



IN THE MATTER OF:

DR. ANNETTE SMITH,

ARB CASE NO. 2022-0065

COMPLAINANT,

ALJ CASE NO. 2020-ACA-00004

v.

DATE: January 13, 2023

**FRANCISCAN PHYSICIAN
NETWORK,**

RESPONDENT.

Appearances:

For the Complainant:

Dr. Annette Smith; *pro se*; Indio, California

For the Respondent:

Elizabeth M. Roberson, Esq., and Shelley M. Jackson, Esq.; *Krieg Devault LLP*; Carmel, Indiana

**Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL
and PUST, Administrative Appeals Judges**

**ORDER DENYING MOTION TO DISMISS
AND REESTABLISHING BRIEFING SCHEDULE**

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the employee protection provisions of the Patient Protection and Affordable Care Act (ACA).¹ On September 21, 2022, Complainant Dr. Annette Smith (Complainant) petitioned the Administrative Review Board (ARB or the Board) for review of an Administrative Law Judge's (ALJ) Order

¹ 29 U.S.C. § 218c, as implemented by 29 C.F.R. Part 1984 (2022).

Granting Respondent's Motion for Summary Decision (D. & O.). On October 5, 2022, Respondent Franciscan Physician Network (Respondent) filed a Motion to Dismiss Complainant's Untimely Appeal (Motion), arguing that Complainant's appeal should be dismissed because it was not filed with the ARB by the applicable deadline. For the reasons set forth below, we deny Respondent's Motion and reestablish the Briefing Schedule.

BACKGROUND

On April 22, 2020, Complainant filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration alleging that Respondent violated the ACA by unlawfully terminating her employment in retaliation for engaging in protected activity. After the case was assigned to an ALJ, Respondent moved for summary decision, arguing, among other things, that Complainant did not engage in activity protected by the ACA. The ALJ agreed with Respondent and issued the D. & O. on September 6, 2022, dismissing Complainant's claim.

The ACA's implementing regulations state that any party desiring to seek review of an ALJ's decision must file a petition for review with the Board within 14 days of the decision's issuance.² Additionally, the ARB's Rules of Practice and Procedure state that electronic filings must be submitted to the ARB by 11:59:59 p.m. Eastern Time on the due date to be considered timely.³ Therefore, Complainant's appeal to the ARB was due by 11:59:59 p.m. Eastern Time on September 20, 2022.

Complainant filed a Petition for Review (Petition) of the ALJ's D. & O. using the ARB's Electronic Filing System (EFS) at 1:47 a.m. Eastern Time on September 21, 2022.⁴ Thus, by rule, Complainant's Petition was filed just shy of two hours after

² 29 C.F.R. § 1984.110(a).

³ 29 C.F.R. § 26.2(b)(2)(i).

⁴ Complainant filed her Petition with the Board pro se. Complainant was represented by Kimberly D. Jeselskis, Esq., and MacKenzie A. Watson, Esq., of the law firm Jeselskis Brinkerhoff and Joseph, LLC, before the ALJ, but states that her counsel "discontinued" their representation of her for this appeal. Complainant's counsel filed a Motion to Withdraw Appearance with the Board on September 26, 2022, stating that they "advised [Complainant] that they would not represent her in any appeal of the" ALJ's decision and requesting permission to withdraw their appearance on behalf of Complainant. There being no objection, we grant the Motion to Withdraw Appearance.

her appeal deadline. Complainant states that she filed her Petition from her home in California. Therefore, accounting for the time zone difference, Complainant filed her Petition at 10:47 p.m. local (Pacific) time on September 20, 2022.

On October 5, 2022, Respondent filed its Motion urging the Board to dismiss Complainant's Petition because it was filed after the appeal deadline. The Board issued an Order to Show Cause on October 12, 2022, directing Complainant to show cause why her appeal should not be dismissed as untimely. Complainant responded to the Order to Show Cause on October 24, 2022. Complainant stated that her "lawyers had discontinued but [she] didn't know this until 5 days before the appeal was due." She also stated that "[l]iving here in California, I just assumed that the east coast gave the west coast 'grace' on being 3 hours behind them." Respondent filed a Response to Complainant's Petition to Show Cause, arguing that Complainant's explanations were insufficient to excuse her late filing.

DISCUSSION

Although Complainant's Petition was untimely, the Board's appeal deadlines are not jurisdictional and are, therefore, subject to equitable modification.⁵ Accordingly, the Board may accept an untimely appeal in appropriate circumstances.⁶ Generally, the Board has identified four circumstances in which tolling may be appropriate:

(1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has [mistakenly] done so in the wrong forum[;] and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁷

⁵ *Mazenko v. Pegasus Aircraft Mgmt., LLC*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 3 (ARB Sept. 7, 2021).

⁶ *Katz v. Underwriters Lab'ys*, ARB No. 2021-0006, ALJ No. 2018-SOX-00030, slip op. at 4 (ARB Nov. 30, 2020) (citation omitted).

⁷ *Mazenko*, ARB No. 2021-0032, slip op. at 3 (quoting *Vicuña v. Westfourth Architecture, P.C.*, ARB No. 2015-0034, ALJ No. 2012-LCA-00023, slip op. at 3 (ARB Apr. 6, 2015)).

Critically, the Board has repeatedly stated that the foregoing circumstances are not exclusive, and a complainant's inability to satisfy one is not necessarily fatal for her untimely appeal.⁸ The party requesting tolling bears the burden of establishing circumstances that justify modifying the appeal deadline.⁹

The particular circumstances presented in this case justify equitably tolling the appeal deadline and accepting Complainant's untimely Petition. As stated above, Complainant filed her Petition before midnight, local (Pacific) time, on the day her appeal was due. However, she failed to account for the time zone difference between her residence in California and the ARB's office in Washington, D.C., and the Board's particular Eastern Time filing requirement. As a result, she missed the appeal deadline by just one hour and 47 minutes.

Although Complainant's appeal was technically late under the ARB's filing rules, her error was reasonable and even to be expected in the circumstances of this case. We would not expect a pro se litigant like Complainant—especially one who, until just days before, had been represented by counsel and who, therefore, likely had not previously had to apprise herself of the particularities of practice and procedure before the ALJ and the ARB—to intuit that she had to account for a time zone difference when filing her appeal with the Board. Notably, the ACA's implementing regulations and the ALJ's Notice of Appeal Rights, which was supplied with the D. & O., stated only that Complainant had to file her appeal within 14 days of the date of the ALJ's decision. The regulations and the Notice of Appeal Rights did not cite or refer to the ARB's time zone rule, specifically, or the ARB's Rules of Practice and Procedure, generally, or otherwise indicate that Complainant had to account for her time zone to comply with the 14-day deadline.¹⁰

⁸ *E.g., id.* (citation omitted); *Judy v. Covenant Transp., Inc.*, ARB No. 2021-0015, ALJ No. 2019-STA-00054, slip op. at 4 (ARB Nov. 8, 2021) (citation omitted); *Sparre v. Norfolk S. Ry. Co.*, ARB No. 2018-0022, ALJ No. 2016-FRS-00038, slip op. at 3 (ARB May 31, 2018) (citation omitted).

⁹ *Mazenko*, ARB No. 2021-0032, slip op. at 3.

¹⁰ 29 C.F.R. § 1984.110(a); D. & O. at 7. ALJs are not required by statute or regulation to give litigants notice of their appeal rights. *Swinney v. Fluor Corp.*, ARB No. 2015-0044, ALJ No. 2014-SOX-00041, slip op. at 3 (ARB June 11, 2015). Even so, to the ALJ's credit in this case, he provided a Notice of Appeal Rights, which is a tremendous aid to litigants, especially litigants who are not represented by counsel. However, in assessing the circumstances of Complainant's tardiness, we cannot ignore that the Notice of Appeal

Although the ARB's Rules of Practice and Procedure are available on the Board's website and through other sources, we understand, in the particular circumstances of this case, why Complainant missed the deadline.¹¹

This is not a case where Complainant unreasonably delayed filing by months, weeks, or even days, or otherwise failed to act diligently to preserve her appeal rights. Instead, Complainant understandably, albeit erroneously, narrowly missed her appeal deadline because of a time zone difference. In the unique circumstances of this case, we conclude that equitable tolling is appropriate.

CONCLUSION

For the reasons set forth above, we **DENY** Respondent's Motion, **ACCEPT** Complainant's Petition, and **REESTABLISH** the Briefing Schedule as set forth below. In addition, we **GRANT** Complainant's counsel's Motion to Withdraw Appearance. To ensure compliance with future deadlines and orders, Complainant is directed to familiarize herself with the ARB's Rules of Practice and Procedure, 29 C.F.R. Part 26, available at <https://www.dol.gov/agencies/arb/resources/rules>. Complainant's failure to comply with the Board's Rules in the future may result in sanctions, including dismissal of her appeal.

BRIEFING SCHEDULE

OPENING BRIEF: Within twenty-eight (28) calendar days of the issuance of this Order, Complainant must file with the Board a supporting legal brief of points and authorities not to exceed fifty (50) double-spaced pages.¹²

RESPONSE BRIEF: Within twenty-eight (28) calendar days from the date of service of the Complainant's principal legal brief, Respondent must file with the

Rights given to Complainant omitted any reference or citation to the ARB's Rules of Practice and Procedure, including the Eastern Time filing requirement.

¹¹ *But cf. Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020) (stating that although pro se litigants are afforded certain latitudes, they are "not excused from the rules of practice and procedure . . . merely because of [their] pro se status.").

¹² The page limitations set forth here do not include pages such as cover pages, tables of contents, tables of citations, signature blocks, or certificates of service. *See* FED. R. APP. P. 32(f).

Board any response brief in opposition to the Complainant's brief not to exceed fifty (50) double-spaced pages.

REPLY BRIEF: Within fourteen (14) calendar days from the date of the service of a legal brief in opposition to the Complainant's opening brief, the Complainant may file with the Board a reply brief not to exceed twenty (20) double-spaced pages.

In all other respects, the Board's September 22, 2022, Notice of Appeal and Order Establishing Briefing Schedule remains in effect.

SO ORDERED.



SUSAN HARTHILL
Chief Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge



TAMMY PUST
Administrative Appeals Judge