



Issue Date: 01 December 2021

In the Matter of:

ZACHARY CURRY,
Complainant,

v.

USAA,
Respondent.

Case No. 2020-CFP-00007

ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION

This matter was brought by Zachary Curry (Complainant), against USAA (Respondent) on May 21, 2020, under the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567 (CFPA). Complainant alleges that Respondent terminated him on June 27, 2019, in retaliation for reporting a fraudulent mortgage application. OSHA dismissed the complaint as untimely on July 8, 2020.

Complainant appealed to the Office of Administrative Law Judges for a hearing on July 9, 2020. Respondent filed a Motion for Summary Decision based, in part, on untimeliness on November 22, 2021. Complainant responded four days later on November 26, 2021. For the reasons set forth below, Respondent’s motion is hereby granted. Complainant’s complaint is untimely and there is no legal basis for equitable tolling.

Respondent terminated Complainant’s employment on June 27, 2019. Complainant has not worked for Respondent since that time. Complainant filed his complaint with OSHA on May 21, 2020, which is 329 days after his termination. On November 22, 2021, Respondent filed their Motion for Summary Decision, arguing that a summary decision is necessary as Complainant failed to file his claim within 180 days of his termination. Complainant filed a response to Respondent’s Motion for Summary Decision on November 28, 2021. Unless the Complainant can show that equitable tolling is shown in this matter, the Respondent’s motion must be granted.

Whistleblower statutes of limitations are subject to equitable modification, *i.e.*, equitable tolling and equitable estoppel. However, in order to justify the tolling of an applicable statute of limitations, a complainant must act diligently and meet the burden of showing the untimeliness of the filing is the result of circumstances beyond his control.¹ As the Complainant is *pro se*, and the

¹ *Reid v. Boeing Corp.*, ARB No. 10-110, ALJ No. 2009-SOX-27, at 2 (ARB Mar. 30, 2013); *Jose Romero v. Coca Cola Co.*, ARB No. 10-095, ARB No. 10-095, ALJ No. 2010-SOX-21, at 2 (ARB Sept. 30, 2010).

ARB has stated that Administrative Law Judges must “construe complaints and papers filed by *pro se* complainants ‘liberally in deference of their lack of training in the law’ with a degree of adjudicative latitude.”² Complainant’s filings have been considered in their entirety and even construing the record “liberally in deference” to his unrepresented status, there is insufficient evidence to avoid granting Respondent’s motion.

Complainant’s opposition and other filings contain no factual allegation or legally sufficient arguments to support a finding that the statute of limitations should be tolled on equitable grounds. Equitable tolling is only available in four situations: (1) when the respondent has actively misled the complainant regarding the cause of action; (2) when the complainant has in some extraordinary way been prevented from filing his action; (3) when the complainant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the respondent’s own acts or omissions lull the complainant into foregoing prompt attempts to vindicate his rights.³

Complainant’s claims were filed outside of the 180 day statute of limitations without legal or equitable justification. Complainant provided no evidence that the untimely filing of his complaint met any of the four criteria that would justify his late filing. The 180-day statute of limitations for the claim began to run on the date that Complainant was provided with final, definitive, and unequivocal notice of his termination.

Respondent’s timeliness argument is well-grounded in law and the facts in this matter. Complainant failed to file his complaint within 180 days of his termination and has not established that equitable tolling should apply. For the above reasons, Respondent’s Motion for Summary Decision is **GRANTED**. The hearings set for December 10, 2021, December 14, 2021, and December 15, 2021, are **CANCELED**. All other pending motions are **DISMISSED** as moot.

SO ORDERED.

WILLIAM P. FARLEY
Administrative Law Judge
Washington, DC

² *Wyatt v. Hunt Transport*, ARB No. 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012) (*quoting Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 6 (ARB Apr. 25, 2003)).

³ *Shevchenko v. Elbrus Logistics Inc.*, ARB Case No. 17-035, ALJ Case No. 2016-STA-00070, 2017 WL 2838092 at 1 (May 2, 2017); *Rosenfeld v. Cox Enterprises, Inc.*, ARB Case No. 160-026, ALJ Case No. 2014-SOX-00033, 2016 WL 4238473 at 2 (May 24, 2016).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within **fourteen (14) days** of the date of the administrative law judge's decision.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1985.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1985.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1985.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1985.109(e) and 1985.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1985.110(b).

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing has become mandatory for parties represented by counsel. Parties represented by counsel must file an appeal by accessing the eFile/eServe system (EFS) at <https://efile.dol.gov/EFILE.DOL.GOV>.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at <https://efile.dol.gov/support/>.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at <https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf> and/or the video tutorial at <https://efile.dol.gov/support/boards/new-appeal-arb>. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at <https://efile.dol.gov/contact>. If you file your appeal online, no paper copies need be filed with the Board.

You are still responsible for serving the notice of appeal on the other parties to the case and for attaching a certificate of service to your filing. If the other parties are registered in the EFS system, then the filing of your document through EFS will constitute filing of your document on those registered parties. Non-registered parties must be served using other means. Include a certificate of service showing how you have completed service whether through the EFS system or otherwise.

Filing Your Appeal by Mail

Self-represented (pro se) litigants may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

<https://efile.dol.gov/support/boards/request-access-an-appeal>

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.