



In the Matter of:

RAFAEL SANTAMARIA,

ARB CASE NO. 05-023

COMPLAINANT,

ALJ CASE NO. 04-ERA-25

v.

DATE: March 31, 2005

**U.S. ENVIRONMENTAL PROTECTION
AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rafael Santamaria, pro se, Roswell, Georgia

For the Respondent:

Karol S. Berrien, Esq., U. S. Environmental Protection Agency, Atlanta, Georgia

FINAL DECISION AND ORDER DISMISSING APPEAL

This case arises under the whistleblower protection provisions of a number of environmental protection statutes¹ and their implementing regulations.² This is the second case involving the Complainant, Rafael Santamaria, and the Respondent United

¹ These Acts include: the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A § 9610 (West 1995); the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995); the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998).

² 29 C.F.R. Part 24 (2004).

States Environmental Protection Agency (EPA) that Santamaria has appealed to the Administrative Review Board. Santamaria initially appealed a Department of Labor Administrative Law Judge's Recommended Decision and Order Granting Respondent's Motion for Summary Decision and Denying Complainant's Motion for Summary Decision in *Santamaria v. United States Environmental Protection Agency*, ARB No. 04-063, ALJ No. 2004-ERA-00006 (ALJ Feb. 24, 2004)(R. D. & O. I). We will refer to that case as *Santamaria I*. We will refer to the case that is the subject of the second appeal, and this order, *Santamaria v. United States Environmental Protection Agency*, ARB No. 05-023, ALJ No. 2004-ERA-0025 (ALJ Nov. 4, 2004), as *Santamaria II*.

Santamaria failed to timely petition the Board to review the Administrative Law Judge's Recommended Decision and Order Granting Respondent's Motion for Summary Judgment (R. D. & O. II) in *Santamaria II*. Accordingly, the Board must determine whether Santamaria has carried his burden of establishing that he is entitled to equitable tolling of the limitations period. We hold that Santamaria has failed to carry this burden. Santamaria's alleged ignorance of his right to appeal R. D. & O. II does not compel tolling in this case, especially given that the Administrative Law Judge served Santamaria with a copy of the applicable appeal rights in *Santamaria I* and Santamaria, in turn, timely petitioned the Board for review of the Administrative Law Judge's R. D. & O. I.

BACKGROUND

On February 24, 2004, a Department of Labor Administrative Law Judge issued the R. D. & O. I in *Santamaria I*. The Administrative Law Judge's recommended decision contained the following notice of Santamaria's rights to petition the Board to review the recommended decision:

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, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. 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. §§ 24.7(d) and 24.8.

On February 26, 2004, Santamaria faxed a timely petition to the Board requesting it to review the recommended decision in *Santamaria I*. The Board issued a Notice of Appeal and Order Establishing Briefing Schedule and both Santamaria and EPA filed briefs in response. This appeal is currently pending before the Board. On October 20,

2004, the Board issued a Final Order suspending Edward Slavin, the attorney representing Santamaria in *Santamaria I*, from practice before the Board until the Tennessee Supreme Court reinstates him as a member in good standing.³

On November 4, 2004, an Administrative Law Judge issued the R. D. & O. II in *Santamaria II*. The R. D. & O. II did not include a notice of the parties's appeal rights. But the procedural regulations interpreting the environmental whistleblower statutes at issue here provide:

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.⁴

Any party desiring review of the R. D. & O. II could have petitioned the Board to review that recommended decision by November 19, 2004. The Board received no petition by that date.

Instead, on November 24, 2004, Santamaria, pro se, filed an untimely petition for review. In response the Board ordered Santamaria to show cause why it should not dismiss the untimely petition. Santamaria filed a response to the Board's Show Cause Order and EPA replied to Santamaria's response.

DISCUSSION

Because the regulation establishing a ten-business-day limitations period for filing a petition for review with the Board does not confer important procedural benefits upon individuals or other third parties outside the Board, we may, under the proper circumstances, accept an untimely petition for review.⁵ The Board is guided by the principles of equitable tolling in determining whether to relax the limitations period in a

³ *In re the qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172 (Oct. 20, 2004).

⁴ 29 C.F.R. § 24.8(a).

⁵ *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999); *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999). *Accord American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

particular case and accept an untimely petition.⁶ The ARB has recognized three situations in which it will accept an untimely petition:

- (1) [when] the respondent has actively misled the complainant respecting his rights to file a petition,
- (2) the complainant has in some extraordinary way been prevented from asserting his or her rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.⁷

If Santamaria can not satisfy one of these elements, his failure is not necessarily fatal to his claim, if he can identify another factor that would justify tolling the limitations period. But even **if** it were true that the late filing did not harm EPA, this fact, alone, would not suffice to require tolling of the limitations period, although the Board would consider the absence of harm if Santamaria identified a factor that might justify such tolling.⁸

Santamaria bears the burden of justifying the application of equitable modification principles.⁹ He requests the Board to accept his untimely petition because EPA actively misled him respecting his rights to file a petition and he was in some extraordinary way prevented from asserting his rights. In support of this request, Santamaria alleges that the Administrative Law Judge failed to include his appeal rights in his decision and he was actively misled to believe that he had no appeal rights because in the civil rights cases with which he was familiar, the complainant was advised of his appeal rights. But he did not explain how **EPA** misled him. He also noted that the Administrative Law Judge “disbarred” his legal counsel, and he was not familiar with the procedures applicable to his case until a friend mentioned that he had a right to appeal.

⁶ *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, 4-5, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez*, slip op. at 2.

⁷ *Accord School Dist. 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 complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and therefore may be subject to equitable tolling).

⁸ *Baldwin County Welcome Ctr.*, 446 U.S. at 152. (“[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures”).

⁹ *Accord Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

The fact that a party did not know that the law required him to timely file a petition will generally not support a finding of entitlement to equitable tolling.¹⁰ Moreover, in this case, Santamaria knew, or should have known that he was required to file an appeal within ten business days because the Administrative Law Judge personally served Santamaria (as well as his counsel) with a copy of the R. D. & O. I on February 24, 2004, and the Board personally served Santamaria with the Notice of Appeal and Briefing Schedule and three subsequent Orders during the course of the litigation before the Board. So contrary to Santamaria's assertions in his response to our Show Cause Order, he knew or should have known that he could appeal a decision under the environmental whistleblower laws and the limitations period for that appeal.

Santamaria has failed to establish that the EPA misled him regarding his appeal rights or that he was in some extraordinary way prevented from asserting those rights. Accordingly, he has failed to carry his burden of establishing a basis for tolling the limitations period and we **DISMISS** his appeal in *Santamaria II*.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

¹⁰ *Accord Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997).