



**In the Matter of:**

**GENE KATZ,**

**ARB CASE NO. 2021-0006**

**COMPLAINANT,**

**ALJ CASE NO. 2018-SOX-00030**

**v.**

**DATE: November 30, 2020**

**UNDERWRITERS LABORATORIES,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Gene Katz, pro se, Highland Park, Illinois**

***Respondent:***

**Michael P. Roche, Esq., Daniel J. Fazio, Esq., and Kara E. Cooper, Esq.;  
Winston & Strawn LLP, Chicago, Illinois**

**BEFORE: James D. McGinley, *Chief Administrative Appeals Judge*; Thomas H. Burrell, *Administrative Appeals Judge*; and Randel K. Johnson, *Administrative Appeals Judge***

**ORDER DISMISSING PETITION FOR REVIEW**

Complainant Gene Katz filed a petition on October 21, 2020, requesting the Administrative Review Board (ARB or Board) to review a Department of Labor Administrative Law Judge's (ALJ) Order Dismissing Complaint in *Katz v. Underwriters Laboratories*, ALJ No. 2018-SOX-00030 (Sept. 30, 2020). The regulation governing appeals of decisions under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, provides that a

petition for review must be filed within fourteen days of the date on which the administrative law judge issued his decision.<sup>1</sup>

Katz did not file his appeal within fourteen days of the ALJ decision dismissing his complaint. The Board must, therefore, consider whether to accept his untimely petition. Because Katz failed to diligently protect his appellate rights and no extraordinary circumstance prevented him from bringing a timely action, we find that it is not appropriate to toll the limitations period.

### BACKGROUND

Katz filed a complaint against Underwriters Laboratories (UL) with the Occupational Safety and Health Administration (OSHA), alleging that UL terminated his employment in retaliation for reporting unlawful behavior in violation of the Sarbanes-Oxley Act of 2002 (SOX).<sup>2</sup> OSHA found that Katz was not a covered employee and UL was not a covered employer under the SOX.<sup>3</sup>

Katz appealed the OSHA finding to the Department of Labor Office of Administrative Law Judges (OALJ).<sup>4</sup> UL moved to dismiss the complaint for failure to state a claim upon which relief can be granted.<sup>5</sup> On September 30, 2020, the ALJ entered an order dismissing Katz's complaint, finding that UL was not covered by the SOX.<sup>6</sup>

The OALJ served its order, which included information regarding Katz's appellate rights and the fourteen-day deadline for filing an appeal at the end of the decision, via email on the same day to the email address Katz had used throughout

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<sup>1</sup> 29 C.F.R. § 1980.110(a) (2020).

<sup>2</sup> Order Dismissing Complaint at 1.

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

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

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 1, 8.

the entire proceeding.<sup>7</sup> A service sheet attached to the order certified that the OALJ served the decision at Katz's email address.<sup>8</sup>

On October 6, 2020, Katz filed a letter with the ALJ asking to reopen discovery in the case.<sup>9</sup> On October 15, 2020, the ALJ entered a Notice of Lack of Jurisdiction in response to the letter, informing Katz that “[b]ecause I have dismissed this complaint, the matter is resolved, and no further discovery will be conducted before this tribunal” and confirming the decision’s “notice detailing [Katz’s] appeal rights.”<sup>10</sup> The notice included a service sheet certifying service upon the same email address as the September 20 decision.<sup>11</sup>

On October 21, 2020, Katz petitioned the Board to review the ALJ’s dismissal of the complaint.<sup>12</sup> In his petition, Katz, apparently aware of the appeal deadline, contends that he did not receive the email of the decision and that he only saw the order on October 20, 2020, after inquiring about the status of the case to UL in response to the Notice of Lack of Jurisdiction.<sup>13</sup> Katz alleges that the complaint was “mysteriously’ kept from [his] email” and that the close-timing of the decision and the 2020 presidential election “demonstrat[es] potential political motivations” for dismissing his complaint.<sup>14</sup> Katz further contends that the order’s fourteen-day appeal deadline was “unreasonably short.”<sup>15</sup>

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<sup>7</sup> Respondent’s Exhibit (RX) B.

<sup>8</sup> *Id.*

<sup>9</sup> RX C.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Complainant’s Petition for Review at 1.

<sup>13</sup> *Id.* at 1, 9.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

On November 5, 2020, UL moved to dismiss the appeal, arguing that Katz did not file his petition on time and that the circumstances do not warrant equitable tolling of the deadline.<sup>16</sup> Katz did not file a reply to UL's motion.

### DISCUSSION

A party must file a petition for review with the Board within fourteen days of the date of the decision of the ALJ to be considered timely.<sup>17</sup> Katz filed his petition twenty-two days after the ALJ's dismissal of his complaint. The petition, therefore, is not timely.

The Board, however, may toll the deadline because the appeal period is not considered jurisdictional and is therefore subject to equitable modification.<sup>18</sup> Accordingly, the Board may accept an untimely petition for review in appropriate circumstances.<sup>19</sup>

The Board may equitably toll the appeal deadline when the petitioner demonstrates that (1) he or she pursued their appellate rights diligently but (2) an extraordinary circumstance prevented them from filing their petition on time.<sup>20</sup> Equitable tolling is granted sparingly and only upon a showing that the extraordinary circumstances preventing a timely filing were out of the petitioner's control.<sup>21</sup>

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<sup>16</sup> Respondent's Motion to Dismiss at 1-5.

<sup>17</sup> 29 C.F.R. § 1980.110(a).

<sup>18</sup> *Madison v. U.S. Dep't of Labor*, 924 F.3d 941, 944 (7th Cir. 2019); *accord Prince v. Westinghouse Savannah River Co.*, ARB No. 2010-0079, ALJ No. 2006-ERA-00001, slip op. at 4 (ARB Nov. 17, 2010), *aff'd sub nom. Prince v. Solis*, 487 Fed. Appx. 773 (4th Cir. 2012).

<sup>19</sup> *Prince*, ARB No. 2010-0079, slip op. at 4.

<sup>20</sup> *Madison*, 924 F.3d at 946-47.

<sup>21</sup> *Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc.*, 782 F.3d 922, 930 (7th Cir. 2015) (quoting *Simms v. Acevedo*, 595 F.3d 774, 781 (7th Cir. 2010)).

The Board has recognized four principal, but not exclusive, circumstances in which equitable tolling may be granted: (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 or her action; (3) when the plaintiff has raised the precise statutory claim in issue but has 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.<sup>22</sup>

Katz has not specifically addressed the application of equitable tolling but has presented several explanations for his petition's untimeliness. None of them are substantiated with any evidence or resemble the four principal extraordinary circumstances. Katz claims without any substantiation that the decision never reached his email, despite a certificate of service provided by the OALJ. Katz seemingly suggests that someone prevented the email from reaching him, commenting that it was "mysteriously" absent from his inbox, but again without any evidence to support the allegation. He also alludes to potential political motivations for dismissing his complaint, without providing any further explanation regarding whose motivations and how they would affect his claim or ability to appeal on time.

Katz also does not demonstrate that he was diligent in pursuing his appellate rights. Assuming he never received the decision, Katz was still able to check the status of the proceedings on the OALJ website, which provides public access to copies of all ALJ decisions.<sup>23</sup> Occasional inspection of the website would have provided him proper notice of the decision and an opportunity to file a timely appeal or request an extension of time. Even after receiving the Notice of Lack of Jurisdiction, Katz did not file an appeal or inquire about the deadline for six days. Katz states that he filed this appeal only a day after he first saw the order when UL provided him with a copy. However, the notice had apprised him of the decision and its description of his appellate rights. Upon reading the notice, Katz could have acted immediately to obtain a copy of the decision.

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<sup>22</sup> *Swinney v. Fluor Corp.*, ARB No. 2015-0044, ALJ No. 2014-SOX-00041, slip op. at 3 (ARB June 11, 2015).

<sup>23</sup> Respondent's Brief at 5.

Accordingly, we hold that Katz has not demonstrated extraordinary circumstances nor any other grounds compelling enough to grant equitable tolling of the fourteen-day appeal period. We therefore **REJECT** Katz's Petition for Review and **DISMISS** his appeal.

**SO ORDERED.**