U.S. Department of Labor

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

IN THE MATTER OF:

SHAHROOZ MARK JAHANBIN,

COMPLAINANT,

v.

THE BOEING COMPANY,

RESPONDENT.

ARB CASE NO. 2024-0035

ALJ CASE NO. 2023-AIR-00023
ALJ EVAN H. NORDBY

DATE: March 13, 2025

Appearances:

For the Complainant:
Shahrooz Mark Jahanbin; *Pro Se*; Irvine, California

For the Respondent:
Caleb F. Hand, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; Memphis, Tennessee; David L. Schenberg, Esq.; *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*; St. Louis, Missouri

Before THOMPSON and ROLFE, Administrative Appeals Judges

DECISION AND ORDER

PER CURIAM:

This case arises under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).[1] Complainant Shahrooz Mark Jahanbin filed a whistleblower complaint with the U.S. Department of Labor's Occupational Safety and Health Administration

[1] 49 U.S.C. § 42121, as implemented by the regulations at 29 C.F.R. Part 1979 (2024).

(OSHA) alleging that Respondent The Boeing Company unlawfully retaliated against him for engaging in protected activity.[2] OSHA dismissed the complaint.[3] Complainant objected to OSHA's determination and the case was assigned to an Administrative Law Judge (ALJ).[4] On April 1, 2024, the ALJ issued an Order Granting Summary Decision (Order) as untimely.[5] Complainant petitioned the Administrative Review Board (Board) for review of the ALJ's Order. For the following reasons, we affirm.

BACKGROUND

Complainant began working for Respondent in October 2009 as an aircraft mechanic and later as an engineer.[6] On December 7, 2020, Respondent suspended Complainant, and on January 28, 2021, Respondent terminated his employment and designated him as "ineligible for rehire."[7] Later in 2021, a Boeing contractor hired Complainant.[8] On December 14, 2021, however, the Boeing contractor discovered Complainant's "ineligible for rehire" status, confiscated Complainant's security badge, and ended his employment contract.[9] Complainant reapplied in January 2022, but was not hired.[10]

On February 9, 2022, 377 days after Respondent terminated Complainant's employment, Complainant filed an AIR21 whistleblower complaint with OSHA.[11] This complaint only alleged that his suspension in December 2020 was unlawful retaliation in violation of AIR21.[12] On September 7, 2023, Complainant filed a

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2 Order Granting Summary Decision (Order) at 2.

3 *Id.*

4 *Id.*

5 *Id.* at 1.

6 *Id.* at 2.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 OSHA Determination Letter at 1.

second complaint with OSHA alleging a broader set of AIR21-related violations.[13] On September 15, 2023, OSHA dismissed the complaint as untimely.[14]

Complainant requested a hearing before the Office of Administrative Law Judges.[15] On March 7, 2024, Respondent filed a Motion for Summary Decision.[16] On April 1, 2024, the ALJ issued an Order Granting Summary Decision, finding Complainant's OSHA complaint untimely.[17] An AIR21 whistleblower complaint must be filed with OSHA within 90 days after an alleged violation occurred.[18] The ALJ found that Complainant filed his initial OSHA complaint 377 days after Respondent terminated his employment with an "ineligible to rehire" status.[19] The ALJ found that the limitations period began on January 28, 2021, when Respondent first terminated Complainant's employment, making his complaint untimely, and concluding that no equitable modification factors applied.[20]

Complainant filed a petition for review before the Board on April 4, 2024. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated the Board the authority to hear appeals from ALJ decisions and issue agency decisions under the AIR21.[21] The Board

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13 Order at 2. Specifically, Complainant asserted that Respondent unlawfully confiscated his security badge and ended his employment contract on December 14, 2021, and refused to re-hire him on or around January 27, 2022, in retaliation for his whistleblower activity. OSHA Determination Letter at 1.

14 Order at 2.

15 *Id.* at 2.

16 *Id.* at 1.

17 *Id.*

18 *Id.* at 4 (citing 29 C.F.R. § 1979.103(d)).

19 *Id.*

20 *Id.* at 4-5.

21 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); *see also* 29 C.F.R. § 1979.110.

reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies.[22] This includes pre-hearing dismissals based on timeliness.[23]

DISCUSSION

Summary decision is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law."[24] In considering a motion for summary decision, the Board views the evidence, and makes all reasonable inferences, in the light most favorable to the non-moving party.[25] If the moving party demonstrates an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[26] The non-moving party may not rest upon mere allegations, speculation, or denials, but must instead set forth specific facts on each issue upon which the non-moving party would bear the ultimate burden of proof.[27] If the non-moving party fails to show an essential element of their case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element necessarily renders all other facts immaterial.[28]

A complainant pursuing a whistleblower retaliation claim under AIR21, must meet certain deadlines.[29] These deadlines apply whether a complainant is represented by counsel or is proceeding pro se.[30] Complainants are responsible for

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[22] *Xanthopoulos v. Mercer Inv. Consulting*, ARB No. 2022-0032, ALJ No. 2021-SOX-00017, slip op. at 10 (ARB Sept. 28, 2023) (citation omitted).

[23] *Lugg v. Lear Corp.*, ARB No. 2022-0008, ALJ No. 2021-SOX-00022, slip op. at 3 (ARB May 19, 2022) (citation omitted).

[24] 29 C.F.R. § 18.72(a).

[25] *Feldman v. Risk Placement Servs., Inc.*, ARB No. 2020-0068, ALJ No. 2019-SOX-00052, slip op. at 4 (ARB Sept. 29, 2021) (citation omitted).

[26] *Id.* (citation omitted).

[27] *Id.* (citation omitted).

[28] *Id.* at 4-5 (citation omitted).

[29] 49 U.S.C. § 42121(b)(1).

[30] *Mehrotra v. Gen. Elec. Co.*, ARB No. 2022-0060, ALJ No. 2017-SOX-00014, slip op. at 4 (ARB Sept. 21, 2023); *see also Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020) (citation omitted) (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."); *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

determining which statute, and which deadline, apply to their case and for meeting that deadline.[31] Employees alleging employer retaliation in violation of AIR21 must file their complaints with within 90 days of the alleged retaliatory act.[32]

The Board has found that the statutes of limitation in whistleblower cases begin to run on the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.[33] The claim accrues on "[t]he date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt."[34] The Board may modify a filing deadline under equitable tolling or equitable estoppel principles.[35]

Here, the ALJ determined that it was undisputed that Complainant's complaints were untimely and concluded that none of the equitable tolling factors apply.[36] We agree. Respondent suspended Complainant on December 7, 2020, and terminated his employment with an "ineligible for rehire" status on January 28, 2021.[37] Applying the 90-day period for filing, Complainant was required to file a complaint with OSHA no later than April 28, 2021.[38] Complainant did not file his complaint until 377 days after he was terminated.[39] Neither party has disputed this.

Complainant contends that the deadline should be extended based on the continuing violations doctrine, equitable estoppel principles, and equitable tolling principles. For the reasons that follow, however, we affirm the ALJ's finding that the limitations period began on January 28, 2021, when Respondent terminated Complainant's employment with an ineligible for rehire status.

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sanctions . . . when they fail to comply with the . . . procedures in the administrative process . . . .'") (citation omitted).

31 *Mehrotra*, ARB No. 2022-0060, slip op. at 4.

32 49 U.S.C. § 42121(b)(1).

33 *Mehrotra*, ARB No. 2022-0060, slip op. at 5 (quoting *Bauche v. Masimo Corp. (Bauche I)*, ARB No. 2022-0035, ALJ No. 2022-SOX-00010, slip op. at 7 (ARB Sept. 27, 2022)).

34 *Mehrotra*, ARB No. 2022-0060, slip op. at 5 (citation omitted).

35 *See Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 8-9 (ARB June 8, 2023) (citations omitted).

36 Order at 4.

37 *Id.*

38 *Id.*

39 *Id.*

1. Continuing Violation

The ALJ recognized that Complainant may point to his employment termination from the Boeing contractor in December 2021 or the contractor's failure to rehire him in January 2022 as additional adverse actions that occurred within 90 days of filing his OSHA complaint.[40] The ALJ found, however, that Complainant could not revive a stale claim by reapplying and being denied employment as a follow-on effect of the original termination.[41]

Complainant contends that the ALJ failed to consider the ongoing retaliation he endured beyond his initial employment termination.[42] He asserts that being re-hired only to be terminated again evidences a pattern of ongoing retaliation, making his complaint timely.[43]

The continuing violations doctrine may allow an employee who ordinarily would be unable to recover damages for discrete acts of discrimination falling outside the limitations period to avoid that bar if those acts are shown to be part of a pattern of discrimination anchored by acts that occurred within the limitations period.[44]

But it is well established that an employer simply refusing to rehire a complainant who was designated as "ineligible for rehire" when terminated does not inherently amount to a continuing violation because the focus remains on the discriminatory nature of the original termination for timeliness purposes.[45] As such,

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40 *Id.*

41 *Id.*

42 Complainant's (Comp.) Brief (Br.) at 8.

43 *Id.*

44 *Trivedi v. Gen. Elec.*, ARB No. 2022-0026, ALJ No. 2022-SOX-00005, slip op. at 9 (ARB Aug. 24, 2022) (citation omitted).

45 *See Johnsen v. Houston Nana, Inc. JV*, ARB No. 2000-0064, ALJ No. 1999-TSC-00004, slip op. at 5 (ARB Jan. 27, 2003) (refusing to rehire an employee who was designated as "ineligible for rehire" does not amount to a continuing violation). A complainant may not revive a stale claim by reapplying and being denied employment as a follow-on effect of the original termination. To allow an employee who unsuccessfully sought reinstatement following a discharge to claim a continuing violation would undermine the purpose of the 90-day period to file a claim. *See Collins v. United Air Lines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975) ("A discharged employee who seeks to be reinstated is really litigating the unfairness of his original discharge because only if the original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer.").

the confiscation of his badge, termination of his contract in December 2021, and refusal to rehire him do not amount to continuing violations of Complainant's December 2020 suspension and January 2021 employment termination. Therefore, we conclude that Complainant has not demonstrated a pattern of ongoing retaliation that would make his complaint timely.

2. Equitable Estoppel

The ALJ found no evidence established that Respondent misled Complainant, and noted that Complainant, when represented by counsel, pursued a state law discrimination complaint arising from his termination in a complaint filed in state court on October 3, 2022.[46] Complainant contends that the ALJ erred and that principles of equitable estoppel apply.

Equitable estoppel applies where the employer has acted deliberately to deceive, mislead, or coerce the employee into not filing a claim in a timely manner.[47] 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."[48] 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."[49]

Complainant contends that Respondent orchestrated an FBI raid to seize evidence that he could have used to support his AIR21 complaint, which prevented him from timely filing his complaint.[50] Delays in gathering documentation, however, are insufficient to equitably estop or toll the deadline to file because documentation is not necessary to file an OSHA complaint.[51] Thus, Complainant's inability to access documentation does not equitably estop or toll the deadline.

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46 Order at 5.

47 *Martin*, ARB No. 2022-0058, slip op. at 8 (citing *Droog v. Ingersoll-Rand Hussman*, ARB No. 2011-0075, ALJ No. 2011-CER-00001, slip op. at 3 n.6 (ARB Sept. 13, 2012) ("[E]quitable 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.") (citation omitted)).

48 *Martin*, ARB No. 2022-0058, slip op. at 8 (citation omitted).

49 *Id.* (citation omitted).

50 Comp. Br. at 11, 24.

51 *See Lugg*, ARB No. 2022-0008, slip op. at 3, 5-7 (affirming the ALJ's finding that an inability to obtain documentation prior to filing an OSHA complaint is not an extraordinary circumstance).

Complainant next contends that Respondent deliberately misled him, which prevented him from timely filing his complaint.[52] He asserts that Respondent and the Department of Justice entered into a Deferred Prosecution Agreement (DPA) in late 2020, and that this made it difficult to follow OSHA procedural policies and prevented him from timely asserting his claim.[53] Complainant also contends that Respondent initiated an FBI raid on Complainant to seize documents, and that this "effectively misled [him] about the nature and timing of his legal rights and obligations," which prevented him from timely filing his complaint.[54]

We are not persuaded by Complainant's arguments. "To establish duress sufficient to toll the running of the limitations period, [a complainant] must do more than simply allege a subjective fear that the Respondents might retaliate against him. Instead, he must show some act or threat by the Respondents that precluded him from exercising his free will and judgment and prevented him from exercising his legal rights."[55]

Complainant's argument that the DPA kept him from timely asserting his claim is vague and he does not articulate how the DPA between Respondent and federal prosecutors kept him specifically from filing his claim.[56] Complainant has also not demonstrated any other instance in which Respondent misled him and prevented him from filing a complaint with OSHA aside from his general assertion, nor has he cited to evidence to support his claim.[57]

On the contrary, Complainant litigated against Respondent in state court in a case that was filed on October 3, 2022, during which time he was represented by counsel.[58] Because Complainant participated in a legal interaction with Respondent in state court, he has not demonstrated that Respondent misled him or prevented him from timely filing his complaint.[59]

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52 Comp. Br. at 9, 21, 24.

53 *Id.* at 18, 21.

54 *Id.* at 24.

55 *Bauche I*, ARB No. 2022-0035, slip op. at 12 (quoting *Farnham v. Int'l Mfg. Sols.*, ARB No. 2007-0095, ALJ No. 2006-SOX-00111, slip op. at 11 (ARB Feb. 6, 2009)).

56 Comp. Br. at 21.

57 *Id.*

58 Order at 5. Summary judgment was entered against him on November 2, 2023. *Id.*

59 *See Bauche I*, ARB No. 2022-0035, slip op. at 12-14 (finding that the complainant was not dissuaded from filing with OSHA because "he actively participated in multiple legal interactions with and against [the respondent] in federal and state court and openly

Therefore, we find that Complainant has not established that equitable estoppel applies.

3. Equitable Tolling

The ALJ found that none of the principles of equitable tolling apply.[60] Complainant contends that the ALJ erred.

A complainant's inability to meet a deadline may also be equitably tolled due to "plaintiff's excusable ignorance of the employer's discriminatory act."[61] Equitable tolling is a rare and "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."[62] The Board has recognized several principal situations in which the limitations period may be tolled, including: (1) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum; (2) when the movant has in some extraordinary way been prevented from filing; and (3) when the movant has some excusable ignorance of the respondent's discriminatory act.[63] Complainant bears the burden of justifying the application of equitable tolling.[64]

First, Complainant contends that he raised the complaint in the wrong forum.[65] Complainant asserts that Respondent's actions, through the FBI's involvement, "led to confusion and misdirection about the proper forum and timing" for his claim.[66]

But Complainant does not cite any evidence that he raised his claim in a timely manner in the wrong forum, nor has he cited evidence that Respondent misled him into filing in the wrong forum. Complainant, through his counsel, filed a claim against Respondent in Washington state court alleging that Respondent discriminated against him based on race and national origin.[67] During the hearing,

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accused [the respondent] of the same fraud and wrongdoing as alleged in [his OSHA whistleblower] case").

60 Order at 4-5.

61 *Martin*, ARB No. 2022-0058, slip op. at 9 (citation omitted).

62 *Id.* (citations omitted).

63 *Id.* (citations omitted).

64 *Id.* (citations omitted).

65 Comp. Br. at 25.

66 *Id.*

67 Order at 5; Respondent's Motion for Summary Decision, Exhibit 11 at 62-63.

Complainant vaguely alleged that he was a whistleblower.[68] That vague allegation, however, is not enough to meet his burden to establish that he raised this precise statutory claim in the wrong forum.[69] Moreover, he similarly has not presented any evidence that Respondent misled him into filing a whistleblower complaint in state court. We therefore reject his argument.

Second, Complainant contends that the deadline to file should be tolled based on extraordinary circumstances because of the complexity of the situation and the seizure of his documentation.[70] However, for the reasons stated above, we find that the seizure of his documentation does not present grounds for an extraordinary circumstance. Complainant has also not sufficiently articulated why the complexity of this situation presents an extraordinary circumstance.

It is undisputed that Respondent terminated Complainant's employment on January 28, 2021, and that Complainant did not file his OSHA whistleblower complaint until 377 days later on February 9, 2022.[71] We have found that the continuing violations doctrine, equitable estoppel, and equitable tolling do not apply, and, thus, that Complainant's OSHA complaint was untimely. Therefore, we find that there was no genuine dispute as to any material fact and that Respondent was entitled to a decision as a matter of law.

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68 *Id.* at 41-42. Ultimately, the judge found that there was nothing in the record that indicated that Respondent terminated his employment because Complainant was a whistleblower or for any discriminatory reason. *Id.* at 69.

69 *See Martin*, ARB No. 2022-0058, slip op. at 9 (the movant bears the burden of establishing that they filed the precise statutory claim in issue in the wrong forum).

70 Comp. Br. at 9, 11, 21-22.

71 Order at 2.

CONCLUSION[72]

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

SO ORDERED.

ANGELA W. THOMPSON
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[72] 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).