U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SHAE HEMINGWAY and BILL HAWKINS,

COMPLAINANTS,

v.

NORTHEAST UTILITIES, NORTHEAST NUCLEAR ENERGY COMPANY, BARTLETT NUCLEAR, INC., and CONNECTICUT YANKEE ATOMIC POWER COMPANY,

RESPONDENTS.

ARB CASE NO. 00-074

ALJ CASE NOS. 99-ERA-014
99-ERA-015

DATE: August 31, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

For the Complainants:
Bill Hawkins, *Pro se, E. Lyme, Connecticut*

For the Respondents:
Laura Kriteman, Esq., *Troutman & Sanders, LLP, Alanta, Georgia*

ORDER DENYING MOTION FOR APPEAL OUT OF TIME

This case arose when Shae Hemingway and Bill Hawkins filed a complaint with the Department of Labor, Occupational Safety and Health Administration, alleging that the respondents, Northeast Utilities; Northeast Nuclear Energy Company; Bartlett Nuclear, Inc. and Connecticut Yankee Atomic Power Company ("the Utilities") had harassed, intimidated and discriminated against them in violation of the employee protection provisions of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (1994).

[1/] This appeal was assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,1978 §5 (May 3, 1996).

On April 10, 2000, the Administrative Law Judge (ALJ) issued a recommended decision granting summary decision in favor of the Respondents. Neither Hemingway nor Hawkins filed a timely appeal of the ALJ's recommended decision. Before the Administrative Review Board (ARB) for resolution is Hawkins' "Motion to Appeal Out of Time."

Background

Pursuant to 29 C.F.R. §24.8:

> (a) Any party desiring to seek review, including judicial review, of a recommended decision of the administrative law judge shall file a 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. To be effective, such a petition must be received within ten business days of the date of the recommended decision of the administrative law judge, and shall be served on all parties and on the Chief Administrative Law Judge.

The ALJ issued his recommended decision on April 10, 2000; neither petitioner filed a petition for review with the ARB by April 24, 2000, *i.e.,* within ten business days.

On July 27, 2000, Hawkins filed a "Motion to Appeal Out of Time." Hawkins acknowledges that his petition for review was untimely, but requests that the Board accept his appeal nonetheless because "I feel that my attorney has misled me to believe that we are still awaiting the ARB's final approval." Motion to Appeal Out of Time at 1. Attached to Hawkins' Motion is a letter dated April 17, 2000, from his attorney stating:

> I have just received the April 10, 2000 decision (copy enclosed) of Judge Sutton in your case. I am very disappointed to report that Judge Sutton has recommended an Order and therein granted Northeast Utilities' and Yankee Atomic's Motion for Summary Decision. While this decision has to be approved by the Administrative Review Board, this is one of those circumstances in which justice is not always just, for the prior judge assigned to this matter had denied the Motion for Summary Judgment. When you have received this please call me as soon as possible to discuss any actions you would like me to take.

Attachment 2.

Hawkins contends that he spoke with his attorney in the first week of July and his attorney informed him that he was still waiting for the ARB's decision. Hawkins further states that he first became aware that an appeal had not been perfected when he received a letter from David J. Vito, United States Nuclear Regulatory Commission Senior Allegation Officer, dated June 21, 2000,

informing Hawkins that upon contacting the ARB, he had been informed that Hawkins had not filed an appeal of the ALJ's Recommended Decision and Order. Hawkins indicates that after receiving Vito's letter, he attempted to contact his attorney; however, he was unsuccessful. He asserts that he was informed on July 26, 2000, that his attorney was on vacation.

Hawkins acknowledges that he read the ALJ's recommended decision, which states:

> This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board . . . . Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

Recommended Decision and Order at 23. Although Hawkins admits that he read this provision, he states that "I did not comprehend this deadline."

The ARB received Hawkins' "Motion to Appeal Out of Time" on August 4, 2000, almost 15 weeks after the due date for a timely filing and approximately 3-4 weeks[2/] after Vito informed Hawkins that no petition for review of his case had been filed with the ARB.

Discussion

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 the environmental whistleblower statutes. 29 C.F.R. §24.1. *Accord Gutierrez v. Regents of the University of California*, ALJ Case No. 98-ERA-19, ARB Case No. 99-116, Order Accepting Petition for Review and Establishing Briefing Schedule, slip op. at 3 (Nov. 8, 1999). Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the agency, it is within the ARB's discretion, under the proper circumstances, to accept an untimely filed petition for review. *Gutierrez v. Regents of the University of California*, *supra*; *Duncan v. Sacramento Metropolitan Air Quality Management District*, ALJ Case No. 97-CAA-12, ARB Case No. 99-011, Order Accepting Appeal and Establishing Briefing Schedule (Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 539 (1970). *Cf. City of Fredericksburg v. Federal Energy Regulatory Commission*, 876 F.2d 1109 (4th Cir. 1989)(FERC could not waive compliance with regulation requiring that water quality certification requests be made in compliance with state law because the regulation clearly is designed to confer a benefit upon the states by discouraging prospective licensees from thwarting state administrative procedures.).

[2/] Hawkins states that Vito's letter was dated June 21, 2000. He did not indicate when he actually received it.

In determining whether to relax the limitations period in a particular case, we are guided by the principles of equitable tolling that have been applied to cases with filing deadlines mandated by statute. *Gutierrez v. Regents of the University of California*, *supra*, at 2. In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complaint must be filed with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. However, the court held that because Congress, not the courts or administrative agency, was entrusted with the responsibility to determine the statutory time limitations, the restrictions on equitable tolling must be "scrupulously observed." *Id.* at 19. The court recognized three situations in which tolling is appropriate:

> (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.

Id. at 20 (citation omitted).

In this case, Hawkins alleges only that he failed to timely file his appeal because he did not "comprehend" the statement of his appeal rights in the ALJ's Recommended Decision and Order and his attorney misled him by leading him to believe that ARB review was automatic.[3/] Thus, none of the three situations recognized in *City of Allentown* is applicable in this case – *i.e.*, the Utilities did not mislead Hawkins in regard to the time limitations for filing a petition for review, Hawkins was not prevented from filing the petition by some extraordinary event and he did not file the petition in the wrong forum. Although the *City of Allentown* court did not hold that these three categories are exclusive, *Gutierrez v. Regents of the University of California*, *supra*, at 4, Hawkins' allegations are insufficient to persuade us that a waiver of the time limit for filing an appeal is warranted in this case.

With regard to Hawkins' claim that he failed to understand the meaning of the appeal instructions explicitly provided by the ALJ, we are unwilling in this case to depart from the general

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[3/] Originally, 29 C.F.R. §24.6(b) provided that an ALJ should forward his or her recommended decision and order automatically to the Secretary of Labor for review. On April 17, 1996, the Secretary of Labor issued Secretary's Order 2-96, which delegated authority to issue final agency decisions under the environmental statutes, including the ERA, to the newly created ARB. 61 Fed. Reg. 19,978 (1996). The 29 C.F.R. Part 24 regulations were amended in 1998 to provide, *inter alia*, for ARB review of environmental whistleblower complaints only upon the filing of an appeal by a party aggrieved by an ALJ's recommended decision. 63 Fed. Reg. 6614 (Feb. 9, 1998); 29 C.F.R. §24.28(a)(1999). Thus, the regulations requiring the filing of a petition for review by a party aggrieved had been in effect for more than two years when the ALJ in this case issued his Recommended Decision and Order. Furthermore, the Recommended Decision, itself, contained a statement of the proper procedure for filing a petition for review. Recommended Decision and Order at 23.

principle that "ignorance of legal rights does not toll a statute of limitations." *Larson v. American Wheel and Brake, Inc.*, 610 F.2d 506, 510 (8th Cir. 1979).

With regard to Hawkins' allegation of attorney error, we note that clients are held accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U. S. 380, 396 (1993); *Malpass v. General Electric Company,* ALJ Nos. 85-ERA-38, 85-ERA-39, Secretary's Final Decision and Order, slip op. at 16 (Mar. 1, 1994). Rejecting the contention that holding a client responsible for the errors of his attorney would be unjust, the Supreme Court reasoned,

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney."

Link v. Wabash Railroad Company, 370 U.S. 626, 633-634 (1962), (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).[4/] Accordingly, even if, as Hawkins alleges, his attorney misled him into believing that ARB review of the ALJ's Recommended Decision and Order was automatic, this allegation is not a sufficient basis for waiving the time limitation for filing a petition for review pursuant to 29 C.F.R. §24.8. *Accord Keyse v. California Texas Oil Corporation*, 590 F.2d 45, 47 (2d Cir. 1978).

Conclusion

Finding no proper grounds upon which to waive the limitations period for filing a petition for review pursuant to 29 C.F.R. 24.8, we **DENY** Hawkins' Motion to Appeal Out of Time.

SO ORDERED.

PAUL GREENBERG
Member

CYNTHIA L. ATTWOOD
Member

[4/] The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.