



In the Matter of:

MICHAEL J. KELLY,

ARB CASE NO. 13-063

COMPLAINANT,

ALJ CASE NO. 2012-ERA-015

v.

DATE: August 9, 2013

**UNITED STATES ENRICHMENT
CORPORATION,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael J. Kelly, pro se, Portsmouth, Ohio

For the Respondent:

Charles C. Thebaud, Morgan Lewis, Washington, District of Columbia

Before: Paul M. Igasaki, Chief Administrative Appeals Judge, and Luis A. Corchado, Administrative Appeals Judge

FINAL DECISION AND ORDER DISMISSING APPEAL

The Complainant, Michael J. Kelly, filed a complaint on July 19, 2012, alleging that the Respondent, United States Enrichment Corporation, retaliated against him in violation of the whistleblower protection provisions of the Energy Reorganization Act (ERA).¹ On May 8, 2013, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting Respondent's Motion for Summary Decision and

¹ 42 U.S.C.A. § 5851 (West 2003 & Supp. 2012).

Dismissing Complaint (D. & O.). The ALJ found that Kelly had failed to file a timely complaint with the Occupational Safety and Health Administration as provided in 42 U.S.C.A. § 5851(b)(1)(establishing 180-day limitations period for filing retaliation complaint with OSHA).

The Secretary of Labor has delegated her authority to issue final agency decisions under the ERA to the Administrative Review Board.² The ALJ's May 8, 2013 D. & O. includes this "Notice of Appeal Rights:"

This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board . . . within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing.^[3]

The limitations period for filing a timely petition for review of the D. & O. expired on May 20, 2013. Kelly filed a petition for review that the Administrative Review Board received by e-mail on June 1, 2013, more than ten (10) business days after the ALJ issued his D. & O. Accordingly, the Board issued an order requiring Kelly to show cause why the Board should not dismiss his petition as untimely. Kelly filed a timely response to the Board's order and the Respondent filed a reply to Kelly's response.

DISCUSSION

The procedures adopted under 29 C.F.R. Part 24 are intended to facilitate the "expeditious handling of retaliation complaints made by employees" arising under the environmental and nuclear whistleblower statutes.⁴ Nevertheless, the regulation establishing a ten-business-day limitations period for filing a petition for review with the Board is not jurisdictional and is therefore subject to equitable modification.⁵

² Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012).

³ D. & O. at 6. *See also* 29 C.F.R. § 24.110(a)(2012).

⁴ 29 C.F.R. § 24.100(b). *Accord Williamson v. Washington Savannah River Co.*, ARB No. 07-071, ALJ No. 2006-ERA-030, slip op. at 3 (ARB June 28, 2007).

⁵ *See Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013)("filing deadlines ordinarily are not jurisdictional"). *Accord Prince v. Westinghouse Savannah River Co.*, ARB

Accordingly, we have held that it is within our discretion to consider an untimely filed petition for review.⁶

In determining whether the Board should toll a statute of limitations, we have recognized four principal 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 vindicate his rights.⁷ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Kelly's claim.⁸ Nevertheless, the Board, like the courts, has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."⁹

Kelly bears the burden of justifying the application of equitable tolling principles.¹⁰ In support of his request that the Board toll the limitations period, Kelly averred that two family members were battling a serious condition; that he had a recent health problem with minor surgery; that he had been traveling back and forth to Columbus, Ohio, a 250-mile round trip, to care for a family member; and that sometimes he stayed in Columbus. He stated that he did not receive the "letter" timely because he was out of town and that he submitted the petition as soon as he could within 10 days of when he received it.

In reply, the Respondent argued that Kelly failed to establish that either the illnesses of his family members and ensuing travel or his recent healthy problem qualified as an extraordinary impediment to timely filing. Further, the Respondent averred that once Kelly received the ALJ's D. & O., he failed to diligently file his petition for review. Thus the Respondent argues that Kelly has failed to establish that he is entitled to equitable tolling of the limitations period. We agree that Kelly failed to

No. 10-079, ALJ No. 2006-ERA-001, slip op. at 4 (ARB Nov. 17, 2010), *aff'd sub nom. Prince v. Solis*, 487 Fed Appx. 773 (4th Cir. 2012).

⁶ *Prince*, ARB No. 10-079, slip op. at 4.

⁷ *Woods v. Boeing-South Carolina*, ARB No.11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012).

⁸ *Id.*

⁹ *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)); *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 4 (ARB Sept. 30, 2010).

¹⁰ *Id.* at 5.

provide sufficient grounds for equitable tolling. Our ruling is limited to the specific arguments and circumstances presented by the parties in this case.

Although Kelly did not cite to any of the four general bases for invoking tolling, we agree with the Respondent that it appears that Kelly is arguing that the illnesses of his family members and resulting absence from his home and his own minor surgical procedure qualified as extraordinary circumstances justifying tolling of the limitations period. “Extraordinary circumstances” is a high standard.¹¹ But we do not need to address whether that standard was met because Kelly failed to provide a timeline of his alleged extraordinary circumstances, specifically explaining how and when they might have precluded him from timely filing the petition. Thus, although we are, of course, sympathetic to the serious health challenges his family has faced, Kelly has failed to carry his burden of establishing that he was precluded by extraordinary circumstances from filing the petition.

Further, Kelly did not demonstrate diligence in filing the petition after he became aware on May 24th that the decision had been previously delivered. He knew or should have known by reading the decision that his petition for review had been due on May 22nd. Yet he waited an additional eight days after he became aware of the decision to submit a 4-sentence petition for review. Again there is no explanation for this delay or for the reason he did not act more diligently once he realized that he had missed the filing date.

CONCLUSION

We conclude that Kelly has failed to carry his burden of establishing that “extraordinary” circumstances justify equitable tolling of the limitations period for filing a petition for review in this case. We also conclude that Kelly did not exercise due diligence in preserving his right to petition the Board for review of the ALJ’s D. & O. Accordingly, we **DISMISS** his petition for review.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

¹¹ See, e.g., *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (“complete psychiatric disability” during the entirety of the limitations period); *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period).