



IN THE MATTER OF:

PHILIP MARK TARDY,

ARB CASE NO. 16-077

COMPLAINANT,

ALJ CASE NO. 2015-AIR-026

v.

DATE: October 5, 2017

DELTA AIR LINES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Philip Mark Tardy, pro se, Ypsilanti, Michigan

For the Respondent:

Benjamin A. Stone, Esq.; *Munger and Stone, LLP*, Atlanta, Georgia

Kelly K. Giustina, Esq.; *Delta Air Lines*; Atlanta, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Philip Mark Tardy filed a complaint under the employee whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st

Century (AIR 21 or the Act),¹ alleging that Delta Air Lines retaliated against him in violation of the Act. A Department of Labor Administrative Law Judge (ALJ) determined that Tardy failed to file a timely complaint and that he had not established grounds for tolling the limitations period, and accordingly dismissed Tardy's complaint. Tardy appealed to the Administrative Review Board (ARB or Board). For the following reasons, the Board affirms the ALJ's dismissal.

BACKGROUND

Tardy worked as a maintenance technician for Delta starting in 2006. On August 2, 2014, he complained to the lead mechanic that a co-worker signed off on replacing an anti-ice duct without mentioning engine or duct damage. On August 8, 2014, Delta disciplined Tardy for grabbing and restraining the co-worker and issued a two-week suspension and three years' probation. Subsequently, Tardy obtained short-term disability benefits.² On August 20, 2014, Delta issued Tardy a final corrective action notice informing him that Delta expected him to "take steps to improve his conduct."³

On April 9, 2015, Tardy filed a complaint with the Occupational Safety and Health Administration (OSHA).⁴ OSHA dismissed the complaint on May 12, 2015, as untimely filed, and Tardy requested a hearing before an ALJ. Tardy appeared before the ALJ, as he does before the ARB, pro se.⁵

The ALJ scheduled a conference call and directed the parties to state their positions on the issues. Following the conference call, in which both parties participated,

¹ 49 U.S.C.A. § 42121 (Thomson/West 2015). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2017).

² Respondent's Exhibit (RX) 11. The November 17, 2014 social work note showed that Tardy was currently employed full-time at Delta but on probation, was attempting to file a complaint with the Federal Aviation Administration, and was thinking about applying for social security disability.

³ RX 6. The letter stated that within a month, Tardy had been involved in a confrontation with two other employees that required supervisors' intervention and that he displayed "evasive and uncooperative behavior" during the investigation.

⁴ RX 15.

⁵ The ALJ found it appropriate to allow Tardy to represent himself after discussion with him regarding the general legal issues and the ALJ's conclusion that Tardy was able to adequately represent himself. Tardy stated that he did not desire a continuance to seek legal counsel but wished to proceed pro se. See Decision and Order (D & O) at 3, n.9.

Delta filed a motion for summary decision on the grounds that Tardy's complaint to OSHA was untimely filed. In opposition to the motion, Tardy argued that equitable tolling was appropriate due to his mental illness and his attorney's incompetence.

At a hearing on whether equitable tolling should apply to Tardy's untimely complaint, Tardy and his witness testified about why his mental history warranted tolling of the 90-day statute of limitations. On June 14, 2016, the ALJ dismissed Tardy's complaint as untimely filed. The ALJ concluded that Tardy had not made the "particularly strong showing" needed to warrant tolling the statute of limitations for mental impairment and even if he had mental impairment, there was no evidence of attorney incompetence, fraud, abandonment, or illness. Tardy timely appealed to the ARB.⁶

DISCUSSION

To be timely, an AIR 21 complainant must file a complaint within 90 days of the date on which the alleged violation occurred (i.e., when the discriminatory decision was both made and communicated to the complainant).⁷ Generally, in determining whether equity warrants tolling of a statute of limitations, the ARB follows the principles that courts have applied to cases with statutorily-mandated filing deadlines.⁸ The ARB has articulated four instances in which equitable tolling may be proper:

- (1) the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights,
- (3) the complainant has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum, or

⁶ The Secretary of Labor has delegated authority to the ARB to issue final agency decisions in AIR 21 cases. *See* Secretary's Order No. 1-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

⁷ 49 U.S.C.A. § 31105(b)(1); 29 C.F.R. § 1979.103(d).

⁸ *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (ARB Feb. 28, 2007).

(4) the employer's own acts or omissions have lulled the employee into foregoing prompt attempts to vindicate his or her rights.^{9]}

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.¹⁰

On appeal before the ARB, Tardy reasserted his claim of mental illness (bi-polar disorder) as justification for equitable tolling of the limitations period. Tardy also argues that his retained legal counsel, who subsequently withdrew from representation, failed to inform him of AIR 21's requirement that his complaint must be filed within 90 days of the suspension and probation that Delta imposed.¹¹

Turning first to Tardy's ineffective-assistance-of-counsel argument, Tardy testified at the hearing that he was familiar with the term equitable tolling, and that he had the funds to hire an attorney. Tardy added that he initially hired legal counsel, who represented him into 2015, to find out if what he had done in August 2014 was protected activity and whether Delta could take action against him.¹² Tardy's initial counsel subsequently withdrew, and Tardy appeared before the ALJ pro se. At the March 2016 hearing, the ALJ questioned Tardy in detail about whether he wanted a continuance to find an attorney. Tardy responded that he had tried for three months to get an attorney, but "[m]ost of them don't even call back."¹³ After a lengthy discussion about the legal requirements of Tardy's complaint, the ALJ offered Tardy a continuance until May 4, 2016, to retain legal counsel. Tardy then consulted with his witness, Cathy Ann Gray, and decided to "just go on with the testimony" and "get this over with."¹⁴

⁹ *Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 4 (ARB Jan. 28, 2011). See *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

¹⁰ *Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-060, slip op. at 5 (ARB Sept. 30, 2010).

¹¹ Tardy submitted a letter brief on June 30, 2016, and included a copy of a June 2, 2015 letter from counsel's law firm.

¹² Hearing transcript (TR) at 34-42.

¹³ *Id.* at 7-9.

¹⁴ *Id.* at 10-19.

The U.S. Supreme Court has held that “[e]quitable tolling is an extraordinary remedy which is typically applied sparingly.”¹⁵ To be entitled to equitable tolling, a complainant must act diligently, and the untimeliness of the filing must result from circumstances beyond his control.¹⁶ The ARB has consistently held that “attorney error does not constitute an extraordinary factor because “[u]ltimately, clients are accountable for the acts and omissions of their attorneys.”¹⁷ Moreover, the ARB has held that ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground establishing entitlement to equitable tolling.¹⁸ The Board finds nothing in this case that would suggest that Tardy’s initially-retained legal counsel or his subsequent lack of legal representation contributed in any way to his failure to file a timely AIR 21 complaint with OSHA.

Further, substantial evidence of record supports the ALJ’s conclusion that Tardy’s bipolar disorder did not render him unable to pursue his complaint. Tardy’s medical records during the 90-day limitations period from August through November 2014 indicated that his speech and thought processes were normal and intact. Treatment notes by healthcare providers at Apex Behavioral Health Western Wayne and a disability claims service sheet show that suicidal, violent, or homicidal ideation was absent and that Tardy’s fund of knowledge was intact during the 90-day time frame.¹⁹ Finally, Tardy testified at the hearing that he would have “gone to OSHA in a New York minute” if he had known of the 90-day deadline that he later learned about from the Internet.²⁰

Tardy stated that his mental condition did not prevent him from working as a mechanic and managing his own affairs. While his concentration and memory were not so good,²¹ Tardy admitted on cross-examination that he paid his own bills and took care

¹⁵ *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990).

¹⁶ *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 4 (ARB Sept. 30, 2010)(citing *Drew v. Dep’t of Corr.*, 297 F.3d 1278, 1286-87 (11th Cir. 2002)).

¹⁷ *Romero*, ARB No. 10-095, slip op. at 5 n.23; *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5 (quoting *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006)).

¹⁸ *McAllister v. Lee Cty. Bd. of Cty. Comm’rs*, ARB No. 15-011, ALJ No. 2013-AIR-008, slip op. at 7 (ARB May 6, 2015).

¹⁹ Complainant’s Exhibit (CX) 1-2.

²⁰ TR at 60-61.

²¹ *Id.* at 6, 32-33.

of his finances, “done it for years,” that he drove himself with the aid of GPS, and that he went to San Francisco in September 2014 to provide his father some relief in caring for his mother whose health was declining.²²

Gray, who testified at hearing on Tardy’s behalf, had lived with Tardy for nine years and testified that he had not “been right” especially since the August 2014 incident. “He was so angry, he was so upset. He’s been suicidal, homicidal. He doesn’t remember anything.” On cross-examination, Gray stated that Tardy suffered from bipolar disorder but had worked for Delta during the entire time she had lived with him. She agreed that Tardy had told her “millions” of times that Delta had retaliated against him and had reported that retaliation to his social worker. Gray added Tardy spent a lot of time reading books and things on the Internet.²³

The Board agrees with the ALJ that Gray’s testimony supported Tardy’s bipolar disorder, but also corroborated Tardy’s mental acuity because she confirmed his testimony that he hired an attorney to “fight [the] punishment,” he told her in August that Delta had retaliated against him, and he called Delta’s human resources department in November 2014 to complain about being retaliated against because he had blown the whistle on a co-worker.²⁴ The substantial evidence of record fully supports the ALJ’s finding that Tardy failed to make the necessary showing that would warrant equitable tolling. Although Tardy established that he had bipolar disorder and suffered from it at all times relevant to these proceedings, the evidence of record fails to establish that Tardy’s bipolar disorder was the cause of his failure to file his complaint within the 90-day statutory filing period.

²² *Id.* at 50-54.

²³ *Id.* at 58-64.

²⁴ *Id.* at 37-42, 58-62.

CONCLUSION

The Board **AFFIRMS** the ALJ's determination that Tardy failed to demonstrate that he was entitled to equitable tolling of the limitations period for filing his AIR 21 complaint. Accordingly, the Board **AFFIRMS** the ALJ's dismissal of Tardy's complaint as untimely filed.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge