



In the Matter of:

MICHAEL P. FLOOD,

ARB CASE NO. 04-069

COMPLAINANT,

ALJ CASE NO. 2004-SOX-16

v.

DATE: January 25, 2005

CENDANT CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael P. Flood, pro se, New York, New York

For the Respondent:

Zachary D. Fasman, Esq., Paul, Hastings, Janofsky & Walker, LLP, New York, New York

**FINAL DECISION AND ORDER
DISMISSING PETITION FOR REVIEW**

This case arose when the Complainant, Michael P. Flood, filed a complaint under the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX),¹ and its implementing regulations² alleging that his employer, Cendant Corporation, terminated his employment in violation of the SOX whistleblower protection provisions. The issue the Board must consider is whether to accept Flood's untimely filed petition for review. We accept for purposes of argument that the Administrative Law Judge agreed to serve his decision and order on Flood by e-mail and that the e-mailed copy Flood received on

¹ 18 U.S.C.A. § 1514A (West 2002).

² 29 C.F.R. § 1980 (2004).

March 3, 2004, was not dated. Nevertheless, we find that it is not appropriate to toll the limitations period because Flood did not diligently protect his rights when he failed to file his petition within ten business days of the date on which he admits that he received the decision and order.

BACKGROUND

When an Occupational Safety and Health Administration (OSHA) investigation determined that Michael Flood did not timely file his complaint,³ he filed a request for a hearing by a Department of Labor Administrative Law Judge (ALJ). Cendant Corporation filed a Motion to Dismiss arguing that Flood had failed to timely file his complaint within 90 days of the alleged SOX violation.⁴ The ALJ agreed and issued a Decision & Order Granting Motion (D. & O.) to dismiss on February 23, 2004.⁵ Attached to the D. & O., the ALJ provided this notice of appeal rights:

This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board (“Board”) . . . and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. . . . To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge.⁶

Flood alleges that because he was travelling in Europe, the ALJ agreed to communicate with him via e-mail. He also states that the copy of the D. & O. the ALJ e-mailed to him did not include the date that the ALJ issued it but Flood indicates that he received the D. & O. on March 3rd.⁷

Flood faxed his petition for review to the Administrative Review Board on March 18, 2004, more than ten business days after the date on which the ALJ issued the D. & O. Accordingly, on March 26, 2004, the Board issued an Order to Show Cause requiring Flood to demonstrate why the Board should not dismiss his appeal because he failed to file a timely petition for review and permitting Cendant to reply to Flood’s response.

³ See 29 C.F.R. § 1980.103(d).

⁴ See 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

⁵ *Flood v. Cendant* [sic] *Corp.*, 2004-SOX-00016 (Feb. 23, 2004).

⁶ *Id.* at 3.

⁷ Exhibit “C” attached to Supplement to Reply to Order (July 27, 2004).

DISCUSSION

Pursuant to the regulations that dictate the time limitations period for filing a petition for review of an administrative law judge's decision and order under the SOX:

Any party desiring to seek review, including judicial review, of a decision of the administrative law judge . . . must file a written petition for review with the Administrative Review Board ("the Board"), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. . . . To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.⁸

This regulation is an internal procedural rule adopted to expedite the administrative resolution of cases.⁹ Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.¹⁰

⁸ 29 C.F.R. § 1980.110(a).

⁹ 29 C.F.R. § 1980.100(b). *Accord Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 3 (ARB Aug. 31, 2000); *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).

¹⁰ *Gutierrez*, slip op. at 3; *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 Service*, 397 U.S. 532, 539 (1970).

The Board is guided by the principles of equitable tolling in determining whether to relax the limitations period in a particular case.¹¹ Accordingly, the Board has recognized three situations in which tolling is proper:

- (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.¹²

These categories are not exclusive¹³ 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.””¹⁴ Once the party requesting tolling identifies a factor that might justify such tolling, we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period. But “[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.”¹⁵

Flood bears the burden of justifying the application of equitable tolling principles.¹⁶ Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling.¹⁷

Flood initially argues that Cendant actively misled him as to his cause of action and prevented him from asserting his rights. But it appears that this argument is

¹¹ *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

¹² *Gutierrez*, slip op. at 3-4.

¹³ *Id.* at 3.

¹⁴ *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). 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).

¹⁵ *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

¹⁶ 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).

¹⁷ Accord *Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997).

addressed to the filing of his initial complaint rather than to the filing of the petition for review, the issue currently before the Board.

Flood also avers that the ALJ's notice of his appeal rights was unclear and lead him to believe that he had 30 days to file his petition for review. But the notice clearly states that while the Board has 30 days to accept the petition for review, to be effective the petitioner must file his or her petition within ten business days of the date on which the administrative law judge issued his or her decision. Accordingly, Flood's statement that "the first date for appeal is noted as '30' days" is obviously incorrect. Neither are we convinced by Flood's argument that "ten" was not as obvious as "30" because it was "spelled out" rather than "written as a number." Flood had an obligation to carefully read the notice and his failure to do so (or the failure of his assistant to do so) does not excuse his failure to timely file his petition.

Underpinning Flood's argument that we should toll the limitations period is his assertion that he did not receive the e-mail copy of the D. & O. from the ALJ until the day his petition for review was due. But the notes Flood submitted in support of his response to the Show Cause Order belie this assertion.¹⁸ Flood states in his notes that he received the e-mailed decision on March 3rd. His petition for review was due on March 8th. Thus, he had 5 days (3 business days) to timely file his petition. Moreover, even if we accept Flood's assertion that the copy of the D. & O. the ALJ sent was not dated, he knew that at the very latest the ALJ issued the D. & O. on March 3rd. Nevertheless, he failed to file his petition for review within ten business days of that date, March 17, 2004. Thus, even giving Flood the maximum benefit of the doubt, he failed to diligently act to protect his rights.¹⁹ Accordingly, because we find no basis for tolling the limitations period, we **REJECT** Flood's Petition for Review and **DISMISS** his appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

¹⁸ Exhibit C attached to Supplement to Reply to Order (July 27, 2004).

¹⁹ *Cf. Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 405 (party who unsuccessfully argued that she was entitled to equitable tolling because her filing was delayed due to overseas mail, failed to explain why she could not have used telephone or facsimile).