



In the Matter of:

JEROME REID,

ARB CASE NO. 03-154

COMPLAINANT,

ALJ CASE NO. 03-ERA-17

v.

DATE: October 19, 2004

**NIAGARA MOHAWK POWER
CORPORATION,**

RESPONDENT.

BEFORE THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jerome Reid, pro se, Syracuse, New York

For the Respondent:

Robert A. LaBerge, Esq., Bond, Schoeneck & King, LLP, Syracuse, New York

FINAL DECISION AND ORDER

Jerome Reid filed a complaint under the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995), alleging that his employer, Niagara Mohawk Power Corporation, had unlawfully retaliated against him in violation of the ERA's whistleblower protection provisions. If an investigator determines that an employer did not violate the ERA, the employee may appeal that decision by filing a timely request for hearing with the Chief Administrative Law Judge.¹ Because Reid failed to file a timely request for a hearing, we affirm the Administrative Law Judge's recommendation and dismiss Reid's complaint.

¹ 29 C.F.R. § 29.4(d)(2)(2004).

BACKGROUND

Reid filed a complaint on May 15, 2002, with the New York Regional Office of the Occupational Safety and Health Administration (OSHA) alleging that Niagara Mohawk had violated the ERA's whistleblower protection provisions.² An OSHA investigator investigated the complaint, and on July 1, 2002, the OSHA Regional Director issued a notice of determination concluding that "[t]he preponderance of credible evidence clearly indicates that your separation from employment . . . was for legitimate business reasons and not a discriminatory reprisal in violation of Section 211 of the Energy Reorganization Act of 1970."³

The Notice of Determination informed Reid how to appeal the OSHA decision:

This letter is notification to you that, if you wish to appeal the above findings, you have a right to a formal hearing on the record. To exercise this right you must **within (5) calendar days of receipt of this letter**, file your request for hearing by facsimile, overnight next day deliver [sic] mail or telegram to: **Chief Administrative Law Judge** Unless a telegram is received by the Chief Administrative Law Judge within the five day period, this notification of determination will become the Final order of the Secretary of Labor dismissing your complaint.⁴

Reid signed a return receipt for the Notice of Determination letter on July 12, 2002.⁵ Reid actually had more time to file the hearing request than the Notice from OSHA indicated because the Department of Labor had amended the Part 24 regulations effective March 11, 1998, to permit filing a request for an ALJ hearing in an ERA case within five **business**, rather than **calendar**, days of the date on which a party received the OSHA determination letter.⁶ So Reid had until July 19, 2002, to file his request for a hearing with the Chief Administrative Law Judge, but he did not do so.

On May 6, 2003, Reid called Michael Mabee, a supervisory investigator in the OSHA New York Regional Office and requested a copy of the return receipt that he

² August 29, 2003 Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 1.

³ Notice of Determination at 1.

⁴ Notice of Determination at 1-2.

⁵ R. D. & O. at 2.

⁶ 63 Fed. Reg. 6622 (Feb. 9, 1998). *See* 29 C.F.R. §§ 24.4(d)(2)(3), 24.5(d).

signed for the Notice of Determination letter. He also faxed copies of two letters to Mabee. A letter dated June 18, 2002, is addressed to Matthew A. Gilmartin at the OSHA Regional Office and states, "I Jerome Reid appeal the recent findings by your office and I would like for your Office to re-evaluate those findings by the field investigator for the following reasons: 1) all documentation and witnesses weren't examin [sic] or interviewed." The second letter, dated October 11, 2002, and also addressed to Gilmartin, is labeled "Second Request" and repeats Reid's request for re-evaluation of the investigative findings. Mabee responded to Reid by letter dated May 6, 2003, that he had reviewed OSHA's files and had found no evidence that the New York Office had received either letter prior to May 6, 2003. Mabee further informed Reid that all ERA appeals must be addressed to the Chief Docket Clerk at the Office of the Chief Administrative Law Judge.⁷

On June 27, 2003, Reid faxed a letter to the Chief Docket Clerk in which he stated that he was submitting an appeal for processing and that he previously had "supplied US DOL OSHA with an appeal letter on or about June 18, 2002, and also faxed a copy of this letter on July 18, 2002."⁸ Attached to this letter is a copy of a letter addressed to Matthew A. Gilmartin dated June 18, 2002, appealing "the recent findings by your office" and a document dated June 27, 2003, entitled "Transmission Log," which appears to list facsimile transmissions. The Log indicates that one page was faxed to (212) 337-2371 on July 18 and contains the handwritten notation "OSHA" by this number, but does not indicate the year in which the document was faxed.⁹

The Office of the Chief Judge docketed Reid's appeal on June 27, 2003, and assigned the case to an Administrative Law Judge (ALJ). The ALJ issued a Notice of Hearing, Order to Show Cause and Pre-Hearing Order on July 8, 2003, ordering Reid to show cause no later than August 1, 2003, why his request for hearing "should not be dismissed as untimely because it was not filed pursuant to 29 C.F.R § 24.4(d)(2) within five business days of May 12, 2002, [sic]¹⁰ the date on which the Complainant received the determination letter on his complaint."¹¹ The Order also warned Reid that "Failure to comply with this Order, without good cause shown, may result in the dismissal of the proceeding or the imposition of other appropriate sanctions against the offending party."¹² The ALJ served the Order on both Reid and his attorney of record.

⁷ R. D. & O. at 2.

⁸ R. D. & O. at 2.

⁹ *Id.*

¹⁰ Reid received the Notice of Determination on July 12, 2002, rather than on May 12, 2002, as the ALJ stated.

¹¹ Notice of Hearing, Order to Show Cause, and Pre-Hearing Order at 1.

¹² *Id.* at 2.

Reid did not file a response as ordered. On August 8, 2003, Niagara Mohawk wrote a letter to the ALJ requesting that he dismiss Reid's complaint because Reid had failed to respond to the Show Cause Order. Niagara Mohawk sent a copy of this letter to both Reid and his attorney.

On August 29, 2003, the ALJ issued a Recommended Decision and Order Dismissing Complaint. Despite Reid's failure to respond to the Show Cause Order, the ALJ did not simply recommend dismissal based on this failure, but instead the ALJ considered and addressed the timeliness of Reid's request for hearing. The ALJ found that OSHA had specifically notified Reid in the July 1, 2002 Notice of Determination letter that he had to file a request for hearing with the Chief Administrative Law Judge. The ALJ concluded that the fact that OSHA told Reid that the notice was due in five calendar days rather than five business days is harmless error because Reid filed nothing with the Office of the Chief Administrative Law Judge until June 27, 2003, more than eleven months after he received OSHA's Notice of Determination letter. The ALJ also found that the erroneous statement in his July 8, 2003 Notice of Hearing, Order to Show Cause and Pre-Hearing Order that Reid had received the Notice of Determination on May 12, 2002, instead of July 12, 2002, was harmless because Reid never responded to the Order.¹³

Though acknowledging that the Administrative Review Board has held that filing periods may be equitably tolled in appropriate circumstances, the ALJ found no grounds for equitable tolling. Thus, the ALJ concluded that Reid's complaint must be dismissed because Reid "was on notice of the procedural requirements for filing a timely request and simply chose to ignore them."¹⁴

On September 11, 2003, Reid's counsel, Marion Chase Pacheco, wrote a letter to the ALJ confessing that she had failed to respond to the July 8, 2003 Notice of Hearing, Order to Show Cause and Pre-Hearing Order because she erroneously believed that when she responded to an Order the ALJ had issued in another of Reid's cases (No. 2000-ERA-00023), she was also responding to the Show Cause Order in this case. She further acknowledged that she persisted in this error even after Niagara Mohawk requested the ALJ to dismiss this case because she assumed that it was Mohawk's counsel who had made a mistake in not realizing that the ALJ had already issued an Order dispositive of his motion -- an Order that the ALJ had issued in No. 2000-ERA-00023. Counsel for Reid further averred that she "do[es] not even have the time to research the appeal right now" because she anticipated that she would be receiving treatment for a spinal condition, but requested that she be permitted to appeal the R. D. & O. "in the interest of justice."

¹³ R. D. & O. at 4.

¹⁴ *Id.*

Reid, pro se, petitioned the Board to review the ALJ's R. D. & O. On September 12, 2003, the ALJ issued an Order forwarding Pacheco's letter to the Board "for appropriate action." The Board issued a Notice of Appeal and Order Establishing Briefing Schedule. Both Reid and Niagara Mohawk filed briefs in response to the Board's order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to review an ALJ's recommended decision in cases arising under the ERA's employee protection provisions.¹⁵ In exercising this authority, the Board acts with all the powers the Secretary would possess in rendering a decision under the ERA, including plenary review of the ALJ's recommended decision.¹⁶ Accordingly, we are not bound by an ALJ's conclusions, but are free to review factual and legal findings de novo.¹⁷

DISCUSSION

The Parties' Arguments

Reid, in his opening brief, argues that the Board should remand his case to the ALJ for a hearing because 1) a Niagara Mohawk employee failed to provide Reid with his exposure, medical and training records until he filed a complaint with the Nuclear Regulatory Commission and OSHA and 2) his legal counsel inadequately represented him.¹⁸

In response, Niagara Mohawk argues that the Board should affirm the ALJ's R. D. & O. because Reid did not timely file his request for a hearing pursuant to 29 C.F.R. §§ 24.4(d)(2)(3), 24.5(d). In addition Niagara Mohawk contends that Reid failed to serve it

¹⁵ See 29 C.F.R. § 24.8 (2004); see also Secretary's Order No. 1-2002, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 67 Fed. Reg. 64, 272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

¹⁶ See Administrative Procedure Act, 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-72 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

¹⁷ *Reid v. Niagara Mohawk Power Corp.*, ARB No. 00-082, ALJ No. 2000-ERA-23, slip op. at 5 (ARB Aug. 30, 2002).

¹⁸ Reid Opening Brief at 1.

with a copy of the hearing notice as 29 C.F.R. § 24.4(d)(3) requires and that Reid failed to timely reply to the ALJ's Show Cause Order. Finally, Niagara Mohawk argues that we should reject Reid's claim of inadequate counsel because he was not represented by counsel on the date he was required to file his hearing request. Furthermore, it contends that neither inadequate counsel nor pro se status excuse a party's failure to adhere to the required filing deadlines.

In addition, Reid attached Pacheco's September 11, 2003 letter to his reply brief. After explaining that prosecuting his cases before the ALJ was very expensive and had put "my family and me in a financial crisis," he requested "that this case be dismiss [sic] with out [sic] prejudice."¹⁹

We Reject Reid's Arguments

As an initial matter, neither the ERA nor the Part 29 Regulations relevant to this ERA claim provide for dismissal without prejudice of a complaint pending before the Board. Even if such a dismissal might be appropriate in some cases,²⁰ we hold that under the facts of this case dismissal without prejudice would not be proper. Reid's only argument in support of his request is that the case has imposed a financial burden upon him and his family. But all that remains before the Board is to issue a decision. Therefore, resolution of this case will not impose any additional financial burden upon Reid. Also, Niagara Mohawk has expended resources in litigating this case, and it would not be fair to deny it a final resolution or to expose it to additional legal costs should Reid attempt to reopen this litigation. Assessing such costs against Reid, given his precarious financial situation, is not a viable option. Therefore, we deny Reid's request to dismiss this complaint without prejudice and turn to the substantive issue whether we should excuse Reid's failure to timely file his hearing request.

Reid's first argument about the Niagara Mohawk employee's failure to respond to his request for records is related to the merits of his discrimination claim. Therefore, we reject it because it is not relevant to the issue of failure to timely file the request for hearing.

We also reject Reid's argument about inadequate representation. While we recognize that Reid is not personally responsible for his counsel's failure to respond to the ALJ's Order to Show Cause, "clients are accountable for the acts and omissions of their attorneys."²¹ In *Link v. Wabash R.R. Co*, the Supreme Court rejected the argument that holding a client responsible for the errors of his attorney would be unjust:

¹⁹ Reid Final Brief at 1.

²⁰ See *Reid v. Niagara Mohawk Power Corp.*, 93-ERA-3 (Sec'y Feb. 14, 1994).

²¹ *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002). *Accord Pioneer Inv. Services*

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.”²²

The Court did note that “[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.”²³

Nor does Reid persuade us that he timely filed a request for hearing. Reid does not even contend that he filed a request with the Chief Administrative Law Judge by July 19, 2002. Indeed, Reid filed nothing with the Office of the Chief Administrative Law Judge until June 27, 2003.²⁴ Reid has submitted a copy of a letter that he says he filed with OSHA on June 18, 2002, appealing OSHA’s findings, and he states that he faxed a copy of this letter to OSHA on July 18, 2002. But even if we could excuse Reid’s failure to file his request with the ALJ, and even if OSHA had received these communications, of which it has no record, Reid could not have requested a hearing on the Notice of Determination at issue here because OSHA did not even issue that Notice until July 1, 2002. So a letter filed on June 18, 2002, could not have requested a hearing on a Notice that OSHA had not yet issued.

Equitable Tolling

We also agree with the ALJ and find that grounds for equitable tolling do not exist here. When deciding whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines.²⁵ In *School Dist. of the City of Allentown v. Marshall*, the third Circuit recognized three situations in which tolling is proper:

Co., v. Brunswick Associates Ltd. P’ship, 507 U.S. 380, 396 (1993); *Malpass v. General Elec. Co.*, Nos. 85-ERA-38, 39 (Sec’y Mar. 1, 1994).

²² 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

²³ *Id.* at 634 n.10.

²⁴ R. D. & O. at 4.

²⁵ *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2 (ARB Nov. 8, 1999).

- (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.²⁶

Reid's inability to satisfy one of these elements is not necessarily fatal to his claim. But courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."²⁷ Furthermore, an absence of prejudice to the other party "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."²⁸

Reid bears the burden of justifying the application of equitable tolling principles.²⁹ But in neither his ALJ nor Board filings does Reid suggest that Niagara Mohawk actively misled him or that an extraordinary event precluded him from timely filing. Nor could Reid argue that he filed a timely request in the wrong forum, that is, with OSHA instead of with the Chief Administrative Law Judge. As explained above, we cannot find that he filed the precise claim in the wrong forum, because even if he did file a hearing request with OSHA, he could not have requested a hearing on a Notice of Determination that OSHA had not yet issued.

CONCLUSION

Regulations that implement the ERA require complainants to timely file a request for hearing with the Chief Administrative Law Judge. Reid did not timely file a request for hearing with the Chief Administrative Law Judge. Furthermore, we find no basis upon which to toll the filing period. Therefore, we **DISMISS** his complaint.

Reid has requested that the Board send a copy of his petition for review to the Solicitor General for review. We have no authority to request the Solicitor General to

²⁶ 657 F.2d 16, 18 (3d Cir. 1981) (citation omitted).

²⁷ *Wilson v. Secretary, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Department 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).

²⁸ *Baldwin County Welcome Ctr.*, 446 U.S. at 152.

²⁹ *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

review a recommended decision of an ALJ under the ERA. Nevertheless, for Reid's convenience, we include the Acting Solicitor General's address in the event that Reid would like to request such review directly:

Paul D. Clement, Acting Solicitor General
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge