In the Matter of:

KENT WARNER, **ARB CASE NO. 08-112**

COMPLAINANT, **ALJ CASE NO. 2008-ERA-002**

v. **DATE: March 29, 2010**

XCEL ENERGY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kent Warner, *pro se,* Welch, Minnesota

FINAL DECISION AND ORDER

Kent Warner filed a complaint with the United States Department of Labor alleging that his employer, Xcel Energy, violated the employee protection provisions of the Energy Reorganization Act (ERA or Act), when it terminated his employment because he voiced concerns regarding the falsification of training records.[1] The Act protects employees who engage in certain protected activities from employer retaliation.[2] A Department of Labor Administrative Law Judge (ALJ) concluded that Warner did not

[1] Occupational Safety and Health Administration's Final Investigative Report.

[2] 42 U.S.C.A. § 5851 (West 2003 & Supp. 2008).

timely file his ERA complaint and recommended that we dismiss it.[3] We affirm the ALJ's decision and dismiss Warner's complaint.

BACKGROUND

The Respondent, Xcel Energy, a nuclear power generation facility, hired the Complainant, Kent Warner, to work at its Welch, Minnesota facility.[4] Warner worked at various jobs for Xcel over the following fourteen years until June 13, 2005, when Xcel terminated his employment.[5] Xcel maintained that it fired him because he made inappropriate comments to a female co-worker involving syrup wrestling and a thong.[6]

Four months after Xcel terminated his employment, in October 2005, Warner telephoned Xcel to request a copy of his personnel record.[7] He was informed that he must make a written request for the record, which he did on November 1, 2005.[8] On November 28, 2005, he contacted a Human Resources employee, Eric Bachman, to find out why he had not received the record, and Bachman informed him that the delay was due to his vacation and that he would send the record to Warner.[9] On December 1, 2005, Warner received a copy of his personnel file and an employee handbook.[10] Warner contacted Xcel again because the file was not complete.[11] Warner received the complete file in mid-December 2005.[12]

Warner contacted the Nuclear Regulatory Agency (NRC) in 2006, and he was told that the NRC would look into the nuclear safety items that he alleged, but that he

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3 *Warner v. Xcel Energy*, ALJ No. 2008-ERA-002 (June 27, 2008) (Decision and Order Dismissing Complaint (D. & O.)).

4 Secretary's Findings at 1 (Nov. 29, 2007).

5 *Id.*

6 *See* Confidential Investigation Report (June 21, 2005).

7 Complainant's Initial Brief (C. Br.) at 1.

8 *Id.*

9 *Id.* at 1-2.

10 *Id.* at 2.

11 *Id.*

12 *Id.*

should talk to the Department of Labor about his "harassment of termination."[13] Two weeks later he was given contact information at the Department of Labor, but Warner did not file his complaint until September 24, 2007, almost 27 months after Xcel terminated his employment, 21 months after he received his complete personnel record, and at least 9 months after her was told to contact the Department of Labor.[14]

An Area Director for the Occupational Safety and Health Administration (OSHA) issued the Secretary's Findings concluding that the complaint must be dismissed because Warner did not file it within 180 days of the date on which Xcel terminated his employment.[15] Warner objected to the Secretary's Findings and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).[16]

The ALJ to whom the case was assigned issued an Order to Show Cause why the Complaint Should not be Dismissed as Untimely Filed. In this Order, the ALJ questioned both the timeliness of the original complaint and the timeliness of Warner's request for a hearing.[17]

The ALJ issued a Decision and Order Dismissing Complaint in which he concluded that Warner filed his request for hearing within the 30-day limitations period established in the ERA's regulations.[18] Nevertheless, he dismissed Warner's complaint because he found that he failed to file his original complaint with OSHA within 180 days after the alleged violation (the termination of his employment) occurred.[19] Furthermore, he noted that Warner was not entitled to toll the limitations under the continuing violation doctrine because the latest possible retaliatory act was the termination, and Warner had failed to file a complaint within 180 days of his termination.[20] The ALJ also found that Warner was not entitled to equitable tolling of the limitations period because "[h]e made

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13 *Id.* at 6.

14 *Id.*

15 Secretary's Findings at 1.

16 *See* 29 C.F.R. § 24.106 (2009).

17 *Warner v. Xcel Energy,* ALJ No. 2008-ERA-002 (Mar. 27, 2008) (Order to Show Cause Why Complaint Should Not Be Dismissed As Untimely Filed).

18 D. & O. at 2. *See* 29 C.F.R. § 24.106(a).

19 D. & O. at 2.

20 *Id.* at 2-3.

no showing that he has been meaningfully prevented from asserting his rights, and this tribunal is an appropriate forum in which to litigate this case."[21]

Warner petitioned the Administrative Review Board for review of the ALJ's D. & O.[22] The Board issued an Order Establishing Briefing Schedule in this case. Warner filed an opening brief in response to the Board's Order, but Xcel did not file a brief in reply to Warner's opening brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in ERA cases.[23] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision … ."[24] Thus the Board reviews the ALJ's legal conclusions de novo.[25] The ERA's implementing regulations provide, "[t]he Board will review the factual determinations of the administrative law judge under the substantial evidence standard."[26] Neither the Complainant nor the Respondent has disputed the ALJ's factual determinations; the Complainant does dispute the ALJ's application of the facts to the relevant law.

DISCUSSION

Employees alleging employer retaliation in violation of the ERA's whistleblower protection provisions must file their complaints with OSHA within 180 days after the alleged violation occurred (i.e., "when the discriminatory decision has been both made and communicated to the complainant").[27] It is undisputed that Warner did not file his

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21 *Id.* at 3.

22 *See* 29 C.F.R. § 24.110(a).

23 Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110.

24 5 U.S.C.A. § 557(b) (West 1996).

25 *Backus v. Indiana Michigan Power Co.,* ARB No. 06-129, ALJ No. 2005-ERA-008, slip op. at 6 (ARB Sept. 30, 2008).

26 20 C.F.R. § 24.110(b).

27 29 C.F.R. § 24.103(2).

complaint until September 24, 2007, which was almost 27 months after Xcel terminated his employment on June 13, 2005. Accordingly, Warner's complaint is untimely. Nevertheless, the ERA's limitations period is not jurisdictional, and therefore it is subject to equitable modification.[28] But the Supreme Court has noted that equitable relief from limitations periods is "typically extended ... only sparingly."[29]

In determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. v. Marshall.*[30] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[31] the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[32]

Although Warner's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[33] Furthermore, ignorance of the law is generally not a factor that warrants equitable modification.[34]

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[28] *Accord Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128; ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30. 2001).

[29] *Irwin v. Veterans Admin.*, 498 U.S. 89, 96 (1990).

[30] 657 F.2d 16, 19-21 (3d Cir. 1981).

[31] 15 U.S.C.A. § 2622 (West 2004).

[32] *Allentown*, 657 F.2d at 20 (internal quotations omitted). This case arises in the Eighth Circuit, in which the court has distinguished between equitable tolling and equitable estoppel as grounds for tolling limitations periods. *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1033-34 (2005). In *Henderson*, the court wrote that equitable estoppel "applies when the employee knows [he] has a claim, but the employer affirmatively and actively takes action that causes the employee not to timely file [his] suit." *Id.* at 1033. The court stated that the doctrine of equitable tolling "focuses on the employee's ignorance of a claim, not on any possible misconduct by the employer," and tolls the limitations period when the plaintiff, despite diligent attempts, is unable to obtain crucial information pertaining to the existence of his claim. *Id.* Application of either doctrine as defined by the Eighth Circuit would not change the outcome of this case, as fully explained below.

[33] *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

[34] *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005).

Warner bears the burden of justifying the application of equitable modification principles.[35] He argues that we should toll the limitations period because Xcel misled him as to the grounds for his termination.[36] He avers that Xcel delayed providing him with his complete personnel file until after the 180-day filing period had run and that memos in the file disclosed that even with his prior discipline issues, the inappropriate comments for which Xcel stated he was fired, warranted discipline, but not termination.[37] Under an equitable estoppel analysis the Board has held that the party invoking the doctrine must show (1) the respondents wrongfully concealed their actions, (2) the complainant failed to discover the operative facts that are the basis of the cause of action within the limitations period; and (3) the complainant acted diligently until discovery of the facts.[38]

Here, Xcel did not conceal any discriminatory actions. Warner knew on June 13, 2005, that Xcel had terminated his employment, and he knew that he voiced concerns regarding the falsification of training records prior to the termination. He then had 180 days from the day of his termination to file his ERA claim because this was when he received "final, definitive, and unequivocal notice" of an adverse employment action by Xcel.[39] Rather than file within this time period; however, he waited over two years before submitting his complaint.

As explained by the Fifth Circuit, "a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose."[40] This precept is applicable here – Warner knew that he had engaged in ERA-

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[35] *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).

[36] C. Br. at 1.

[37] *Id.* at 2.

[38] *Overall v. Tenn. Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 39-40 (ARB Apr. 30, 2001) (citations omitted).

[39] *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-035, slip op. at 5 (ARB Dec. 16, 2005).

[40] *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1216-17 (5th Cir. 1992). *Accord Coppinger-Martin v. Nordstrom, Inc.*, ARB No. 07-067, ALJ No. 2007-SOX-019, slip op. at 6 (ARB Sept. 25, 2009) (concealing the reason for an adverse employment action does not toll the statute of limitations governing a whistleblower claim, nor does it estop the employer from asserting timeliness as a defense).

protected activity and that he had been adversely affected in the terms of his employment when Xcel fired him. He claimed that he did not know the true reason for the firing until he received and reviewed his personnel record. However, he admitted that the personnel file "reconfirm[ed] his suspicions" of retaliatory treatment and that "[d]uring my employment I had been contacting the Employee Concern Program and Human Resources on issues at the site that I believed were harassing and leading to my termination."[41] He also stated that prior to his termination, one of his co-workers contacted him at home and warned him that his supervisor "was out to get me fired" and that he again "contacted Employee Concerns Program telling them I felt harassed and felt that I would be fired."[42] Further, after chronicling a number of events that he felt demonstrated harassment, as disclosed in the personnel records, he stated, "I [was] aware that most of these existed but had no hard documentation to prove it until my personnel file arrived in Dec. of 2005."[43] Therefore, application of equitable estoppel is not warranted. While a complainant's burden to establish the elements of his claim may be difficult, it is still the complainant's burden to do so. Warner's argument confuses notice with evidence. As the Board wrote in *Halpern v. XL Capital, Ltd.*, "[n]either the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. [A complainant's] failure to acquire evidence of . . . motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint . . . ."[44] To toll a limitations period until a complainant acquired evidence of motive "would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them."[45]

Finally, even if we had found that the limitations period was tolled until Warner received his personnel record, he could not establish that he timely filed his complaint because he still failed to file within 180 days of receiving the file or of being put on notice that he should file his claim with the Department of Labor. His only excuses for this failure are that he "was not aware of the 180 days for a workers right to appeal"[46] and

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41 C. Br. at 3-4.

42 *Id.* at 4-5.

43 *Id.* at 6.

44 ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 5 (Aug. 31, 2005) (citations omitted).

45 *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1338 (6th Cir. 1995) (quoting *Pinney Dock & Transp. v. Penn Central Corp.*, 838 F.2d 1445, 1478 (6th Cir. 1988).

46 C. Br. at 6.

did not know "the laws and time lines to appeal my case."[47] But ignorance of the law is no excuse, especially in this case when an NRC representative told him in 2006 that he needed to file his retaliation complaint with the Department of Labor, and he still waited until September of 2007 to do so.[48]

CONCLUSION

We agree with the ALJ that Warner has failed to show good cause for his failure to timely file his ERA complaint. He has failed to demonstrate that Xcel actively misled him regarding the cause of action, that he was in some extraordinary way prevented from filing his action, or that he raised the precise claim in the wrong forum. Accordingly, we **DISMISS** his complaint as untimely.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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47 *Id.* at 8.

48 Further, Warner has not even alleged, much less shown that he was prevented in some extraordinary way from timely filing or that he filed in the wrong forum.