



**In the Matter of:**

**MOSHE FRIEDMAN,**  
**COMPLAINANT,**

**ARB CASE NO. 12-089**

**ALJ CASE NO. 2012-ERA-008**

**v.**

**DATE: November 25, 2013**

**COLUMBIA UNIVERSITY,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Moshe Friedman, *pro se*, South Fallsburg, New York**

***For the Respondents:***

**Evandro C. Gigante, Esq.; *Proskauer Rose LLP*, New York, New York**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA). 42 U.S.C.A. § 5851 (Thomson Reuters 2012). On January 28, 2011, Moshe Friedman filed the above-captioned complaint with the Occupational Safety and Health Administration (OSHA) alleging that Columbia University terminated his employment in retaliation for his whistleblowing about safety violations. OSHA dismissed the complaint as untimely filed under the ERA. Friedman requested a hearing with the Office of Administrative Law Judges. Prior to a hearing, Columbia University filed a motion for summary decision. After holding an evidentiary hearing on the motion, the Administrative Law Judge (ALJ) found that the undisputed material facts established that Friedman's complaint was untimely filed under the ERA and dismissed the complaint. Friedman petitioned the Administrative Review Board (ARB or Board) for review. We affirm.

## JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to whistleblower claims filed under the ERA.<sup>1</sup> The Secretary has delegated that authority to the Administrative Review Board.<sup>2</sup> We review a grant of summary decision de novo under the same standard that ALJ's must employ.<sup>3</sup> Pursuant to 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."<sup>4</sup> When reviewing the evidence the parties submitted, the ALJ and the Board must view it in the light most favorable to the non-moving party, Friedman in this case.<sup>5</sup> In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.<sup>6</sup> The Board "construe[s] complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."<sup>7</sup>

## BACKGROUND

Given our singular focus on the timeliness of the filing of Friedman's complaint with OSHA, we identify only the most critical facts the ALJ cited and which Friedman does not dispute. Friedman was employed in the Columbia Medical Center's Radiation Safety Office.<sup>8</sup> Pursuant to a reorganization at Columbia, Friedman was notified on January 7, 2010, that his job

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<sup>1</sup> 42 U.S.C.A. § 5851.

<sup>2</sup> Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012). See 29 C.F.R. Part 24 (2013).

<sup>3</sup> *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5 (ARB Sept. 26, 2012); *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012).

<sup>4</sup> 29 C.F.R. § 18.40(d) (2012); see *Franchini*, ARB No. 11-006, slip op. at 6; *Siemaszko*, ARB No. 09-123, slip op. at 3.

<sup>5</sup> See *Franchini*, ARB No. 11-006, slip op. at 6; *Siemaszko*, ARB No. 09-123, slip op. at 3.

<sup>6</sup> See *Franchini*, ARB No. 11-006, slip op. at 7; *Siemaszko*, ARB No. 09-123, slip op. at 3.

<sup>7</sup> *Hyman v. KD Res. L.L.C.*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 8 (ARB Mar. 31, 2010) (citations omitted).

<sup>8</sup> See Administrative Law Judge's Exhibit (ALJX) 7 – Fenn Affidavit and Affidavit Exhibits A, B.

with Columbia would be eliminated on February 1, 2010.<sup>9</sup> Friedman’s job was eliminated on February 1, 2010.<sup>10</sup> On March 18, 2010, Friedman’s then-attorney wrote a letter to Columbia pursuing a severance agreement, Friedman’s whistleblower rights and expressly acknowledging the 180-day limitation for filing an ERA whistleblower complaint with OSHA.<sup>11</sup> On November 23, 2010, Friedman executed a separation agreement with Columbia.<sup>12</sup> Friedman filed the OSHA complaint in this matter on January 28, 2011.<sup>13</sup>

## DISCUSSION

After holding an evidentiary hearing on Columbia’s motion for summary decision, the ALJ found “no genuine issue of material fact to be resolved” and determined as a matter of law that

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<sup>9</sup> *Id.*

<sup>10</sup> *See* Order of Dismissal of Complaint (Order) at 1. In his petition for review and his supporting brief, Friedman acknowledges that his position was terminated through a restructuring but he argues that it was not properly authorized. *See* Petition for Review of Administrative Law Order at 2; Complainant’s Supporting Legal Brief of Points and Authorities (Complainant’s Brief) at 23-24. But an objection to the legality of the layoff does not change the fact that the unfavorable employment action occurred in February 2010. *See also* Complainant’s Brief at 18 (Friedman expressly relies on statements made by another employee who said that Friedman was notified on January 7, 2010, of a restructuring and the “restructuring resulted in the elimination of . . . Mr. Friedman’s Office Administrator position.”). More importantly, it is the February 2010 layoff that Friedman points to as the unfavorable employment action that constituted whistleblower retaliation.

<sup>11</sup> Order at 1; *see* 42 U.S.C.A. § 5851(b)(1); 29 C.F.R. § 24.103(d)(2). Again, Friedman does not deny that his attorney wrote a letter to Columbia asserting Friedman’s whistleblower rights and expressly noting the 180-day time limit. Friedman only argues that knowledge of his whistleblower rights and the 180-day time limit should not be “imputed to him based on a March 18, 2010 letter by [his] attorney to the Respondent.” Petition for Review at 2; Complainant’s Brief at 4.

<sup>12</sup> ALJX 7 – Fenn Affidavit and Affidavit Exhibit B.

<sup>13</sup> ALJX 1. In his rebuttal brief, Friedman expressly acknowledges that he filed an OSHA complaint on January 28, 2011, and OSHA made a determination on that complaint on February 7, 2012. Complainant’s Rebuttal at 5. He also argues that another party filed an OSHA complaint on July 30, 2010, that allegedly included Friedman as a party and OSHA also made a determination on that complaint. But, in the case before us, it is the January 28, 2011 complaint and OSHA’s determination of that complaint that the ALJ dismissed as untimely. The July 30, 2010 complaint is a separate matter and not before us. If Friedman believed he was a party in the July 30, 2010 complaint, then presumably he complied with the regulations to request a hearing on OSHA’s determination for that complaint and pursued his alleged claim. *See* 29 C.F.R. § 24.106 (allowing a party to object to an OSHA determination and request a hearing).

Friedman filed his OSHA complaint too late in the case before us and dismissed the complaint.<sup>14</sup> Consequently, we shall review the ALJ's Order as a grant of summary decision.

Complaints for illegal retaliation under the ERA must be filed within 180 days after the alleged violation occurred (i.e., "when the discriminatory decision has been both made and communicated to the complainant").<sup>15</sup> In ERA whistleblower cases, the 180-day deadline runs from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.<sup>16</sup> As we noted earlier, Friedman does not dispute that he received a notice on January 7, 2010, and that his job was eliminated on February 1, 2010. If the January 7, 2010 notice was insufficient to start the clock on the time limitations, the elimination of Friedman's job on February 1, 2010, certainly was sufficient, as a matter of law, to start the running of the 180-day time limitation under 29 C.F.R. § 24.103(d)(2).<sup>17</sup> Friedman filed the above-captioned complaint with OSHA on January 28, 2011.<sup>18</sup> Consequently, the above-captioned complaint was late by almost a year unless Friedman can establish a regulatory or equitable basis for tolling the limitation period.

Friedman did raise a regulatory argument for tolling the limitation period. In response to Columbia's motion for summary decision, Friedman argued that Columbia had not posted the whistleblower provisions of the ERA explaining the provisions of the Act and its implementing regulations, including the filing deadline for filing an ERA whistleblower complaint as required under 29 C.F.R. § 24.102(d)(1).<sup>19</sup> Pursuant to 29 C.F.R. § 24.102(d)(2), if the required notice has not been posted, the deadline for filing an ERA whistleblower complaint within 180 days of an alleged violation will be "inoperative, unless the respondent establishes that the complainant had knowledge of the material provisions of the notice," whereby the 180 days will run from the date "that the complainant later obtained knowledge of the provisions of the notice."<sup>20</sup>

It is undisputed that on March 10, 2010, an attorney representing Friedman wrote a letter to Columbia pursuing Friedman's whistleblower rights. The ALJ properly noted that Friedman's

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<sup>14</sup> Order at 3.

<sup>15</sup> 29 C.F.R. § 24.103(d)(2); *see also* 42 U.S.C.A. § 5851(b)(1).

<sup>16</sup> *Swenk v. Exelon Generation Co.*, ARB No. 04-028, ALJ No. 2003-ERA-30, slip op. at 4 (ARB Apr. 28, 2005).

<sup>17</sup> *Id.* at 7.

<sup>18</sup> ALJX 1.

<sup>19</sup> *See* ALJX 11; *see also* 42 U.S.C.A. § 5851(a)(i); 29 C.F.R. § 24.102(d)(1); 29 C.F.R. Part 24, Appendix A.

<sup>20</sup> 29 C.F.R. § 24.102(d)(2).

attorney at the time acknowledged in his March 10, 2010 letter that “Mr. Friedman was terminated on January 7, 2010” and that “Mr. Friedman has 180 days from the date of his termination to file a complaint with OSHA” pursuant to the ERA’s whistleblower protection provisions.<sup>21</sup> Friedman admitted both to OSHA and to the ALJ at the hearing that he had received a copy of his attorney’s March 10, 2010 letter at the time.<sup>22</sup>

As the ALJ determined, assuming that Friedman had no knowledge of the 180-day deadline to file an ERA whistleblower complaint because of Columbia’s failure to comply with the posting requirements of 29 C.F.R. § 24.102(d)(1), his attorney acting on his behalf had knowledge of the deadline at least as of March 10, 2010. Consequently, we agree with the ALJ that the provision in 29 C.F.R. § 24.102(d)(2) tolling the running of the 180-day period from date of the alleged violation no longer applies to an employee who has an attorney pursuing ERA whistleblower rights who expressly acknowledges the 180-day limitation period.<sup>23</sup> Under subsection 24.102(d)(2), the 180-day limitation period nevertheless begins to run anew when “the complainant later obtained knowledge of the provisions of the notice.” The OSHA complaint was filed more than 180 days after Friedman’s attorney acknowledged in his March 10, 2010 letter of the deadline for filing an ERA whistleblower complaint and, therefore, Friedman’s regulatory tolling argument fails to save his claim.

Friedman also argues that he should be entitled to equitable tolling of the 180-day deadline in this case. In determining whether to toll a statute of limitations, we have recognized four non-exclusive situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to

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<sup>21</sup> See ALJX 7 – Affidavit Exhibit A.

<sup>22</sup> See ALJX 1; Hearing Transcript (HT) at 38.

<sup>23</sup> As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

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 R.R. Co.*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)); see also *Greene v. Envtl. Prot. Agency*, ARB No. 03-094, ALJ No. 2002-SWD-1, slip op. at 6, n. 29 (ARB Mar. 9, 2011).

vindicate his rights.<sup>24</sup> Friedman bears the burden of justifying the application of equitable tolling principles.<sup>25</sup>

Friedman has failed to provide sufficient grounds justifying the application of any of the four general bases for invoking the equitable tolling principles. Friedman knew or should have known by March 10, 2010, about the deadline for filing an ERA whistleblower complaint. But there is no explanation for his delay in filing his above-captioned ERA whistleblower complaint until January 28, 2011, that would equitably toll the 180-day period for filing his complaint.

Lastly, Friedman points to two other complaints filed with OSHA to argue that the complaint in this case is timely. He asserts that a fellow Columbia employee, who received the same employment termination notice Friedman received on January 7, 2010, timely filed another ERA whistleblower complaint with OSHA that allegedly included Friedman as a party-complainant. Friedman also argues that he has timely filed a more recent ERA whistleblower complaint with OSHA on June 21, 2011, complaining that, in violation of the terms of the separation agreement he signed with Columbia, Columbia has failed to return his personal computer data stored on his Columbia work computer in retaliation for Friedman filing his above-captioned ERA whistleblower complaint on January 28, 2011.<sup>26</sup> Because only the above-captioned complaint Friedman filed on January 28, 2011, is now before us, we decline to address in this case Friedman's assertions regarding any other alleged complaints he may have filed.

Finally, Friedman contends he was not given a full and fair opportunity to reply to Columbia's motion for summary decision below before the ALJ. We note that Friedman filed an initial reply to Columbia's motion for summary decision,<sup>27</sup> and the ALJ then held a hearing on the motion at which Friedman testified. Moreover, after the hearing, the ALJ allowed Friedman to file an additional reply to Columbia's motion, while also allowing Columbia to then file a reply to Friedman's second reply.<sup>28</sup> Given this procedural background, we reject Friedman's contention that he was denied a full and fair opportunity to reply to Columbia's motion for summary decision. .

Consequently, reviewing the evidence the parties submitted in the light most favorable to Friedman, we affirm the ALJ's finding that no genuine issue of material fact exists that Friedman's complaint in the above-captioned case was untimely filed.

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<sup>24</sup> *Kelly v. U.S. Enrichment Corp.*, ARB No. 13-063, ALJ No. 2012-ERA-015, slip op. at 3 (ARB Aug. 9, 2013); *Hyman*, ARB No. 09-076, slip op. at 7-8.

<sup>25</sup> *Id.*

<sup>26</sup> *See* ALJX 11.

<sup>27</sup> *See* ALJX 11.

<sup>28</sup> *See* HT at 26-27.

## CONCLUSION

We agree with the ALJ that no genuine issue of material fact exists and that based on the undisputed facts Friedman's complaint in the above-captioned case was untimely filed. Accordingly, we **AFFIRM** the ALJ's decision and **DISMISS** his complaint as untimely.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Chief Deputy Administrative Appeals Judge**