

U.S. Department of Labor

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



IN THE MATTER OF:

STIRLING MAZENKO,

ARB CASE NO. 2021-0032

COMPLAINANT,

ALJ CASE NO. 2019-AIR-00001

v.

DATE: September 7, 2021

**PEGASUS AIRCRAFT
MANAGEMENT, LLC;
HENRY AIR II TRUST; AND
HENRY AIR II, LLC**

RESPONDENTS.

Appearances:

For the Complainant:

**Stephen L. Brischetto, Esq.; *Law Office of Stephen L. Brischetto,*
Portland, Oregon**

For the Respondents:

Douglas L. Stuart, Esq.; *Aerlex Law Group;* Los Angeles, California

**Before: James D. McGinley, *Chief Administrative Appeals Judge,* and
Stephen M. Godek, *Administrative Appeals Judge***

**ORDER ACCEPTING COMPLAINANT'S APPEAL
AND SETTING BRIEFING SCHEDULE**

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ Stirling Mazenko (Complainant) filed a complaint alleging that Respondent terminated his employment in retaliation for Complainant's protected activity. On October 26,

¹ 49 U.S.C. § 42121 (2020). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2020).

2020, the ALJ issued a Decision and Order Denying Relief (D. & O.). On April 23, 2021, Complainant filed his Petition for Review. The issue before the Administrative Review Board (ARB or Board) is whether Complainant showed good cause for his failure to timely file his Petition for Review with the Board. We conclude that Complainant has shown good cause.

BACKGROUND AND PROCEDURAL HISTORY

On October 26, 2020, the ALJ issued a D. & O. In an AIR 21 case, a petition for review of an ALJ's decision must be filed "within ten business days of the date of the decision of the" ALJ to be effective.² On April 23, 2021, Complainant filed an untimely Petition for Review. Complainant and his counsel (Brischetto) claim that they never received the D. & O. Brischetto further claims he only discovered the D. & O. through independent research on April 22, 2021. On May 17, 2021, the Board issued an Order to Show Cause, ordering Complainant to show cause why the Board should not dismiss his appeal for failing to timely file a Petition for Review. On May 24, 2021, the Board issued an Order holding the case in abeyance pending resolution of the Board's Show Cause Order.

Prior to the COVID-19 pandemic, the ALJ served documents on the parties via regular mail and an e-mail from Broome.donna.m@dol.gov.³ However, due to the pandemic, the ALJ changed the form of service to e-mail alone, discontinuing service via regular mail. On May 7, 2020, the ALJ e-mailed Brischetto to notify him of the change in service, but Brischetto claims he did not see the e-mail because the notice came from a new e-mail address, OALJSQLMail@dol.gov. Similarly, Brischetto claims he did not receive the October 26, 2020 e-mail serving the D. & O., even though the ALJ's case tracking system indicates that the ALJ electronically served Brischetto on October 26, 2020.⁴

The parties have responded to the Order to Show Cause with briefs and declarations in support of their responses.

² 29 C.F.R. § 1979.110(a).

³ Except on December 13, 2019, when the ALJ served the parties solely via regular mail, not via both regular mail and an e-mail from Broome.donna.m@dol.gov.

⁴ Brischetto eventually found the May 7, 2020, e-mail notice on his computer, but he never found the October 26, 2020, e-mail serving the D. & O. It is unclear why he could not find the October 26, 2020, e-mail serving the D. & O.

JURISDICTION

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.⁵

DISCUSSION

Complainant argues that extraordinary circumstances require equitable tolling of the limitations period. In particular, Complainant argues that the ALJ changed the form of service without adequately notifying Complainant, thereby preventing Complainant from receiving the D. & O. and the opportunity to timely file a Petition for Review. For the reasons discussed below, we agree.⁶

The limitations period is not jurisdictional and therefore is subject to equitable tolling principles. The ARB allows for equitable tolling in four situations:

(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

The party requesting tolling “bears the burden of establishing the applicability of the equitable tolling principles.”⁸ Though the “inability to satisfy one of these elements is not necessarily fatal to” a party's claim, “the courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise *due diligence* in preserving his legal rights.”⁹

Complainant argues equitable tolling is appropriate because the ALJ changed the form of service without adequately notifying Complainant, which

⁵ 29 C.F.R. § 1979.110(a); *see also* 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. 13186 (Mar. 6, 2020).

⁶ We need not address the other arguments raised by Complainant because we conclude that the circumstances justify equitable tolling of the limitations period.

⁷ *Vicuna v. Westfourth Architecture, et al.*, ARB No. 2015-0034, ALJ No. 2012-LCA-00023, slip op. at 3 (ARB Apr. 6, 2015).

⁸ *Id.*

⁹ *Lubary v. El Floridita d/b/a Buenos Ayres Bar & Grill*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 6 (ARB April 30, 2012) (emphasis added).

prevented Complainant from timely filing a Petition for Review. Prior to the pandemic, the ALJ served Complainant via regular mail and an e-mail from Broome.donna.m@dol.gov. However, due to the COVID-19 pandemic, the ALJ changed the form of service to e-mail alone, discontinuing service via regular mail. On May 7, 2020, the ALJ e-mailed Brischetto to notify him of the change in service, but Brischetto claims he did not discover the e-mail because the notice came from an e-mail address that was different from the one that the ALJ had previously used to notify the parties (OALJSQMail@dol.gov). Brischetto contends that he was not monitoring for e-mails from unknown addresses, and he frequently deletes e-mails from unfamiliar e-mail addresses due to the risk of scams, viruses, and malware.

We agree with Complainant that the circumstances in this case justify equitable tolling. Prior to the pandemic, the ALJ had consistently served documents through regular mail or via Broome.donna.m@dol.gov, which created a reasonable expectation for Complainant to receive future service in the same manner, at least until notified otherwise. However, the ALJ did not provide Complainant with adequate notice of the change in service. Instead, the ALJ notified Brischetto of the change in service via a new, unknown e-mail address. Brischetto, therefore, did not recognize the email containing the D. & O. until he discovered it at a later point in time.

In addition, if Brischetto had received adequate notice of the change in service, he could have properly monitored for service of the D. & O. and timely filed the petition for review. Indeed, when Brischetto discovered the D. & O. on April 22, 2021, we find that he exercised due diligence in protecting Complainant's rights by promptly filing the petition for review the next day, on April 23, 2021.

Finally, when the ALJ notified Brischetto of the change in service, the ALJ could have requested that Brischetto respond and confirm receipt of the notice, thereby ensuring that Brischetto understood the service procedures had changed. However, the ALJ's notice did not require Brischetto to respond and confirm receipt. In fact, the email notice at issue explicitly stated that it was an "automated email[.]" and "**DO NOT RESPOND TO THIS EMAIL.**" The ALJ, therefore, never received an acknowledgment of receipt of the email from the Complainant, and did not know whether the Complainant had knowledge of the change in service. Under these circumstances, it is not reasonable to infer that the Complainant had in fact been properly served.

Upon consideration of the parties' briefs, declarations, and other materials in response to the Order to Show Cause, the Board holds that the circumstances justify equitable tolling of the limitations period in this case because inadequate notice prevented Complainant from filing a timely Petition for Review. Consequently, we accept Complainant's Petition for Review.

Moreover, by accepting the Complainant's Petition for Review, the case is no longer held in abeyance, and the Board has set a Briefing Schedule for the parties, as set forth below.

CONCLUSION

This matter is **ACCEPTED** for review.

BRIEFING SCHEDULE

This is the briefing schedule for this case:

OPENING BRIEF: Within twenty-eight (28) days of the issuance of this Order, the petitioner must file with the Board a supporting legal brief of points and authorities.

RESPONSE BRIEF: The opposing party must file any response in opposition to the supporting legal brief with the Board within twenty-eight (28) calendar days from the date of service of the petitioner's principal legal brief.

REPLY BRIEF: Within fourteen (14) calendar days of the service of a legal brief in opposition to the petitioner's opening brief, the petitioner may file a reply brief.

ALL BRIEFS: No further briefs may be filed without the permission of the Board. Except as otherwise specified in this Order, the form of all briefs and other filings shall comply with Federal Rule of Appellate Procedure (FRAP) 32(a). The content of all briefs must comply to the extent practicable with FRAP 28.

OTHER FILINGS

No appendix may be filed without permission of the Board. Any appendix must be efiled (electronically filed) unless good cause is shown by a pro se party why filing an electronic version is impossible or impracticable.

All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with FRAP 27(d).

OTHER MATTERS

All pleadings should include the ARB case number as it appears in this Order.

The Administrative Review Board encourages the parties to consider the alternative dispute resolution (ADR) program administered by the Office of Administrative Law Judges (OALJ). The OALJ offers two types of court-sponsored alternative dispute resolution: settlement judges and mediation services. If all parties agree to use the OALJ ADR program, they should jointly notify the Board of their intention, and the Chair of the Board will refer the matter to the Chief Administrative Law Judge for the limited purpose of appointing a mediator or settlement judge (other than a judge previously involved in the case). Unless the Chief Administrative Law Judge directs otherwise, settlement discussions must be completed within 56 days of the date of referral or the case will be automatically returned to the Board for the issuance of a new briefing schedule on the original grant of the petition for review. If the matter is settled, any agreement or consent findings will be reviewed and approved by the Board.

SO ORDERED.