



**In the Matter of:**

**LUIS PATINO,**

**ARB CASE NO. 09-054**

**COMPLAINANT,**

**ALJ CASE NO. 2005-AIR-023**

**v.**

**DATE: November 24, 2009**

**BIRKEN MANUFACTURING COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Leon M. Rosenblatt, Esq., *Law Offices of Leon M. Rosenblatt*, West Hartford,  
Connecticut**

***For the Respondent:***

**Robert L. Hirtle, Esq., Matthew T. Wax-Knell, Esq., *Rogin Nassau, L.C.C.*,  
Hartford, Connecticut**

**FINAL DECISION AND ORDER**

Luis Patino alleged that the Birken Manufacturing Company fired him in violation of the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).<sup>1</sup> After a hearing, a United States Department of Labor Administrative Law Judge (ALJ) concluded that Birken had not violated AIR 21 and dismissed Patino's complaint. Patino appealed, and the

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<sup>1</sup> 49 U.S.C.A. § 42121(a) (West 2006 Supp.).

Administrative Review Board (ARB) vacated the dismissal and remanded the case for further proceedings.<sup>2</sup>

On remand, the ALJ concluded that Birken had failed to prove by clear and convincing evidence that it would have fired Patino absent his protected activity of informing the company of allegedly defective aircraft parts. The ALJ awarded back pay of \$12,922.62.<sup>3</sup> Subsequently, the ALJ awarded Patino attorney's fees of \$23,735.00 and costs of \$631.20.<sup>4</sup> Birken appealed both orders to the ARB.

On appeal, Patino argued that Birken had failed to timely file its petition for review of the ALJ's December 15, 2008 recommended decision.<sup>5</sup> The ARB issued an order directing Birken to show cause why the ALJ's 2008 decision did not become final when the ARB did not receive a petition for review by December 29, 2008. Birken responded to the show cause order and Patino filed a reply.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated her authority to decide this matter to the ARB.<sup>6</sup> In cases arising under AIR 21, we review the ALJ's findings of fact under the substantial evidence standard.<sup>7</sup> The Board reviews the ALJ's legal conclusions de novo.<sup>8</sup>

### **DISCUSSION**

We first consider whether Birken timely filed its appeal of the ALJ's December 15, 2008 recommended decision.

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<sup>2</sup> *Patino v. Birken Mfg. Co.*, ARB No. 06-125, ALJ No. 2005-AIR-023 (ARB July 7, 2008).

<sup>3</sup> *Patino v. Birken Mfg. Co.*, ALJ No. 2005-AIR-023 (Dec. 15, 2008).

<sup>4</sup> *Patino v. Birken Mfg. Co.*, ALJ No. 2005-AIR-023 (Jan. 28, 2009).

<sup>5</sup> Complainant's Brief at 1-2.

<sup>6</sup> *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1979.110 (2009).

<sup>7</sup> 29 C.F.R. § 1979.110(b).

<sup>8</sup> *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

Appended to the ALJ's December 15, 2008 decision was a Notice of Appeal Rights. The notice stated that to appeal, "you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the issuance of the administrative law judge's decision."<sup>9</sup> The notice added that a Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication, or, if hand-delivered or by other means, when the Board receives it. The notice warned that if no Petition is filed, the administrative law judge's decision becomes the final order of the Secretary of Labor.

Birken filed its petition for review with the ARB on February 10, 2009. That is more than a month beyond December 29, 2008, the tenth business day after December 15, 2008; therefore, Birken's petition for review was untimely.

The regulation establishing a ten-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under AIR 21.<sup>10</sup> Therefore, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.<sup>11</sup>

The ARB is guided by the principles of equitable tolling in determining whether to relax the limitations period in a particular case.<sup>12</sup> Accordingly, we have recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.<sup>[13]</sup>

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<sup>9</sup> See 29 C.F.R. § 1979.110(a).

<sup>10</sup> 29 C.F.R. § 1979.110(a); *Stoneking v. Avbase Aviation*, ARB No. 03-101, ALJ No. 2002-AIR-007, slip op. at 3 (ARB July 29, 2003).

<sup>11</sup> *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 4 (ARB May 14, 2003).

<sup>12</sup> *Cook v. Env'tl. Prot. Agency*, ARB No. 06-036, ALJ No. 2005-CER-001, slip op. at 3 (ARB Feb. 22, 2006), citing *Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 3 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 3 (ARB Nov. 8, 1999).

<sup>13</sup> *Herchak*, slip op. at 5.

These categories are not exclusive, but Birken bears the burden of justifying the application of equitable tolling principles.<sup>14</sup>

Birken does not address its arguments to the three situations in which equitable tolling is proper but, as we have said, they are not exclusive. Instead, Birken argues that it is entitled to tolling for four reasons.

Birken first contends that its failure to file a timely petition for review was “nothing more than an innocent error,” which resulted from its misunderstanding of the appeal rights attached to the December 15, 2008 decision.<sup>15</sup> But arguing that Birken’s counsel misunderstood is not persuasive because an attorney’s ignorance of the law will generally not support a finding of entitlement to equitable tolling.<sup>16</sup> Further, the ARB has consistently held that attorney error does not support equitable tolling because “[u]ltimately, clients are accountable for the acts and omissions of their attorneys.”<sup>17</sup> Therefore, we reject this argument.

Birken also argues that Patino knew that Birken wanted to appeal but waited three months before arguing to the ARB about the untimely appeal.<sup>18</sup> Therefore, Patino would suffer no prejudice if the ARB reviewed both the ALJ’s December 15, 2008 recommended decision and his January 28, 2009 order awarding attorney’s fees. But while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting tolling identifies a factor that might justify such tolling, “[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.”<sup>19</sup>

Birken’s other arguments are that it is entitled to equitable tolling because the ARB would further judicial economy by reviewing both ALJ decisions and could resolve

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

<sup>15</sup> Response to Order to Show Cause at 3.

<sup>16</sup> *Higgins v. Glen Raven Mills*, ARB No. 05-143, ALJ No. 2005-SDW-007, slip op. at 8 (ARB Sept. 29, 2006).

<sup>17</sup> *Dumaw v. Int’l Bhd. of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5-6 (ARB Aug. 27, 2002). *Accord Blodgett v. Tennessee Dep’t of Env’t & Conservation*, ARB No. 03-043, ALJ No. 2003-CAA-007, slip op. at 2-3 (ARB Mar. 19, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 2003-SOX-024, slip op. at 4, (ARB Jan. 13, 2004); *Herchak*, slip op. at 6.

<sup>18</sup> Response to Order to Show Cause at 5.

<sup>19</sup> *Cook*, slip op. at 4 citing *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).

two important questions of public interest that would serve to promote and preserve air safety.<sup>20</sup> But these arguments do not persuade us because Birken does not explain how judicial economy and the public interest in air safety implicate equitable tolling. Nor does it offer precedent or any other legal rationale to support these arguments.

Accordingly, we conclude that Birken did not timely file its petition for review and failed to meet its burden to justify its entitlement to equitable tolling of the ten-day limitations period. Therefore, we will not consider Birken's petition for review of the ALJ's December 15, 2008 decision.

#### *Attorney's fees*

A successful AIR 21 complainant is entitled to receive all costs and expenses, including attorney's fees, reasonably incurred in bringing the complaint.<sup>21</sup>

The ALJ employed the familiar lodestar method<sup>22</sup> in calculating attorney's fees and awarded Patino's three counsel \$23,735.00 in fees and \$631.20 in costs, for a total of \$24,366.20. The ALJ found that the list of services and the hours expended by each of the attorneys were clearly identified and dismissed Birken's objections.<sup>23</sup>

Birken timely filed a petition for review of the ALJ's January 28, 2009 order awarding attorney's fees. Birken argues on appeal that the ALJ's award of attorney's fees is not reasonable because the amount is nearly double the amount of the damages award.<sup>24</sup> Birken notes the factors to be considered in awarding fees and contends that this case was not novel or difficult, did not preclude the attorneys from accepting other cases or delay other work, and the recovery was small compared to the fee award.<sup>25</sup>

We agree with the ALJ that while the amount of the recovery in this case may be minimal, reducing properly supported fee requests simply because of limited damages is

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<sup>20</sup> Response to Order to Show Cause at 4-5.

<sup>21</sup> 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b).

<sup>22</sup> *Evans v. Miami Valley Hosp.*, ARB Nos 08-039, -043, ALJ No. 2006-AIR-022, slip op. at 2 (ARB Aug. 31, 2009).

<sup>23</sup> *Patino*, slip op. at 2 (Jan. 28, 2009 order).

<sup>24</sup> Respondent's Brief at 24.

<sup>25</sup> *Id.* at 25.

not appropriate.<sup>26</sup> Other than generally objecting that the amount awarded is not reasonable, Birken does not otherwise quarrel with the itemized task-and-time entries. Therefore, we affirm the ALJ's award of attorney's fees.<sup>27</sup>

### CONCLUSION

Birken did not file a timely petition for review of the ALJ's December 15, 2008 decision, which therefore became final. Further, the ALJ's supplemental award of attorney's fees and costs is in accordance with law. Therefore, we **AFFIRM** the ALJ's January 28, 2009 decision. Patino's attorney has 30 days in which to submit a petition for additional attorneys' fees for work before the ARB. He is to serve any such petition on Birken, which will have 30 days in which to file objections to the petition.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Chief Administrative Appeals Judge**

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<sup>26</sup> *Florek v. Eastern Air Cent.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 12 (ARB May 21, 2009) (ARB rejects respondent's argument that attorney's fee award was 400 percent of damages and therefore unreasonable).

<sup>27</sup> *See Pierce v. United States Enrichment Corp.*, ARB Nos. 06-055, -058, -119, ALJ No. 2004-ERA-001, slip op. at 4 (ARB Feb. 27, 2009) (affirming unchallenged fees and costs reasonably incurred in litigating the case).