



**In the Matter of:**

**MICHAEL COOLEY,**

**ARB CASE NO. 09-126**

**COMPLAINANT,**

**ALJ CASE NO. 2005-AIR-014**

**v.**

**DATE: December 10, 2009**

**HYANNIS AIR SERVICE,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Michael Cooley, *pro se*, Ocala, Florida**

***For the Respondent:***

**Joan Ackerstein, Esq., Erik Winton, Esq., *Jackson Lewis LLP*, Boston,  
Massachusetts**

**FINAL DECISION AND ORDER DISMISSING APPEAL**

Michael Cooley complained that Cape Air (now Hyannis Air Service) violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) and its implementing regulations<sup>1</sup> when it terminated his employment after he raised concerns about air safety issues. The question before the

---

<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2009).

Administrative Review Board is whether Cooley showed good cause for his failure to timely file his petition for review with the Board. We conclude that he has not.

## BACKGROUND

Cape Air hired Cooley to pilot its aircraft in January of 2000. Cape Air fired him on December 11, 2003, allegedly because he demonstrated poor judgment in departing from Tampa on a flight to Fort Myers with inadequate fuel.<sup>2</sup> Cooley filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Cape Air terminated his employment because he reported safety concerns when he filed flight discrepancy and mechanical interruption reports. He further averred that Cape Air discharged him in part because of the protected activity and that the fuel issue was a pretext for the dismissal.<sup>3</sup>

OSHA issued the Secretary's Findings that concluded that Cape Air did not violate the Act's employee protection provisions.<sup>4</sup> Cooley objected to the findings and requested a formal hearing before an Administrative Law Judge (ALJ).<sup>5</sup> The ALJ conducted a hearing and ultimately found that, based on the hearing testimony, exhibits, and post-hearing briefs, Cooley failed to establish that he engaged in protected activity that contributed to the termination of his employment with Cape Air. The ALJ further determined that Cooley did not establish that the adverse personnel action was a pretext for any of Cooley's filings regarding Cape Air's safety violations or procedures. Therefore, he found that Cooley failed to prove the essential elements of his case and, accordingly, that Cape Air did not violate the employee protection provisions of the Act.<sup>6</sup>

Pursuant to AIR 21's implementing regulations, a party wishing to challenge an administrative law judge's recommended decision must file a petition for review with the Administrative Review Board within ten business days of the date of the judge's decision.<sup>7</sup> In a letter postmarked July 20, 2009, Cooley requested the Board to grant him

---

<sup>2</sup> *Cooley v. Hyannis Air Serv.*, ALJ No. 2005-AIR-014, slip op. at 6 (July 6, 2009) (R. D. & O.).

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

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

<sup>5</sup> *See* 29 C.F.R. § 1979.106(a)(2009).

<sup>6</sup> R. D. & O. at 33.

<sup>7</sup> 29 C.F.R. § 1979.110(a). This regulation provides in pertinent part:

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge must file

an extension of thirty to sixty days to file his petition for review. He noted that his counsel had recently informed him that the Florida Bar had suspended the counsel from practicing law.

The Board granted Cooley's motion and ordered him to file his Petition for Review "on or before **September 18, 2009.**" Cooley did not comply with the Board's Order. Cooley did not sign or mail his Petition for Review until September 19, 2009, and the Board did not receive it until September 28, 2009. Accordingly, the Board ordered Cooley to show cause no later than 10 days after the date of its Order (October 15, 2009), why the R. D. & O. did not become the Secretary's final decision and order when he failed to file his Petition for Review "on or before **September 18, 2009.**" The Board further cautioned Cooley that if he failed to file a timely response to the show cause order, the Board could dismiss his appeal without further notice. Cooley's response to the Show Cause Order was dated October 30, 2009, and the Board did not receive it until November 9, 2009. Hyannis filed a Reply to Complainant's Response to the Order to Show Cause urging the Board to dismiss Cooley's petition for review because he failed to timely respond to the Order to Show Cause and he failed to establish grounds for equitable tolling.

#### DISCUSSION

The Board's authority to effectively manage its docket, including authority to require compliance with Board briefing orders, is necessary to "achieve orderly and expeditious disposition of cases."<sup>8</sup> This Board has authority to issue sanctions, including dismissal, for a party's continued failure to comply with the Board's orders and briefing requirements.<sup>9</sup> Cooley failed to timely file his Response to the Board's Order to Show

---

a written petition for review with the Administrative Review Board . . . which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a timely petition for review is filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. A petition must be filed within 10 business days of the date of the decision of the administrative law judge.

<sup>8</sup> *Link v. Wabash*, 370 U.S. 626, 630-31 (1962).

<sup>9</sup> *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ-AIR-006 (ARB Dec. 30, 2004, Reissued Jan. 5, 2005), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *Powers v. Pinnacle Airlines, Inc.*, ARB No.

Cause even though the Board cautioned him that if he failed to do so, the Board could dismiss his appeal without further order. Nevertheless, because the Board recognizes that dismissal is a very severe sanction, we will consider his response to the Show Cause Order.

As we informed Cooley in our Order to Show Cause, the regulation establishing the 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 Board is guided by the principles of equitable tolling in determining whether to relax the limitations period in a particular case.<sup>12</sup> Accordingly, the Board has 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>

But the Board has not determined that these categories are exclusive.<sup>14</sup> Cooley's inability to satisfy one of these elements is not necessarily fatal to his claim but courts "have

---

04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004), *aff'd sub nom. Powers v. U.S. Dep't of Labor, et al.*, Nos. 04-4441/05-3266 (6th Cir. Jan. 26, 2006); *Blodgett v. TVEC*, ARB No. 03-043, ALJ No. 2003-CAA-007 (ARB Mar. 19, 2003) (dismissing complaint for failure to comply with briefing order); *cf.* Fed. R. App. P. 31(c) (allowing dismissal as sanction for failure to file a conforming brief); Fed R. App. P. 41(b) (permitting courts to dismiss a complaint for failure to comply with court orders).

<sup>10</sup> 29 C.F.R. § 1979.110. *Accord 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>11</sup> *Gutierrez*, slip op. at 3; *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 1997-CAA-012 (ARB Sept. 1, 1999).

<sup>12</sup> *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

<sup>13</sup> *Gutierrez*, slip op. at 3-4.

<sup>14</sup> *Id.* at 3.

generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”<sup>15</sup> Furthermore, 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>16</sup>

Cooley bears the burden of justifying the application of equitable tolling principles.<sup>17</sup> Ignorance of the law will generally not support a finding of entitlement to equitable tolling.<sup>18</sup>

In his response to the Order to Show Cause, Cooley did not argue that any of the three *Allentown* situations provided grounds for tolling in this case. Instead, Cooley averred:

As to the filing date, when I received the Order to Show Cause I was in disbelieve [sic] that I had missed filling [sic] by the deadline. When I went back to the original document from the ARB, I realized I had wrongly noted the deadline. Additionally, I was operating with wrong information that “days” mean business days, excluding holidays, and that the postmark date is considered the filling [sic] date.<sup>[19]</sup>

Essentially, Cooley’s only explanation for his failure to meet the deadline for filing his petition for review is that he “wrongly noted the deadline.” His contention that he was operating under the wrong information concerning the definition of “days” is irrelevant to the issue here because his petition was due on a date certain, September 18, 2009, and not after a specified number of days.

---

<sup>15</sup> *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). See also *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984)(pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

<sup>16</sup> *Baldwin County Welcome Ctr.*, 446 U.S. at 152.

<sup>17</sup> *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

<sup>18</sup> *Accord Wakefield v. Railroad Ret. Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway*, slip op. at 4-5.

<sup>19</sup> [Cooley’s Response to] Order to Show Cause at 1.

We find that the fact that Cooley wrongly noted the deadline does not excuse his failure to demonstrate due diligence in filing his petition for review, especially given the facts that the Board gave him an additional 60 days in which to do so and explicitly warned him that if he failed to timely file the petition the Board could dismiss it.

We conclude that Cooley has failed to carry his burden of establishing entitlement to equitable tolling of the limitations period for filing a petition for review. Accordingly, we **DISMISS** his petition for review.

**SO ORDERED.**

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

**OLIVER TRANSUE**  
**Administrative Appeals Judge**