

**U.S. Department of Labor**

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



**IN THE MATTER OF:**

**ROBERT DEAN,**

**ARB CASE NO. 2023-0022**

**COMPLAINANT,**

**ALJ CASE NO. 2023-WPC-00001**

**ALJ DANA ROSEN**

**v.**

**DATE: September 28, 2023**

**SOUTH CAROLINA DEPARTMENT  
OF TRANSPORTATION,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Robert Dean; *Pro Se*; Johns Island, South Carolina**

***For the Respondent:***

**Lake E. Summers, Esq.; *Malone, Thompson, Summers & Ott LLC*;  
Columbia, South Carolina**

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

## **DECISION AND ORDER**

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the Federal Water Pollution Control Act (FWPCA) (sometimes referred to as the Clean Water Act) and its implementing regulations.<sup>1</sup> Robert Dean (Dean or Complainant) filed a whistleblower complaint with the

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<sup>1</sup> 33 U.S.C. § 1367; 29 C.F.R. Part 24 (2023).

Occupational Safety and Health Administration (OSHA) alleging that his former employer, South Carolina Department of Transportation (SCDOT or Respondent), retaliated against him for engaging in activities protected under the FWPCA.<sup>2</sup> After OSHA dismissed his complaint, Complainant requested a hearing before the Office of Administrative Law Judges (OALJ).<sup>3</sup> A United States Department of Labor Administrative Law Judge (ALJ) issued an Order Granting Respondent’s Motion to Dismiss (Order of Dismissal) denying the claim because Complainant’s request for a hearing was untimely.<sup>4</sup> Complainant timely appealed the ALJ’s decision to the Administrative Review Board (ARB or Board).<sup>5</sup> We vacate and remand.

### BACKGROUND

On June 2, 2022, Complainant filed a complaint with OSHA, alleging that Respondent denied him sick leave benefits and leave under the Family and Medical Leave Act in retaliation for reporting “potential Clean Water Act violations.”<sup>6</sup> On October 18, 2022, OSHA dismissed the complaint, finding that the evidence “did not support that Respondent retaliated against Complainant for engaging in any protected activity under the FWPCA.”<sup>7</sup> OSHA notified Complainant of his right to request a hearing before the OALJ, advised Complainant that he had 30 days from the receipt of OSHA’s findings to request a hearing, and cautioned Complainant that failure to request a hearing would render the OSHA decision final.<sup>8</sup>

On November 18, 2022, 31 days after Complainant received the OSHA decision, Complainant filed his objections with the OALJ via email and requested a hearing.<sup>9</sup> On December 5, 2022, Respondent submitted a letter to the Chief ALJ (Motion to Dismiss),<sup>10</sup> arguing that Complainant’s objections were untimely under

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<sup>2</sup> Order Granting Respondent’s Motion to Dismiss at 1.

<sup>3</sup> *Id.* at 1-2.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> Complainant’s Petition for Review of the Order of Dismissal (Petition) at 1.

<sup>6</sup> Order of Dismissal at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> In the ALJ’s subsequent Order to Complainant to Show Cause Why This Complaint Should Not Be Dismissed for Untimely Objections By 2/23/2023 (Order to Show Cause), the ALJ referred to Respondent’s December 5, 2022 letter as a “Motion to Dismiss with

29 C.F.R. § 24.106(a) and, consequently, his complaint should be dismissed with prejudice.<sup>11</sup> On December 7, 2022, Complainant responded by email, asking the Chief ALJ to excuse his untimeliness and explaining that he failed to timely request a hearing because (1) he was waiting for a response to a Freedom of Information Act (FOIA) request before filing; and (2) he interpreted the applicable deadline to fall on November 18, not November 17, 2022.<sup>12</sup> Complainant requested the ALJ deem his objections as timely, grant an extension of time, or grant a waiver, modification, or suspension of the deadline.<sup>13</sup>

On February 2, 2023, the ALJ issued an Order to Show Cause.<sup>14</sup> In the Order to Show Cause, the ALJ referred to Respondent's Motion to Dismiss, observed that Complainant's request for a hearing was untimely, and ordered Complainant to show cause why his case should not be dismissed. On February 7, 2023, Complainant filed an Answer.<sup>15</sup> In Complainant's Answer, he reiterated that his objections and request for a hearing were untimely because he was waiting for a response to his FOIA request.<sup>16</sup> He also restated that he interpreted the 30-day deadline for filing his objections to expire on November 18, 2022, and requested the ALJ find his objections were timely filed, grant an extension of time, or grant waiver, modification, or suspension of the deadline.<sup>17</sup>

On February 23, 2023, Respondent filed a Renewed Motion to Dismiss, arguing that there was no dispute that Complainant miscalculated the 30-day deadline, and that Complainant's admitted miscalculation of the filing deadline, "does not constitute excusable neglect," nor create, "unique circumstances," to waive the filing deadline.<sup>18</sup> On February 27, 2023, the ALJ issued the Order of Dismissal,

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Prejudice Complainant's Appeal." Order to Show Cause at 2. The letter was not in the form of a motion and Respondent subsequently filed a Renewed Motion to Dismiss on February 23, 2023.

<sup>11</sup> Order of Dismissal at 2.

<sup>12</sup> Complainant's December 7, 2022 email at 1-2, attached as exhibit to Complainant Robert Dean's Answer to Show Cause on Timeliness (Answer).

<sup>13</sup> *Id.* at 3.

<sup>14</sup> Order to Show Cause at 1.

<sup>15</sup> Answer at 1.

<sup>16</sup> *Id.* at 4-5.

<sup>17</sup> *Id.* at 6-9.

<sup>18</sup> Respondent SCDOT's Renewed Motion to Dismiss at 14.

dismissing the complaint with prejudice for Complainant's failure to timely file his objections and request for a hearing.<sup>19</sup> The ALJ's Order of Dismissal did not address Dean's arguments regarding "waiver, modification, or suspension of the" deadline.<sup>20</sup> After the ALJ issued the Order of Dismissal, Complainant attempted to file an Opposition to Respondent's Renewed Motion to Dismiss with the ALJ on March 10, 2023. On March 15, 2023, the ALJ issued an Order deeming Complainant's responsive filing moot because she had already dismissed the case and Complainant had appealed to the ARB.<sup>21</sup>

In his Petition to the Board, Complainant argues that the ALJ should have accepted his untimely request for a hearing for the reasons set forth in his Answer to the ALJ's Order to Show Cause and his Opposition to Respondent's Renewed Motion to Dismiss.<sup>22</sup> Complainant also raises several collateral, procedural arguments: (1) the ALJ's Order of Dismissal was issued prematurely before he was afforded the opportunity to respond to Respondent's Renewed Motion to Dismiss;<sup>23</sup> (2) Respondent's Renewed Motion to Dismiss was procedurally flawed;<sup>24</sup> (3) the ALJ's recitation of the procedural history of the case failed to address key filings;<sup>25</sup> (4) the ALJ failed to make provisions for a pro se litigant;<sup>26</sup> and (5) the ALJ relied on improper OSHA findings.<sup>27</sup>

The parties have also filed several motions before the Board. Complainant has requested the Board enter additional documents into the record<sup>28</sup> and to

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<sup>19</sup> Order of Dismissal at 4.

<sup>20</sup> *Id.*

<sup>21</sup> Order That Complainant's Response Is Moot, the Complaint Has Been Dismissed, and the Dismissal Appealed at 2. Complainant had filed his Petition with the Board on March 13, 2023.

<sup>22</sup> Petition at 14.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> *Id.* at 4-5.

<sup>27</sup> *Id.* at 5-10.

<sup>28</sup> *See generally* Complainant's Motion to Submit Documents.

introduce new evidence.<sup>29</sup> Respondent has, in turn, objected to these motions.<sup>30</sup> Respondent has also requested that the Board strike Complainant’s Opening Brief because it was not timely filed.<sup>31</sup>

### JURISDICTION & APPLICABLE LEGAL STANDARDS

The Secretary of the Department of Labor has delegated to the Board the authority to review ALJ decisions under the FWPCA.<sup>32</sup> We review the ALJ’s decision to dismiss Dean’s complaint as untimely de novo.<sup>33</sup>

Under the regulations governing the FWPCA, a complainant who wishes to object to OSHA’s findings and request a hearing on a complaint, “must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and order . . . .”<sup>34</sup> A complainant pursuing a whistleblower retaliation claim must meet this deadline, which applies regardless of whether the complainant is represented by counsel or is proceeding pro se.<sup>35</sup> Complainants are responsible for determining which statutes and regulations, and which deadlines, apply to their cases and for meeting those deadlines: “[I]gnorance of the law is no excuse” for missing a deadline.<sup>36</sup>

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<sup>29</sup> See generally Complainant’s Motion to Submit New Evidence.

<sup>30</sup> See generally Respondent’s Opposition to Complainant’s March 20, 2023 Motion to Submit Documents; Respondent’s Response in Opposition to Complainant Robert Dean’s April 13, 2023 Motion to Submit New Evidence.

<sup>31</sup> Respondent’s Motion to Strike the Opening Brief Filed by Complainant Robert Dean (Motion to Strike). Respondent also filed a Motion to Hold Proceedings in Abeyance.

<sup>32</sup> 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).

<sup>33</sup> *Martin v. Paragon Foods*, ARB No. 2022-0058, ALJ No. 2021-FDA-00001, slip op. at 5 (ARB June 8, 2023) (citations omitted); *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) (citation omitted).

<sup>34</sup> 29 C.F.R. § 24.103(d).

<sup>35</sup> *Martin*, ARB No. 2022-0058, slip op. at 6 (citations omitted).

<sup>36</sup> *Id.* (citation omitted).

As we have recently explained in detail, the Board may modify a filing deadline under equitable tolling or equitable estoppel principles.<sup>37</sup> Equitable estoppel only applies where the employer has acted deliberately to deceive, mislead, or coerce the employee into not filing a claim in a timely manner.<sup>38</sup> 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.”<sup>39</sup> 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.”<sup>40</sup>

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.”<sup>41</sup> 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.”<sup>42</sup> The Board has 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; (2) when the movant has in some extraordinary way been prevented from filing; and (3) when the movant has some excusable

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<sup>37</sup> *Id.* at 8 (citing *Hyman v. KD Res.*, ARB No. 2009-0076, ALJ No. 2009-SOX-00020, slip op. at 6 (ARB Mar. 31, 2010); *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)).

<sup>38</sup> *Id.* at 8 (citing *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 9 (ARB Dec. 10, 2012); *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))).

<sup>39</sup> *Id.* (quoting *Overall v. Tenn. Valley Auth.*, ARB Nos. 1998-0111, -0128, ALJ No. 1997-ERA-00053, slip op. at 39 (ARB Apr. 30, 2001)).

<sup>40</sup> *Id.* (quoting *Overall*, ARB Nos. 1998-0111, -0128, slip op. at 39).

<sup>41</sup> *Id.* at 9 (quoting *Hyman*, ARB No. 2009-0076, slip op. at 6).

<sup>42</sup> *Id.* (quoting *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004); *Blanche v. United States*, 811 F.3d 953, 962 (7th Cir. 2016) (internal citation omitted)).

ignorance of the respondent's discriminatory act.<sup>43</sup> Complainant bears the burden of justifying the application of equitable tolling.<sup>44</sup>

In his submissions to the ALJ, Complainant stated that he waited until November 18, 2022 to submit his request for a hearing to allow time for a response to his FOIA request.<sup>45</sup> Complainant expected to receive documents related to his FOIA request on November 17, 2022, which he believed would allow him an additional day to review the documents prior to submitting his hearing request.<sup>46</sup> Complainant claimed that he wanted to wait for these documents due to his concern that they could potentially disprove his case but that SCDOT delayed producing the necessary documents.<sup>47</sup> Complainant further appears to allege before this Board that SCDOT deliberately hampered his FOIA efforts and argues that this allegation "goes to whether the ALJ should have considered the essential elements of Equitable Tolling as they might apply to my tardiness case."<sup>48</sup>

Complainant also stated that he calculated his deadline based on his interpretation of 29 C.F.R. § 18.32(a)(1)(i), which states, "[e]xclude the day of the event that triggers the period," and 29 C.F.R. § 18.32(a)(2), which states that "the 'last day' ends at 4:30 p.m. local time." Based on his reading of these regulations, Complainant mistakenly believed the 30-day deadline expired on November 18, 2022, at 4:30 p.m.<sup>49</sup>

## DISCUSSION

Here, the ALJ did not address whether Complainant's explanations for his tardy filing met any of the grounds for equitable modification. Summary dismissals

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<sup>43</sup> *Id.* (citations omitted); *see also Hyman*, ARB No. 2009-0076, slip op. at 6 ("Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act." (citing *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991))).

<sup>44</sup> *Martin*, ARB No. 2022-0058, slip op. at 9 (citations omitted).

<sup>45</sup> *See* Petition at 14 (incorporating his Answer, which contained his explanations for his tardiness and are substantially similar to his arguments in his Opening Brief); *see also* Complainant's December 7, 2022 email at 1-2; Answer at 4-6.

<sup>46</sup> Complainant's December 7, 2022 email at 1-2; Answer at 5.

<sup>47</sup> Complainant's December 7, 2022 email at 2; Answer at 5.

<sup>48</sup> Complainant's Motion to Submit New Evidence at 5-6. Despite a thorough review of the record, we are unable to dispositively rule out the possibility that Complainant made this argument below, a finding that is best made by the ALJ. *Cf.* Answer at 4-5.

<sup>49</sup> Complainant's December 7, 2022 email at 2; Answer at 6-7.

with no record cites or analysis of applicable legal principles or cases may expedite matters, but “it leaves the parties and the Board scrambling to divine by guesswork the decision’s reasoning and outcome.”<sup>50</sup> Accordingly, we vacate the ALJ’s Order of Dismissal granting Respondent’s Motion to Dismiss and remand with instructions to make factual and legal findings in accordance with Board precedent.

Complainant also contends that the ALJ’s Order of Dismissal was issued prematurely, prior to the conclusion of Complainant’s 14-day deadline to file an opposition to Respondent’s Renewed Motion to Dismiss.<sup>51</sup> Because we vacate the ALJ’s Order of Dismissal, we also vacate the ALJ’s Order That Complainant’s Response is Moot,<sup>52</sup> and instruct the ALJ to reconsider whether to admit Complainant’s Opposition to Respondent’s Renewed Motion to Dismiss, along with Respondent’s Reply, if applicable.

Finally, because we vacate the Order of Dismissal and remand to the ALJ for further proceedings in accordance with the above instructions, all motions pending before the Board are denied as moot.<sup>53</sup>

Complainant has invoked his pro se status to excuse tardiness in several filings before the ALJ and this Board.<sup>54</sup> Complainant is reminded that pro se complainants are equally bound to follow the rules of practice and procedure as complainants represented by counsel.<sup>55</sup> The Board has afforded this Complainant some latitude in our review of his submissions and the record, but “[w]hile a pro se

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<sup>50</sup> *Perkins v. Cavicchio Greenhouses, Inc.*, ARB No. 2022-0018, ALJ No. 2019-ACA-00005, slip op. at 10 n.59 (ARB Sept. 30, 2022); *accord Debuse v. Corr Flight S.*, ARB No. 2022-0019, ALJ No. 2020-AIR-00015, slip op. at 10 (ARB May 13, 2022) (citations omitted).

<sup>51</sup> Petition at 2.

<sup>52</sup> *See* Order That Complainant’s Response Is Moot, The Complaint Has Been Dismissed, and The Dismissal Appealed at 1.

<sup>53</sup> The pending motions are: Respondent’s Motion to Strike Complainant’s Opening Brief; Complainant’s March 20, 2023 Motion to Submit Documents; and Complainant’s April 13, 2023 Motion to Submit New Evidence. Although the Board granted Respondent’s Motion to Hold Proceedings in Abeyance on April 25, 2023, because we are remanding this case to the ALJ for further proceedings, the briefing schedule need not be reestablished.

<sup>54</sup> *See, e.g.*, Petition at 4-5; Complainant’s Reply to Response at 8; Complainant’s Opposition Response to Respondent’s Motion to Strike Complainant’s Opening Brief at 6.

<sup>55</sup> *Jeanty v. Lily Transp. Corp.*, ARB No. 2019-0005, ALJ No. 2018-STA-00013, slip op. at 12 (ARB May 13, 2020) (citations omitted).



litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.”<sup>56</sup>

### CONCLUSION

Accordingly, the Board **VACATES AND REMANDS** the ALJ’s Order Granting Respondent’s Motion to Dismiss for further proceedings in accordance with this Order.<sup>57</sup> The Board further **DENIES** as moot Respondent’s Motion to Strike Complainant’s Opening Brief and **DENIES** as moot Complainant’s March 20, 2023 and April 13, 2023 Motions to Submit Documents and New Evidence.

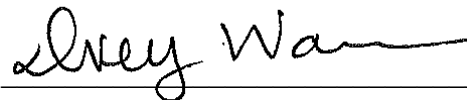
**SO ORDERED.**




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**SUSAN HARTHILL**

**Chief Administrative Appeals Judge**




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**IVEY S. WARREN**

**Administrative Appeals Judge**

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<sup>56</sup> *Coates v. S.E. Milk, Inc.*, ARB No. 2005-0050, ALJ No. 2004-STA-00060, slip op. at 9 (ARB July 31, 2007).

<sup>57</sup> In any appeal of this Decision and Order, the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.