



In the Matter of:

KEVIN JUDY,

ARB CASE NO. 2021-0015

COMPLAINANT,

ALJ CASE NO. 2019-STA-00054

v.

DATE: November 8, 2021

COVENANT TRANSPORT, INC.,

RESPONDENT.

Appearances:

For the Complainant:

**Richard R. Renner, Esq.; Kalijarvi, Chuzi, Newman & Fitch, P.C.;
Washington, District of Columbia**

For the Respondent:

John R. Bode, Esq.; Miller & Martin PLLC; Chattanooga, Tennessee

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

ORDER OF DISMISSAL

PER CURIAM. This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended.¹ Kevin Judy (Complainant) filed a whistleblower complaint against Covenant Transport, Inc. (Respondent) for alleged retaliation against him in violation of STAA's whistleblower protection provisions. The ALJ issued an Order Dismissing Complaint (Order). Complainant appealed the ALJ's order. We affirm.

BACKGROUND

Complainant worked as a driver trainer for Covenant Transport (Respondent). Complainant alleges that on November 25, 2016, Respondent ordered

¹ 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2020) (the STAA's implementing regulations).

him to rent a car and drive from Orlando, Florida to Chattanooga, Tennessee, while he was on leave at home. He requested alternate transportation so that he would not have to drive while tired; in the alternative he asked for additional time to rest. Respondent denied both of these requests. Thereafter, Complainant asked to be assigned to a truck from the Orlando terminal. Respondent also denied this request, telling Complainant that no trucks were available. During the drive to Chattanooga, Complainant endured wrist pain and fatigue. The following day, he reported to company officials that his superior forced him to drive while tired, and Respondent terminated his employment that same day.

On January 23, 2017, Judy filed a complaint with the Federal Motor Carrier Safety Administration (FMCSA), reporting his safety concerns. On December 11, 2018, FMCSA determined his complaint was substantiated. However, Complainant did not receive a copy of FMCSA's determination until September 24, 2020.

Complainant also filed two concurrent complaints with the Occupational Safety and Health Administration (OSHA) regarding the same safety concerns. The first claim was filed on January 23, 2017, and was dismissed on March 13, 2017, after OSHA determined it did not have jurisdiction. On May 8, 2017, Complainant filed a second complaint with OSHA and alleged that Respondent fired him for engaging in protected activity. On June 15, 2017, OSHA closed the complaint based on Complainant's voluntary withdrawal.

In the summer of 2018, Complainant retained an attorney, who filed a lawsuit on Judy's behalf in Federal court. However, Complainant's attorney filed the lawsuit under the wrong statute.

In December 2018, Complainant contacted the office of the Secretary of Labor regarding his claim. In January 2019, Complainant spoke with Antoine Robinson, Assistant Regional Administrator of the Department of Labor's Whistleblower Protection Program. Mr. Robinson allegedly told Complainant that OSHA did not correctly handle his prior complaints and instructed Complainant to re-file his 2017 complaints with OSHA.

On January 25, 2019, Complainant re-filed the present complaint with OSHA. On May 3, 2019, OSHA determined the complaint was not timely filed because the same allegations had been dismissed in the complaints previously filed in 2017. OSHA then dismissed the case.

Complainant subsequently requested a hearing before the Office of Administrative Law Judges (OALJ). The ALJ issued an order to show cause as to why the complaint should not be dismissed as untimely. Complainant responded, contending that equitable tolling should apply for several reasons, which include

that he filed his claim in the wrong forum, and that OSHA misled him into withdrawing his complaint.²

On January 8, 2019, the ALJ dismissed the complaint. The ALJ found that Complainant did not establish he was entitled to equitable tolling of the 180-day period allowed to file a complaint.³ Notably, the ALJ found that Complainant's allegation that OSHA discouraged him from pursuing his complaint was concerning and that, "[i]f true – and at this stage of the proceedings I must assume that they are – they may well constitute a basis for equitable tolling."⁴ However, the ALJ determined that the extent of the tolling period was unclear and that the "most favorable view of that issue for [Complainant] would be that the 180-day filing period began again on June 15, 2017," when OSHA approved the withdrawal of his second complaint.⁵ Because Complainant did not re-file his complaint until January 25, 2019, the ALJ concluded that he was not entitled to equitable tolling.

Complainant filed a timely appeal to the Administrative Review Board (ARB or Board). Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to the Board to issue agency decisions in STAA cases.⁶ The ARB reviews an ALJ's grant of summary decision de novo.⁷ This includes other pre-hearing dismissals based on timeliness.⁸ Summary decision should be entered where "there is no genuine dispute as to any

² In addition, Complainant also argued that Respondent misled him about the reason for his termination and that health conditions, flooding in his home, a hurricane in his area, and caring for sick family members prevented him from timely filing his claims.

³ Under the implementing STAA regulations, a person alleging discrimination must file a complaint with OSHA no later than 180 days after any alleged adverse action. 29 C.F.R. § 1978.103(d).

⁴ Order at 10.

⁵ *Id.*

⁶ 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).

⁷ *Elias v. Celadon Trucking Servs., Inc.*, ARB No. 2012-0032, ALJ No. 2011-STA-00028, slip op. at 3 (ARB Nov. 21, 2012).

⁸ *Edmund v. Metro. Transit Auth.*, ARB No. 2009-0034, ALJ No. 2009-STA-00003 (ARB Nov. 19, 2009).

material fact and the movant is entitled to decision as a matter of law.”⁹ The ARB views the record on the whole in the light most favorable to the non-moving party.¹⁰

DISCUSSION

The limitations period for filing a complaint under the STAA is not jurisdictional and is subject to equitable modification.¹¹ Equitable tolling is granted sparingly, and only upon a showing that extraordinary circumstances preventing a timely filing were out of the petitioner’s control.¹²

The Board recognizes four principal situations in which a party may be entitled to equitable tolling: 1) when the opposing party has actively misled the movant regarding the cause of action; 2) when the movant has in some extraordinary way been prevented from filing; 3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum, and 4) where the opposing party’s own acts or omissions have lulled the movant into foregoing prompt attempts to vindicate his rights.¹³ However, the Board has not found these situations to be exclusive, and an inability to satisfy one of them is not necessarily fatal to a claim.¹⁴

When a plaintiff invokes equitable tolling, the claim must be brought “within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.”¹⁵ Complainant bears the burden of justifying the application of equitable tolling.¹⁶ In addition, “courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”¹⁷

⁹ 29 C.F.R. § 18.72(a).

¹⁰ *Lee v. Schneider Nat’l, Inc.*, ARB No. 2002-0102, ALJ No. 2002-STA-00025, slip op. at 2 (ARB Aug. 28, 2003).

¹¹ *Edmund*, ARB No. 2012-0032, slip op. at 4.

¹² *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)).

¹³ *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 8 (ARB Dec. 10, 2012) (citations omitted).

¹⁴ *Id.*

¹⁵ *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990).

¹⁶ *See Jaludi v. Citigroup, Inc.*, ARB No. 2021-0053, ALJ No. 2021-SOX-00014, slip op. at 2-3 (ARB Aug. 25, 2021).

¹⁷ *Lubary v. El Floridita*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 6 (ARB Apr. 30, 2012) (internal citation omitted) (emphasis added).

On appeal, Complainant contends the ALJ erred in concluding that the 180-day filing period began again on June 15, 2017, when OSHA approved his request to withdraw his complaint. Complainant asserts that the period of equitable tolling is determined when the tolling condition is resolved, not by its onset. Complainant further contends that the 180-day filing period should have begun on January 23, 2019, when he first spoke with Mr. Robinson from the Office of the Secretary of Labor. Complainant contends that his OSHA complaint was timely re-filed on January 25, 2019.

However, on balance, the record before us does not provide adequate grounds to equitably toll the appeal deadline in this case. The record shows that Complainant failed to exercise due diligence, and thus does not constitute the type of extraordinary circumstances that justify extending the filing deadline in this case under equitable tolling principles. Although Complainant asserts that an OSHA investigator advised him to withdraw his claim voluntarily and file a lawsuit in Federal court, he did not retain legal representation until the summer of 2018, which was well over a year after he withdrew his OSHA complaint.¹⁸ Moreover, the fact that Complainant's attorney mistakenly filed the lawsuit under the wrong statute does not support tolling—attorney error, standing alone, does not constitute an extraordinary factor that justifies equitable tolling of a filing deadline because “clients are accountable for the acts and omissions of their attorneys.”¹⁹

Complainant also contends that he filed his complaint in the wrong forum when he filed a complaint with the FMCSA. However, as the ALJ correctly found, Complainant also filed a proper and timely simultaneous complaint with OSHA. Thus, Complainant is not entitled to equitable tolling on the basis that he filed the same statutory claim in the wrong forum.

Accordingly, we hold that Judy has demonstrated neither extraordinary circumstances nor any other grounds compelling us to equitably toll the 180-day filing period.

CONCLUSION²⁰

Therefore, we **AFFIRM** the ALJ's order and **DISMISS** Judy's complaint.

SO ORDERED.

¹⁸ Comp. Br. at 10.

¹⁹ *Nevarez v. Werner Enters.*, ARB No. 2018-0005, ALJ No. 2013-STA-00012 (ARB Dec. 14, 2017) (citations omitted).

²⁰ In any appeal of this Decision and Order that may be filed with the Courts of Appeals, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board (ARB)).