

U.S. Department of Labor

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



IN THE MATTER OF:

MICHAEL DICKERSON,

ARB CASE NO. 2023-0026

COMPLAINANT,

ALJ CASE NO. 2019-SOX-00009

ALJ STEVEN B. BERLIN

v.

DATE: July 28, 2023

ITERIS, INC.,

RESPONDENT.

Appearances:

For the Complainant:

Michael Dickerson; *pro se*; San Juan Capistrano, California

For the Respondent:

Kevin D. Holden, Esq.; *Jackson Lewis, P.C.*; Richmond, Virginia

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

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

WARREN, Administrative Appeals Judge:

This case arises under the Sarbanes-Oxley Act of 2002¹ (SOX), as amended, and its implementing regulations.² Complainant, Michael Dickerson (Complainant or Dickerson), filed a complaint alleging that Respondent, Iteris, Inc. (Respondent or Iteris), violated the SOX by terminating his employment. On March 21, 2023, an

¹ 18 U.S.C. § 1514A.

² 29 C.F.R. Part 1980 (2023).

Administrative Law Judge (ALJ) denied the complaint by issuing a Decision and Order Denying Claim (D. & O.). On April 6, 2023, the Administrative Review Board (Board) received from Complainant a Petition for Review (Petition) of the D. & O.

On May 17, 2023, Respondent filed a Motion to Dismiss Complainant's Petition (Motion). Respondent argues that, on April 4, 2023, Complainant instructed Federal Express, a private carrier, to deliver the Petition in two days; therefore, he knowingly ensured that the ARB would not receive the Petition by the April 4, 2023 deadline set forth in the D. & O.³ Complainant filed a Response to Respondent's Motion to Dismiss on May 31, 2023 (Response to the Motion). For the reasons set forth below, we deny Respondent's Motion and reestablish the briefing schedule.

BACKGROUND

The D. & O. issued by the ALJ on March 21, 2023, included a "Notice of Appeal Rights" (Notice) describing the amount of time Complainant was allotted to appeal the D. & O. to the Board. The Notice informed Complainant that, to appeal the D. & O., he was required to file a Petition with the Board "within fourteen (14) days of the date of the administrative law judge's decision."⁴ The Petition would be considered filed "on the date of its postmark, facsimile transmittal, or e-filing,"⁵ but if Complainant filed it "in person, by hand-delivery or other means, it would be considered "filed when the Board receives it."⁶

Complainant was therefore required to file his Petition with the Board on April 4, 2023. On that date, Complainant instructed Federal Express, a private carrier, to deliver his Petition to the Board. A delivery by a private carrier is considered delivery "in person, by hand-delivery or other means."⁷ The Board received the Petition on April 6, 2023, two days after the due date.

JURISDICTION

The Secretary of Labor has delegated to the Board the authority to issue agency decisions in this matter.⁸

³ See Motion at 2.

⁴ D. & O. at 20.

⁵ *Id.* (citing 29 C.F.R. § 1980.110(a)).

⁶ *Id.*

⁷ 29 C.F.R. § 1980.110(a).

⁸ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

DISCUSSION

On May 17, 2023, Respondent filed a Motion arguing that, “[b]y instructing Federal Express to deliver the Petition for Appeal in two days, Dickerson knowingly ensured that the ARB would not receive the petition for appeal by the deadline set forth in the [D. & O.]”⁹

In his Response to the Motion, Complainant asserts that “[t]hroughout this entire whistleblower claim process, [he] has used the same method (Federal Express) . . . The majority of correspondence was shipped on the last date permitted per the Court order, yet no mention was ever made about the date of physical delivery being considered the ‘filing date.’”¹⁰

A complainant pursuing an appeal of a whistleblower retaliation claim must meet certain deadlines.¹¹ These deadlines apply whether the complainant is represented by counsel or is proceeding pro se.¹² Potential complainants are responsible for determining which deadline applies to their case and for meeting that deadline: “[i]gnorance of the law is no excuse’ for missing a filing deadline.”¹³

However, the Board’s filing deadline is not jurisdictional and is therefore subject to equitable tolling.¹⁴ Accordingly, the Board may accept an untimely petition for review in appropriate circumstances.

Equitable tolling refers to a set of circumstances equitably excusing the complainant’s inability to meet a deadline and focuses on, among other things, “plaintiff’s excusable ignorance of the employer’s discriminatory act.”¹⁵ Equitable tolling is a rare and “an extraordinary measure that applies only when plaintiff is

⁹ Motion at 2.

¹⁰ Response to the Motion at 2.

¹¹ 29 C.F.R. § 1980.110(a).

¹² *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 6 (ARB June 8, 2023) (citations omitted).

¹³ *Id.* (quoting *Warner v. Xcel Energy*, ARB No. 2008-0112, ALJ No. 2008-ERA-00002, slip op. at 8 (ARB Mar. 29, 2010)).

¹⁴ See 29 C.F.R. §§ 1980.110(a), 1980.115; see also *Boechler, P.C. v. Comm’r of Internal Revenue*, 142 S. Ct. 1493, 1500 n.1 (2022) (equitable tolling is not limited to Article III courts) (citations omitted); *Martin*, ARB No. 2022-0058, slip op. at 7-9.

¹⁵ *Hyman v. KD Res.*, ARB No. 2009-0076, ALJ No. 2009-SOX-00020, slip op. at 6 (ARB Mar. 31, 2010).

prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances.”¹⁶

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;¹⁷ (2) when the movant has in some extraordinary way been prevented from filing;¹⁸ and (3) when the movant has some excusable ignorance of the respondent’s discriminatory act.¹⁹

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 his or her untimely appeal.²⁰ The party requesting tolling bears the burden of establishing circumstances that justify modifying the appeal deadline.²¹

The particular circumstances presented in this case justify equitably tolling the appeal deadline and accepting Complainant’s untimely Petition. As stated above, Complainant instructed Federal Express to deliver his Petition on the day his appeal was due. However, he failed to account for the two days it would take Federal Express to deliver the Petition to the Board. As a result, he missed the appeal deadline by two days. If Complainant had instead mailed his Petition on April 4, it would have been timely filed even though mail delivery typically would have taken more than two days.

¹⁶ *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).

¹⁷ *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).

¹⁸ *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 8 (ARB Dec. 10, 2012).

¹⁹ 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.”).

²⁰ E.g., *Mazenko v. Pegasus Aircraft Mgmt., LLC.*, ARB No. 2021-0032, ALJ No. 2019-AIR-00001, slip op. at 3 (ARB Sept. 7, 2021) (Order Accepting Complainant’s Appeal and Setting Briefing Schedule); *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).

²¹ *Smith v. Franciscan Physician Network*, ARB No. 2022-0065, ALJ No. 2020-ACA-00004, slip op. at 4 (ARB Jan. 13, 2023) (Order Denying Motion to Dismiss and Reestablishing Briefing Schedule) (citing *Mazenko*, ARB No. 2021-0032, slip op. at 3).

Here, the record suggests that Complainant had a valid reason for believing that the date he instructed Federal Express to deliver his Petition met the deadline described in the Notice. As noted, Complainant argues that “[t]hroughout his entire whistleblower claim process, [he] has used the same method (Federal Express) to submit all briefs, responses, rebuttals, etc.”²² Further, at the hearing on his complaint, Complainant, appearing *pro se*, informed the ALJ that he was utilizing Federal Express to deliver documents. The ALJ provided Complainant with instructions, indicating that the date upon which Federal Express completed a “pick up” of his brief satisfied the filing deadline:

JUDGE BERLIN: So, because you won't have the transcript for a few days after you've paid for it, I'm going to require that the opening brief be filed within 35 days after the invoice date. And for this purpose, usually under our rules something is not filed until it's received at our office, but I don't want to have to worry about the mail from Virginia or whatever. So, I'm going to use postmark dates, or if it's sent by private service --

MR. HOLDEN: I'm actually have a runner get it there by the end of the day -- I don't know if you've noticed.

JUDGE BERLIN: Well, if you have an office in San Francisco --

MR. HOLDEN: We do.

JUDGE BERLIN: -- it's --

MR. HOLDEN: -- it's easier.

JUDGE BERLIN: -- we do get a lot of things delivered by messenger. So, I understand. And then we'll have a record of when it came.

MR. HOLDEN: In all fairness to Mr. Dickerson, it is, I think, more difficult for him to make those same kind of arrangements. So, I'm perfectly -- I agree with you, I think postmark date -- it's called the “mailbox rule,” that as long as it gets into the mailbox on the filing day -- that was the old rule.

JUDGE BERLIN: It will be viewed as filed --

MR. DICKERSON: In other words -- postmarked --

JUDGE BERLIN: It will be viewed as filed when it's postmarked. So, if you waited -- it's not quite the mailbox rule -- if you've waited until the 35th day, go to the post office and get it postmarked.

MR. HOLDEN: Right, right.

²² Response to the Motion at 2.

MR. DICKERSON: So, I've just been Fed-Exing it.
 JUDGE BERLIN: That's fine.
 MR. DICKERSON: I always try to beat it --
 JUDGE BERLIN: If they pick it up from you by the 35th
 day.
 MR. DICKERSON: Yeah.²³

This exchange, which occurred near the close of the hearing, indicates that the ALJ told Complainant that the date upon which Federal Express received his brief would be considered a “postmark.” And the Notice informed Complainant that his Petition would be considered filed “on the date of its postmark, facsimile transmittal, or e-filing.”²⁴

The ALJ conducted the hearing in this case in October 2019, but did not issue the D. & O. until March 2023. According to Complainant, he made six attempts “to contact Judge Berlin’s office in the hopes of getting some sort of update on the status of this case to no avail.”²⁵ When Complainant finally received the D. & O., it was reasonable for him, as a *pro se* litigant, to rely on the ALJ’s then-most-recent instructions indicating that a document is timely filed when it is submitted to Federal Express on the due date.

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 misunderstood the definition of “postmark” and missed the deadline.²⁶

This is not a case where Complainant unreasonably delayed filing by months, weeks, or even days, or otherwise failed to act diligently to preserve his appeal rights. Instead, Complainant understandably, albeit erroneously, relied on his understanding that the “postmark” rule applied to Federal Express, in part based on an exchange with the ALJ regarding same. In the unique circumstances of this case, we conclude that equitable tolling is appropriate.

²³ Hearing transcript at 779-81.

²⁴ D. & O. at 20.

²⁵ See Complainant’s September 19, 2022 Letter to the Office of Administrative Law Judges.

²⁶ *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.”).

CONCLUSION

Accordingly, we **DENY** Respondent's Motion, **ACCEPT** Complainant's Petition, and **REESTABLISH** the Briefing Schedule as set forth below. To ensure compliance with future deadlines and orders, Complainant is directed to familiarize himself 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 his appeal. The Board encourages Complainant to register with the Board's Electronic Filing and Service System available at <https://efile.dol.gov>, and as described in the Board's April 20, 2023 Notice of Appeal Acceptance, Electronic Filing Requirements, and Briefing Schedule.

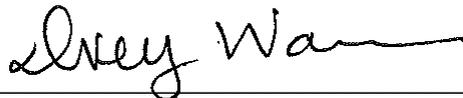
BRIEFING SCHEDULE

Complainant filed his Opening Brief on May 17, 2023. Therefore, the remaining briefing is due to be filed as follows.

- **Response Brief:** Within 28 calendar days of the date of this Order, the opposing party may file with the Board a Response Brief in opposition to the Opening Brief. The Response Brief may not exceed 50 double-spaced pages.
- **Reply Brief:** Within 14 calendar days from the date of service of a Response Brief, the petitioner may file with the Board a Reply Brief. The Reply Brief may not exceed 20 double-spaced pages.

No additional briefs may be filed without the prior written permission of the Board, issued by Order.

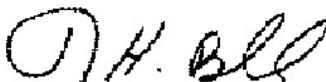
SO ORDERED.



IVEY S. WARREN
Administrative Appeals Judge



SUSAN HARTHILL
Chief Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge