



**In the Matter of:**

**PAMELA WALLUM, on behalf of  
TERRY WALLUM, deceased,<sup>1</sup>**

**ARB CASE NO. 12-110**

**COMPLAINANT,**

**ALJ CASE NO. 2009-AIR-020**

**v.**

**DATE: September 19, 2012**

**BELL HELICOPTER TEXTRON, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Pamela Wallum, pro se, Arlington, Texas**

*For the Respondent:*

**Arthur T. Carter, Esq., Sarah R. Teachout, Esq., Haynes and Boone, L.L.P.,  
Dallas, Texas**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown,  
Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals  
Judge**

### **ORDER DENYING PETITION FOR REINSTATEMENT**

Terry Wallum alleged that Bell Helicopter Textron, Inc.,<sup>2</sup> fired him in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR

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<sup>1</sup> Terry Wallum initiated this action pro se. Mr. Wallum died on August 23, 2010. The Administrative Review Board granted Mrs. Wallum's motion for substitution of party.

21).<sup>3</sup> Wallum filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on May 28, 2009. OSHA denied his complaint, and Wallum requested a hearing before an administrative law judge (ALJ).

The ALJ issued an Order to Show Cause on November 5, 2009, and then dismissed Wallum's complaint because he failed to respond to the order. Subsequently, Wallum claimed that he had never received the show-cause order. The ALJ vacated the dismissal and issued a second show-cause order on December 23, 2009. Wallum again failed to respond. On January 26, 2010, the ALJ dismissed Wallum's May 28, 2009 complaint.

Appended to the ALJ's January 26, 2010 decision was a Notice of Appeal Rights that informed Wallum of the requirement 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>4</sup> The notice warned that if no petition was filed, the administrative law judge's decision would become the final order of the Secretary of Labor. Wallum did not appeal the dismissal of his complaint to the Administrative Review Board (ARB) within 10 days, and the ALJ's dismissal became a final order.<sup>5</sup>

On August 25, 2011, Pamela Wallum, Terry Wallum's widow, filed a motion with the ARB to reinstate his dismissed May 28, 2009 complaint and consolidate it with a previous complaint then pending on appeal before the ARB. The ARB denied the motion on the grounds that because Wallum did not appeal the ALJ's January 26, 2010 dismissal of his May 28, 2009 complaint, the ALJ's dismissal had become the final order of the Secretary of Labor thereby rendering the ARB without authority to reinstate the

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<sup>2</sup> Bell Helicopter, a subsidiary of Textron, designs, manufactures, and sells vertical lift aircraft, primarily helicopters. It also operates a helicopter training academy, runs a full-service, repair-and-overhaul facility for helicopters, and provides aircraft spares and component repair services to U.S. government and military contractors. Terry Wallum was a gearbox assembler in Bell's transmission department for almost ten years before Bell fired him on May 27, 2009.

<sup>3</sup> 49 U.S.C.A. § 42121 (Thomson/West 2012). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2012).

<sup>4</sup> 29 C.F.R. § 1979.110(a) provides: "To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge."

<sup>5</sup> 29 C.F.R. § 1979.110(a) further provides in pertinent part: "The decision of the administrative law judge shall become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the [Administrative Review] Board."

complaint. The ARB then remanded Wallum's other complaint to the ALJ for further proceedings.<sup>6</sup>

On March 20, 2012, Mrs. Wallum again asked the ARB to reinstate the May 28, 2009 complaint and filed an addendum to her August 25, 2011 motion. Bell responded on June 26, 2012 requesting that the ARB deny her motion. Mrs. Wallum repeated her request in a June 28, 2012 letter and asked that the ARB review her filings "liberally and with a degree of adjudicative latitude."

In support of her petition to reinstate, Mrs. Wallum asks the ARB to waive the rule requiring that an appeal to the ARB of an ALJ's decision be filed within 10 business days of the date of that decision because of "the unusual and special circumstances surrounding" the May 28, 2009 complaint.<sup>7</sup> She referenced her late husband's illness and hospitalization, an audit report from the Office of the Inspector General concerning the OSHA regional office in Austin, Texas, and the ARB's remand of "the similar, previously filed complaint" as special circumstances justifying a waiver.

Bell opposed the motion on the grounds that the ALJ's dismissal of the May 28, 2009 complaint was not appealed and that the ARB had already ruled that the ALJ's January 26, 2010 dismissal had become the Secretary of Labor's final decision. Bell argues that Wallum had two opportunities before the ALJ to show why his May 28, 2009 complaint should not be dismissed, plus a further opportunity to appeal the ALJ's January 26, 2010 decision, and that Wallum failed to make use of either opportunity.<sup>8</sup>

Mindful of our duty to remain impartial and refrain from becoming an advocate for a pro se complainant, we are equally mindful of our obligation to "construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."<sup>9</sup> In contrast to this liberal

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<sup>6</sup> *Wallum v. Bell Helicopter Textron, Inc.*, ARB No. 09-081, ALJ No. 2009-AIR-006, slip op. at 2 n.3 (ARB Sept. 11, 2011). In responding to Mrs. Wallum's petition to reinstate, the ARB explained that the ALJ's January 26, 2010 dismissal was of no consequence in Wallum's appeal then pending and would have no effect on the ALJ's disposition upon remand. On remand, the parties resolved the issue in Wallum's previous complaint, which the ALJ then dismissed with prejudice.

<sup>7</sup> March 20, 2012 letter at 2-6.

<sup>8</sup> Bell's June 26, 2012 letter at 2-3.

<sup>9</sup> *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 4 (ARB Jan. 31, 2011) (quoting *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 2003-STA-047, slip op. at 2 (ARB Apr. 26, 2005) (citations omitted)).

latitude is the legal requirement that “[t]o be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge.”<sup>10</sup>

Here, Wallum never filed a petition for review of the ALJ’s January 26, 2010 decision, which clearly informed him of the need to do so. This lack of action on his part resulted in the ALJ’s decision becoming the final order of the Secretary. The ARB has no authority to reinstate a complaint that an ALJ decision has dismissed and that has become the Secretary’s final order.

In the interests of justice we are willing to construe Mrs. Wallum’s petition for reinstatement as an untimely petition for review before the ARB. In construing the procedural rule requiring that a complainant file a petition for review with the ARB within ten business days, the ARB has held that “compliance with the filing period is not a jurisdictional prerequisite to obtaining review.”<sup>11</sup> Instead, we have held such filing provisions comparable to a statute of limitations, which may be tolled for equitable reasons.<sup>12</sup>

Recognizing that the limitations period is not jurisdictional in the sense that non-compliance serves as an absolute bar to administrative action, the ARB has subjected the filing deadline to equitable modification through tolling or estoppel.<sup>13</sup> Accordingly, the ARB has followed the tolling principles set forth in *School District of Allentown v. Marshall*, in determining whether to toll the running of a statute of limitations period where an untimely complaint has been filed. These principles permit tolling when:

- (1) 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>[14]</sup>

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<sup>10</sup> 29 C.F.R. § 1979.110(a).

<sup>11</sup> *Avlon v. Am. Express Co.*, ARB No. 09-089, ALJ No. 2008-SOX-051, slip op. at 10 (ARB May 31, 2011) (citations omitted).

<sup>12</sup> This “interpretation is fully consistent with Supreme Court and Federal Appellate Court precedent holding that an administrative agency may waive procedural requirements in the interest of justice, provided that such a waiver will not prejudice the other party.” *Id.* at 11.

<sup>13</sup> *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 6 (ARB Mar. 31, 2010) (citations omitted).

<sup>14</sup> 657 F.2d 16, 20 (3d Cir. 1981).

In *Hyman*, the Board recognized a fourth equitable principle, “where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.”<sup>15</sup> These equitable principles are equally applicable when assessing whether to toll the running of the appeals period for filing petitions for review with the ARB.<sup>16</sup>

Applying these equitable considerations to Mrs. Wallum’s arguments, she nevertheless has presented no evidence to justify the application of equitable tolling or estoppel. Mrs. Wallum does not assert that Bell (or anyone else, for that matter) actively misled her regarding her late husband’s cause of action arising from his discharge in May 2009 or as to his right to appeal. Nor did he file an appeal from the ALJ’s dismissal of his May 28, 2009 complaint in the wrong forum. Instead, Mrs. Wallum relies on 29 C.F.R. § 1979.114, entitled “Special Circumstances: Waiver of Rules,”<sup>17</sup> to ask that the ARB consider that her husband had been in the hospital with declining health during the timeframe of the ALJ’s show-cause orders and his January 2010 dismissal.

The ARB has recognized that a medical condition that prevents a complainant from timely pursuing his or her legal rights has been held to be an “extraordinary” circumstance that justifies equitable tolling.<sup>18</sup> We are not unsympathetic to Wallum’s ill health and Mrs. Wallum’s loss upon his subsequent death in August 2010. Nevertheless, Mrs. Wallum bears the burden of proving that her husband’s ill health or his death constitutes extraordinary circumstances justifying tolling of the limitations period for the ALJ’s January 26, 2010 decision.<sup>19</sup>

Beyond Mrs. Wallum’s statement that her husband was seriously ill in the hospital, nothing in the record shows that his declining health and hospitalization in

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<sup>15</sup> *Hyman*, ARB No. 09-076, slip op. at 4, quoting *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978).

<sup>16</sup> *Herchak v. America W. Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 4-5 (ARB May 14, 2003).

<sup>17</sup> 29 C.F.R. § 1979.114 provides: “In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days’ notice to all parties and interveners, waive any rule or issue any orders that justice or the administration of the Act requires.”

<sup>18</sup> *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001, slip op. at 4 (ARB Nov. 17, 2010), citing *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999).

<sup>19</sup> *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ Nos. 2010-SOX-021, slip op. at 4-5 (ARB Sept. 30, 2010); *Salsbury v. Edward Hines Jr. Veterans Hosp.*, ARB No. 05-014, ALJ No. 2004-ERA-007, slip op. at 7 (ARB July 31, 2007).

December 2009 or his subsequent death in 2010 (six months after the petition was due) prevented him from filing a timely appeal. The evidentiary record being devoid of any evidence that would justify the equitable tolling of the deadline for filing the petition for review of the ALJ's dismissal,<sup>20</sup> we are constrained as a matter of law to deny Mrs. Wallum's petition for reinstatement.

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>20</sup> See *Reeves v. Old Dominion Freight Line*, ARB No. 05-128, ALJ No. 2005-STA-034, slip op. at 4-5 (ARB Sept. 28, 2007) (that complainant was incapacitated and under a doctor's care do not establish that he was entitled to equitable tolling).