Martin filed numerous complaints about Paragon's operations with various state and federal agencies.[8]

1. Martin's Complaints to Government Entities During His Employment

During his employment, Martin filed complaints with the Pennsylvania Department of Agriculture's Bureau of Food Safety and Laboratory Services, the Allegheny County Health Department, the Pittsburgh Police Department, the Cranberry, Pennsylvania Police Department the Food and Drug Administration ("FDA"), and the U.S. Department of Agriculture ("USDA"). In those complaints, Martin asserted that Paragon engaged in criminal behavior or reported health and safety issues at Paragon's plant, but Martin did not complain that Paragon retaliated against him because he filed these complaints.[9]

Martin also asserted in the ALJ proceeding below that he complained to the U.S. Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) in August 2019.[10] Specifically, he asserted that: "I can obtain phone records from August 2019 in which I notified OSHA about illegal activity at Paragon and

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5 D. & O. at 11.

6 *Id.* at 3.

7 *Id*. at 4.

8 *Id.* at 3-4.

9 *Id.*

10 Complainant's Response to Order to Refile Response to Order to Show Cause (Comp. Resp. OSC) at 3.

was referred to the FDA/USDA by OSHA."[11] Martin also asserted that Paragon reduced his hours in the summer of 2019 but he did not allege in the ALJ proceedings that he complained about this reduction in hours, or other alleged retaliatory acts, to OSHA.[12]

On August 11, 2019, Martin filed a complaint with the Pennsylvania Human Relations Commission (PAHR), stating that he had been experiencing harassment at his workplace from May 2019 onward.[13] While Martin mentioned certain safety and health concerns in his complaint, the main focus of his claim did not allege whistleblower or retaliation issues related to CERCLA, SWDA, or FSMA. Instead, Martin's complaint alleged that his employer wanted to use him as a scapegoat for any issues, unfairly disciplined him when other employees broke similar work policies, and forced him to do work that fell outside his job duties.[14]

2. Martin Complained to Various Government Entities After Paragon Terminated His Employment

After Paragon terminated his employment in January 2020, Martin continued to complain about Paragon's operations to various state and federal agencies.[15] In April 2020, Martin initiated contact with Christopher Robinson, OSHA's Pittsburgh Area Director. Martin apprised Robinson of safety and health issues at the Warrendale work site but never expressed his intent to file a whistleblower retaliation claim.[16]

On April 28, 2020, and May 1, 2020, Martin filed safety and health complaints with OSHA.[17] Those complaints alleged that Paragon: (1) diluted a

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[11] *Id.* In his Petition for Review and Opening Brief before the Board, Martin alleges for the first time that he contacted OSHA in August 2019 to complain that Paragon *retaliated* against him by issuing a "summary write up." Complainant's Petition For Review (PFR) at 1 ("I notified OSHA immediately after I was retaliated against around August of 2019.); Complainant's Opening Brief (Comp. Br.) at 1 ("I . . . called OSHA around August 2019.").

[12] Comp. Resp. OSC at 1, 3.

[13] D. & O. at 3-4; *see also* Respondent's Reply Brief, Exhibit (Ex.) A (Oct. 10, 2022) (Resp. Reply Br.).

[14] D. & O. at 4; Resp. Reply Br., Ex. A.

[15] D. & O. at 5. Based on our thorough review of the record, it appears that Martin complained to OSHA and made, or attempted to make, FOIA requests to the Small Business Administration, the FDA, and a Pennsylvania state agency.

[16] D. & O. at 4; *see also* PFR at 3 ("It is also important to note that I spoke to [Chris] Robinson and never said I was a whistleblower.").

[17] D. & O. at 4-5 (referring to OSHA Complaint #157968 (Apr. 28, 2020) and OSHA Complaint #1581824 (May 1, 2020)).

cleaning product ("vigil-quat 4312"), and failed to warn employees about the hazards of using the product;[18] and (2) failed to provide adequate respiratory protection and did not provide employees with a medical evaluation, fit testing, or training for the respirators.[19] Neither complaint alleged retaliation by Paragon.

On May 8, 2020, Robinson informed Martin that OSHA had investigated his complaints, that Paragon stated it had corrected the hazards, and that OSHA was closing the cases.[20] On May 9, 2020, Martin again asked OSHA to investigate his concerns.[21]

Finally, on September 1, 2020, Martin filed a whistleblower retaliation complaint with OSHA, alleging that Paragon discharged him on January 20, 2020, in retaliation for raising safety complaints.[22]

3. Procedural History

In his September 2020 OSHA whistleblower complaint, Martin alleged that Paragon demoted him/reduced his hours, disciplined him, and terminated his employment in retaliation for reporting safety concerns.[23] On October 9, 2020, OSHA dismissed the complaint as untimely, finding Martin filed his complaint more than 180 days after Paragon terminated his employment.[24] On October 26, 2020, representing himself, Complainant filed objections to OSHA's finding and requested a hearing before the DOL's Office Administrative Law Judges.[25]

The ALJ issued two show cause orders directing Martin to explain "why this matter should not be dismissed for failing to file a timely complaint and, if appropriate, address any reasons why equitable tolling of the limitations period would be applicable in this matter."[26] In his initial response to the Order to Show Cause, Martin submitted four reasons why the filing deadlines should be tolled:

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18 D. & O. at 4-5; OSHA Complaint #157968 (Apr. 28, 2020); OSHA Complaint #1581824 (May 1, 2020).

19 D. & O. at 4-5; OSHA Complaint #1581824 (May 1, 2020).

20 D. & O. at 5.

21 *Id.*

22 *Id.* at 1.

23 *Id.*

24 *Id.* at 2.

25 *Id.*

26 *Id.*

1. The OSHA fact sheets do not define "days," thus misleading him into believing weekends and holidays are not counted;
2. Paragon lied to him when they told him his position was being eliminated due to organizational changes;
3. He was unable to timely file his complaint because he was grieving his grandmother's sudden death and had to attend to her funeral and estate; and
4. He filed his complaint in the wrong forum.[27]

In response to the ALJ's August 3, 2021 Order to Refile Response to Order to Show Cause, Complainant reasserted his previous arguments, and added that after Paragon fired him, he was working three jobs and faced with cancerphobia and medical depression, which made it difficult to file a whistleblower claim.[28]

On July 18, 2022, the ALJ dismissed Martin's complaint as untimely filed, finding that the reasons Martin provided did not fall within any of the grounds the ARB has recognized that justify modification of the filing deadline.[29] On August 8, 2022, Complainant timely petitioned the Board for review.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue final agency decisions for the Department in cases brought under CERCLA, SWDA, and FSMA.[30] We review the ALJ's decision to dismiss Martin's complaint as untimely de novo.[31]

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[27] *Id.* at 6. The ALJ explained that he issued a second order requiring Martin to refile his response on August 3, 2021, because Martin's original response was unclear. *Id.* at 2.

[28] *Id.* at 7, 9.

[29] *Id.* at 11.

[30] 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. 13,186 (Mar. 6, 2020).

[31] *Johnson v. The Wellpoint Cos., Inc.*, ARB No. 2011-0035, ALJ No. 2010-SOX-00038, slip op. at 5 (ARB Feb. 25, 2013) (citations omitted); *Boyd v. EPA*, ARB No. 2010-0082, ALJ No. 2009-SDW-00005, slip op. at 2-3 (ARB Dec. 21, 2011) (citations omitted).

DISCUSSION

1. Governing Law

A complainant pursuing a whistleblower retaliation claim under CERCLA, SWDA, and FSMA, must meet certain deadlines.[32] These deadlines apply whether the complainant is represented by counsel or is proceeding pro se.[33] Potential complainants are responsible for determining which statute, and which deadline, applies to their case and for meeting that deadline: "[I]gnorance of the law is no excuse" for missing a filing deadline.[34]

Employees alleging employer retaliation in violation of the CERCLA and SWDA must file their complaints with OSHA within 30 days of the alleged retaliatory act.[35] Under the FSMA, an employee must file a complaint with OSHA within 180 days after the alleged retaliatory act occurred.[36]

In his briefing to this Board, Complainant asserts that Paragon retaliated against him by: (1) terminating his employment in January 2020 (termination complaint); and (2) issuing a "summary write up" in August 2019.[37] Paragon discharged Martin on January 20, 2020.[38]

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[32] 42 U.S.C. § 9610(b) (CERCLA); 42 U.S.C. § 6971(b) (SWDA); 21 U.S.C. § 399d(b)(1) (FSMA).

[33] A complainant "is not excused from the rules of practice and procedure applicable to this proceeding merely because of his [or her] *pro se* status." *See Jeanty v. Lily Transp. Corp*., ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020) (citing *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) ("[T]his court has repeatedly insisted that *pro se* parties follow the same rules of procedure that govern other litigants.")); *see also Phox v. The Savoy at 21C*, ARB No. 2021-0057, ALJ No. 2019-FDA-00014, slip op. at 3 n.9 (ARB Jan. 6, 2022) ("While the Board does provide a degree of latitude to pro se complainants, we also 'must be able to impose appropriate sanctions . . . when they fail to comply with the . . . procedures in the administrative process . . . .'") (citation omitted).

[34] *Warner v. Xcel Energy*, ARB No. 2008-0112, ALJ No. 2008-ERA-00002, slip op. at 8 (ARB Mar. 29, 2010).

[35] 42 U.S.C. § 9610(b); 42 U.S.C. § 6971(b).

[36] 21 U.S.C. § 399d(b)(1).

[37] PFR at 1; Comp. Br. at 1. In his OSHA complaint and before the ALJ, Martin also argued that Paragon retaliated against him in July 2019 by reducing his hours. D. & O. at 7 n.6. Martin does not pursue this argument on appeal, but even if he had, it would be untimely because he filed his OSHA retaliation complaint approximately 14 months after his hours were allegedly reduced in July 2019. *Id.*

[38] D. & O. at 4.

Therefore, to be timely under CERCLA and SWDA, Martin was required to file his retaliation complaint with OSHA by February 19, 2020, and on or before July 18, 2020 to be timely under the FSMA. Martin filed his OSHA whistleblower retaliation complaint on September 1, 2020, 225 days after Paragon discharged him from employment, and his termination complaint was therefore untimely even under the more generous FSMA filing deadline.[39]

2. Extensions of Time

Under statutes where the filing period is not jurisdictional, it operates as a requirement that, like a statute of limitations, is subject to "waiver," "equitable estoppel," and "equitable tolling."[40] In determining whether a claims-processing rule is jurisdictional, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[41]

The statutory provisions that govern this case, which specify the time for filing a complaint with OSHA, do not refer in any way to OSHA's jurisdiction.[42] Thus, under CERCLA, SWDA, and FSMA, the filing period is not jurisdictional and therefore is subject to certain equitable modifications.[43]

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[39] Martin does not contend that either his April or May 2020 OSHA safety and health complaints included a retaliation complaint.

[40] *Zipes v. Trans World Airlines*, 455 U.S. 385, 393-94 (1982). *Accord Wilkins v. United States*, --- U.S. ---, 143 S. Ct. 870, 876 (2023) (citation omitted); *see also Boechler, P.C. v. Comm'r of Internal Revenue,* --- U.S. ---, 142 S. Ct. 1493, 1500 n.1 (2022) (equitable tolling is not limited to Article III courts) (citations omitted).

[41] *Wilkins*, 143 S. Ct. at 876 ("Courts will [] not assume that in creating a mundane claims-processing rule," Congress intended to create "jurisdictional consequences.") (citation omitted). As the Supreme Court in *Zipes* explained, the statutory "provision specifying the time for filing discrimination charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes,* 455 U.S. at 394; *see also Fort Bend Cty., Texas v. Davis,* --- U.S. ---, 139 S. Ct. 1843, 1849-50 (2019) (reaffirming *Zipes* and other well-established Supreme Court decisions holding time prescriptions for procedural steps in judicial or agency forums are non-jurisdictional).

[42] 42 U.S.C. § 9610(b); 42 U.S.C. § 6971(b); 21 U.S.C. § 399d(b)(1).

[43] The ALJ identified at least four examples of circumstances where the ARB has found equitable modification may be appropriate: (1) respondent has actively misled the complainant regarding the cause of action; (2) complainant has in some extraordinary way been prevented from filing the action; (3) complainant has raised the precise statutory claim at issue but has done so in the wrong forum; and (4) respondent's own acts or omissions have lulled the complainant into forgoing prompt attempts to vindicate the rights at issue. D. & O. at 5-6 (citations omitted). Because these four listed circumstances are a

Equitable tolling and equitable estoppel are two different and distinct equitable doctrines which this tribunal and courts have applied to modify a filing deadline.[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] Both concepts are discussed in detail below.

A. Equitable Estoppel

As the Secretary has long-recognized, courts "generally have held that unless the employer has acted deliberately to deceive, mislead or coerce the employee into not filing a claim in a timely manner, equitable estoppel will not apply."[46] Equitable estoppel "presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant—beyond the wrongdoing upon which the claim is grounded—to prevent the plaintiff from filing a timely complaint."[47] Equitable estoppel applies when a respondent or defendant prevents "a complainant from suing in time by, for example, promising not to plead the limitations defense or by presenting fabricated evidence to negate any basis for a claim."[48]

Application of the doctrine of equitable estoppel subtracts from the limitations period the entire period during which the modifying condition is

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mixture of tolling and estoppel grounds, we believe it is useful to further elucidate these equitable concepts for clarity in this case and going forward.

[44] *Hyman v. KD Res.,* ARB No. 2009-0076, ALJ No. 2009-SOX-00020, slip op. at 6 (ARB Mar. 31, 2010); *see Edmonson v. Eagle Nat'l Bank*, 922 F.3d 535, 549-50 (4th Cir. 2019); *Phillips v. Leggett & Platt, Inc.,* 658 F.3d 452, 458 (5th Cir. 2011).

[45] *Hyman*, ARB No. 2009-0076, slip op. at 6 (quoting *Rhodes v. Guiberson Oil Tools Div.,* 927 F.2d 876, 878 (5th Cir. 1991)).

[46] *Woods v. Boeing-South Carolina,* ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 9 (ARB Dec. 10, 2012) (citing *Tracy v. Consol. Edison Co.*, No. 1989-CAA-00001, slip op. at 5 (Sec'y July 8, 1992)); *see also Droog v. Ingersoll-Rand Hussman*, ARB No. 2011-0075, ALJ No. 2011-CER-00001; slip op. at 3 n.6 (ARB Sept. 13, 2012) ("equitable estoppel occurs where an employee is aware of his [statutory] rights but does not make a timely filing due to his reasonable reliance on his employer's misleading or confusing representations or conduct.") (quoting *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 752 (1st Cir. 1988)).

[47] *Overall v. Tenn. Valley Auth.*, ARB Nos. 1998-0111, -0128, ALJ No. 1997-ERA-00053, slip op. at 39 (ARB Apr. 30, 2001) (citing *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7th Cir. 1990)).

[48] *Overall*, ARB Nos. 1998-0111, -0128, slip op. at 39.

operating to prevent a respondent from benefitting as the result of its concealment.[49] "Complainant bears the burden of justifying the application of equitable estoppel principles."[50]

B. Equitable Tolling

Equitable tolling, in contrast to equitable estoppel, refers to a set of circumstances equitably excusing the complainant's inability to meet a deadline—as previously noted, it focuses on "plaintiff's excusable ignorance of the employer's discriminatory act."[51] Equitable tolling is a rare and "an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances."[52]

In determining whether the Board should toll a statute of limitations, we have recognized several principal situations in which a moving party may be entitled to the remedy, including (1) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum;[53] (2) when the movant has in some extraordinary way been prevented from filing;[54] and (3) when the movant has some excusable ignorance of the respondent's discriminatory act.[55] Complainant bears the burden of justifying the application of equitable tolling.[56]

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[49] *Id.* at 40 (citing *Cada*, 920 F.2d at 452).

[50] *Overall*, ARB Nos. 1998-0111, -0128, slip op. at 39-40 ("[a]t least one federal circuit has articulated the burden of proof assumed by the party invoking the doctrine as follows: '(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the acts.'" (quoting *Hill v. U.S. Dep't of Lab.*, 65 F.3d 1331, 1335 (6th Cir. 1995) (internal citation omitted).

[51] *Hyman*, ARB No. 2009-0076, slip op. at 6.

[52] *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004) (citing *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990)); *see also Blanche v. United States,* 811 F.3d 953, 962 (7th Cir. 2016) (internal citation omitted).

[53] *Hyman*, ARB No. 2009-0076, slip op. 6-7 (citing *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981) (articulating situations in which equitable modification may apply under the whistleblower provisions of the Toxic Substances Control Act).

[54] *Woods,* ARB No. 2011-0067, slip op. at 8.

[55] *See Hyman*, ARB No. 09-076, slip op. at 6 (citing *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991) ("Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act.").

[56] *Carbon v. Shire Pharms.*, ARB No. 2018-0064, ALJ No. 2018-SOX-00009, slip op. at 3 (ARB May 5, 2020); *Cada,* 920 F.2d at 453.

3. Martin's Complaint to OSHA That Paragon Terminated His Employment in Retaliation for Protected Activity Was Untimely

As a self-represented complainant apparently lacking formal legal expertise, the ALJ provided Martin "with a degree of adjudicative latitude" throughout the ALJ proceedings,[57] and the Board does likewise on this petition. However, while a self-represented litigant may be held to a lesser standard than that of legal counsel in procedural matters, the burden of establishing the basis for equitable modification of a filing deadline, is no less.[58] In other words, as the complaining party, it is Complainant's burden to demonstrate why equitable principles should be applied to toll the limitations period.[59] Having thoroughly reviewed the ALJ's decision, the record below, and the parties' briefing on appeal, we agree with the ALJ that Martin failed to establish any situation that would warrant an extension of the filing deadline.

A. Estoppel

Martin contends that his late filing should be excused because Paragon lied to him about its reason for terminating his employment.[60] In the termination letter, Paragon stated that his position was being eliminated.[61] According to Martin, however, Paragon subsequently attempted to hire new custodians, and it was only after seeing an opening for his position posted on the internet that Martin thought Paragon terminated his employment for retaliatory reasons.[62] This argument fails for legal and factual reasons.

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[57] D. & O. at 2 n.2 (citing *Hyman*, ARB No. 2009-0076, slip op. at 8 (citing *Ubinger v. CAE Int'l*, ARB No. 2007-0083, ALJ No. 2007-SOX-00036, slip op. at 6 (ARB Aug. 27, 2008))).

[58] *See Flener v. H.K. Cupp, Inc.*, Case No. 1990-STA-0042, slip op. at 3 n.2 (Sec'y Oct. 10, 1991); *see also Trivedi v. Gen. Elec. and GE Healthcare*, ARB No. 2022-0026, ALJ No. 2022-SOX-00005, slip op. at 7 (ARB Aug. 24, 2022) (citations omitted); *Durham v. Tenn. Valley Auth.*, ARB No. 2006-0038, ALJ No. 2006-CAA-00001, slip op. at 4 (ARB Feb 27, 2006) (pro se complainants bear "the burden of justifying the application of equitable tolling principles") (citations omitted).

[59] *See infra* notes 50, 56, and 58; *see also Trivedi*, ARB No. 2022-0026, slip op. at 7.

[60] Comp. Br. at 4; *see also* D. & O. at 7-8.

[61] *Id.*

[62] D. & O. at 7 ("Complainant argues that Respondent actively misled him regarding the cause of action by posting his former position on the Indeed.com website after his termination, noting that Respondent posted and took down the Custodian position several times throughout the year.").

As a legal matter, the limitations period began to run once Martin received notice of the adverse employment action, i.e., upon his discharge on January 20, 2020, not when Martin realized that the reason given by the employer for the adverse action might not be the real reason.[63] As "[n]either the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint . . . [complainant's] failure to acquire evidence of . . . motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint . . . .").[64] Thus, "a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose."[65]

This precept is applicable here. Martin alleged no facts even suggesting that Paragon attempted to thwart his filing of a timely whistleblower complaint by improperly inducing, much less coercing, him into foregoing the filing, for example, promising not to plead the limitations defense.[66] Rather, Martin knew that he had engaged in protected activity and that he had been adversely affected in the terms of his employment when Paragon fired him. Martin claims that he did not know the true reason why Paragon terminated his employment until he saw Paragon's job postings for his old job position. Martin's argument, however, confuses notice with evidence.[67] To suspend a limitations period until a complainant acquired evidence of motive "would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them."[68]

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[63] *Udofot v. NASA/Goddard Space Ctr.*, ARB No. 2010-0027, ALJ No. 2009-CAA-00007, slip op. at 6 (ARB Dec. 20, 2011) ("the clock does not begin to tick when [complainant] learned of a possible motive for his termination, but rather when he received unequivocal notice of his termination.") (citing *Halpern* v. *XL Capital, Ltd.*, ARB No. 2004-00120, ALJ 2004-SOX-00054, slip op. at 5 (Aug. 31, 2005)).

[64] *Halpern*, ARB No. 2004-0120, slip op. at 5. Although *Halpern* involved a different whistleblower statute, the statutes at issue in the instant case likewise do not require a complainant to acquire motive evidence before filing a complaint.

[65] *Warner*, ARB No. 2008-0112, slip op. at 6 (citation omitted). *Accord Coppinger-Martin v. Nordstrom, Inc.,* ARB No. 2007-0067, ALJ No. 2007-SOX-00019, slip op. at 6 (ARB Sept. 25, 2009) (concealing the reason for an adverse employment action does not toll the statute of limitations governing a whistleblower claim, nor does it estop the employer from asserting timeliness as a defense).

[66] *Overall*, ARB Nos. 1998-0111, -0128, slip op. at 41.

[67] *Halpern*, ARB No. 2004-0120, slip op. at 5.

[68] *Hill*, 65 F.3d at 1338 (quoting *Pinney Dock & Transp. v. Penn Central Corp.*, 838 F.2d 1445, 1478 (6th Cir. 1988)).

Therefore, application of equitable estoppel is not warranted in this case. Accordingly, the running of the CERCLA, SWDA, and FSMA's filing periods, which began on January 20, 2020, when Paragon unequivocally informed Martin that his employment would be terminated, were not suspended under equitable estoppel principles.

B. Tolling

In the ALJ proceedings, Martin asserted that his lateness should be excused due to a number of extenuating circumstances.[69] Martin does not expressly appeal or pursue these arguments before the Board; rather, he states that it is "not true" that he reported to the wrong agency because he reported to OSHA in 2019.[70] Nevertheless, for the sake of completeness, we address the ALJ's conclusions with respect to Martin's tolling arguments.

First, Martin argued that he could not timely file his retaliation complaint because he was grieving his grandmother's death and needed to attend to her funeral and estate.[71] The ALJ correctly held that, in responding to the show cause order, Martin did not provide information indicating that he suffered a level of incapacity that rendered him unable to attend to his affairs. To the contrary, Martin asserted that "he was working three jobs and was too busy to timely file, which demonstrates that he was still able to engage in activities of daily living and manage his daily affairs."[72]

Martin next argued that he filed his whistleblower complaint in the wrong forum.[73] The record indicates that Martin filed complaints with numerous agencies about Paragon's operations prior to July 18, 2020, but the majority of his complaints were in 2019, before Paragon terminated his employment.[74] Although Martin

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69 D. & O. at 6-7.

70 PFR at 3; Comp. Br. at 2. We address that argument *infra* Part 4.

71 D. & O. at 8-9.

72 *Id.* at 9. We also note that in this time period, Martin filed two safety and health complaints with OSHA and contacted other agencies.

73 *Id.* at 10.

74 *Id.* As the ALJ found, none of Martin's complaints in other forums (in 2019 or 2020) mentioned the precise claims that he asserted under CERCLA, FSMA, and SWDA. *Id.* Additionally, even if there was an overlap in facts and elements in this or any of his other administrative claims, the overlap is not sufficient to establish a precise statutory claim. *Woods*, ARB No. 2011-0067, slip op. at 10 n.44; *Udofot*, ARB No. 2010-0027, slip op. at 6 (complete identity of the causes of action are necessary to allow courts to assess how to apply the limitations period and policy) (internal citations omitted); *Schafermeyer v. Blue Grass Army Depot*, ARB No. 2007-0082, ALJ No. 2007-CAA-00001, slip op. at 14 (Sept. 30, 2008) (tolling not available where filings in wrong forum did not contain the simple

complained about Paragon to OSHA in April and May 2020, he reported safety and health concerns, not retaliation.[75] Significantly, Martin also contradicts this argument by asserting that he "had no concrete proof that retaliation against a whistleblower had occurred because [he] did not realize it until after the 180 days."[76]

Martin also contended in the ALJ proceedings that he reviewed OSHA materials and concluded that weekends and holidays were not counted as days affecting the filing period.[77] The ALJ correctly concluded that this mistake was insufficient to warrant tolling of the filing period.[78]

Martin presented a fifth argument asserting that he was "faced with cancerphobia and medical depression, which made it difficult to file a whistleblower claim."[79] We agree with the ALJ's conclusion that Martin failed to present any evidence that these illnesses made it impossible for him to manage his day-to-day activities.[80]

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statement that complainant was entitled to relief because he engaged in protected activities under the environmental whistleblower statutes, respondent knew of these activities, and as a result, terminated his employment).

[75] D. & O. at 4-5 (referring to OSHA Complaint #157968 (April 28, 2020) and OSHA Complaint #1581824 (May 1, 2020)).

[76] *Id.* at 9.

[77] *Id.* at 11.

[78] *Id*. at 9, 11 ("Initially, the tribunal notes that this assertion undermines any other argument that Complainant was unaware of his legal rights, as he clearly had knowledge of the deadline and that he had to file within a certain amount of time. Regardless, as previously noted, ignorance of the filing period alone is insufficient to warrant equitable tolling.") (internal citations omitted); *see also Trivedi,* ARB No. 2022-0026, slip op. at 8 ("'ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground establishing entitlement.'") (quoting *Tardy v. Delta Air Lines*, ARB No. 2016-0077, ALJ No. 2015-AIR-00026, slip op. at 5 (ARB Oct. 5, 2017)); *Sch. Dist. of Allentown*, 657 F.2d at 21 (3d Cir. 1981) (same)).

[79] D. & O. at 7-9.

[80] *Id.* at 9 ("There are no medical documents to support his health assertions and while he includes pictures of his "sleeping pills," they appear to be melatonin, which is an over-the-counter pill that anyone can buy. In fact, another one of his arguments was that he was working three jobs and was too busy to timely file, which demonstrates that he was still able to engage in activities of daily living and manage his daily affairs."); s*ee also Woods*, ARB No. 2011-0067, slip op. at 11 (mental illness tolls the limitation period only if the illness in fact prevents the petitioning party from managing their affairs, understanding his legal rights and acting upon them); *Hall v. EG&G Defense Materials, Inc.*, ARB No. 1998-0076, ALJ No. 1997-SDW-00009, slip op. at 2 (ARB Sept. 30, 1998) (same).

4. The Board Declines to Consider Martin's New Claim That He Complained to OSHA in August 2019 About a Retaliatory "Summary Write Up"

In his response to the ALJ's August 3, 2021 Order to Refile Response to Order to Show Cause, Martin also asserted that Paragon reduced his hours in July 2019.[81] In his Petition for Review and Opening Brief before the Board, however, Martin does not address the ALJ's decision regarding the hours reduction; Martin instead claims that Paragon retaliated against him in August 2019 by issuing him a "summary write up."[82] He further claims that:

> I called OSHA around August 2019 and reported retaliation against a whistleblower immediately . . . The calls that I made to the OSHA whistleblower hotline were never reviewed. They prove my case. The calls should be on a recorded line and they will prove that I did not untimely file, but was blocked by Paragon.[83]

Thus, Martin's argument before the Board raises three new allegations for the first time: (1) he suffered a different type of adverse action in 2019 (a summary write up);[84] (2) he reported the summary write up as retaliation to OSHA in August 2019 (as opposed to reporting safety and health concerns); and (3) Paragon blocked him from filing a retaliation claim with OSHA by refusing to provide him a record of the summary write up.[85]

Martin does not cite to any evidence in the record below supporting these assertions, and they were not discussed by the ALJ.[86] Instead, Martin contends that his mobile carrier refused to provide him with documentation proving that he made the phone calls to OSHA, and further argues that OSHA did not search their phone

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[81] Comp. Response to OSC at 1, 2. Martin alleged that he complained to Paragon about his reduced hours, *id.*, but as the ALJ correctly held, complaining to Paragon's management about a reduction in hours would not toll the deadline for filing a claim with OSHA. D. & O. at 10 (citing *Woods*, ARB No. 2011-0067, slip op at 9).

[82] Comp. Br. at 1; PFR at 1.

[83] Comp. Br. at 1-2.

[84] We need not decide whether a summary write up is an adverse action because we decline to consider this new claim.

[85] Comp. Initial Br. at 2.

[86] In his Response to the ALJ's Order to Show Cause, Martin did not claim he reported any form of *retaliation* to OSHA; rather, he claimed that he reported "illegal activity." Comp. Response to OSC at 3. Hence, the ALJ found that Martin's reduction in hours claim was untimely. D. & O. at 7 n.6.

records for his calls, or issue a court order or subpoena to obtain the documentation from his phone carrier to support his claim.[87]

The Board, like the federal courts, does not generally consider arguments raised for the first time on appeal, nor evidence submitted for the first time on appeal,[88] and we decline to do so here.

Martin's new argument is also rife with factual inconsistencies. As a threshold matter, Martin does not articulate any action by Paragon that constitutes "blocking" an OSHA complaint—he does not explain why Paragon's refusal to provide him with the document he believed he needed affirmatively prevented him from filing a retaliation complaint.[89] To the extent Martin argues that he needed a copy of the summary write up as proof of Paragon's retaliatory motivations before he could file a complaint with OSHA, his argument fails. The fact that Martin may not have had every document he believed he needed to prove his case does not mean that he lacked sufficient information to at least be on notice of, and to file an OSHA complaint concerning, his claim.[90] Indeed, if Martin was able to call OSHA to complain about retaliation in August 2019, as he now alleges, he was not in fact "blocked" by Paragon from doing so.

Moreover, Martin's assertion that he tried to present a whistleblower claim to OSHA in August 2019 contradicts his other assertions that he was unaware that he had been the subject of retaliation until June 2020:

> (1) "I didn't even realize that Paragon had retaliated months prior while I was still employed because they gave me another reason why my hours were reduced . . . ."[91]

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87 Comp. Br. at 3; PFR at 3.

88 *Bauche v. Masimo Corp.*, ARB No. 2022-0035, ALJ No. 2022-SOX-00010, slip op. at 8 n.35 (ARB Sep. 27, 2022) ("'The Board does not generally consider arguments raised for the first time on appeal . . . nor evidence submitted for the first time on appeal.'" (quoting *Phillips v. Norfolk S. Ry. Co.*, ARB No. 2015-0059, ALJ No. 2014-FRS-00133, slip op. at 3 n.5 (ARB Aug. 11, 2015) (internal citations omitted))); *see Simko v. U.S. Steel Corp.*, 992 F.3d 198, 205 (3d Cir. 2021) ("It is well-established that arguments raised for the first time on appeal are not properly preserved for appellate review."). Martin has not identified any applicable exception to this general rule.

89 Martin's barebones statement that Paragon "blocked" his filing with OSHA is also insufficient to meet the requirements for equitable estoppel. As explained above, estoppel applies when a respondent has acted affirmatively to prevent a complainant from suing in time. *See supra* Section 3.A.

90 *See Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).

91 Response to OSC at 2.

(2) "[U]nbeknownst to me at the time, Paragon had actually retaliated by first reducing the hours I worked."[92]
(3) "I did not know this was retaliation until it was after the 30 and 180 days."[93]
(4) "Paragon deceived me . . . caused me to miss the 180 day time period, as I could have called OSHA back with further proof of retaliation . . . even though Paragon refused to hand over the summary write up and discipline form which proved I had reported in compliance within the allotted time period."
(5) "I spoke to Chris Robinson and never said I was a whistleblower."[94]

For these reasons, we reject Martin's new assertion on appeal that he reported to OSHA in August 2019 that Paragon issued a retaliatory summary write. Moreover, there is no factual basis to equitably toll or modify the limitations period in the circumstances alleged by Complainant.

For all of the reasons cited, we conclude that Martin filed an untimely complaint and failed to establish any situation that would warrant an extension of the filing deadline.

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92 *Id.*

93 *Id.* at 6.

94 Comp. PFR at 4; s*ee Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006) ("[D]ismissal . . . on the basis of a limitations defense may be appropriate when the plaintiff effectively pleads herself out of court by alleging facts that are sufficient to establish the defense." (citation omitted)); *cf. Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) ("When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." (internal quotations and citation omitted)).

CONCLUSION[95]

Accordingly, we **AFFIRM** the ALJ's Decision and Order dismissing the complaint as untimely filed.

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

IVEY S. WARREN
Administrative Appeals Judge

NED I. MILTENBERG
Administrative Appeals Judge

[95] In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.