



In the Matter of :

NATALY MINKINA, M.D.,

ARB CASE NO. 05-074

COMPLAINANT,

ALJ CASE NO. 2005-SOX-19

v.

DATE: July 29, 2005

AFFILIATED PHYSICIAN'S GROUP,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Nataly Minkina, MD, pro se, Chestnut Hill, Massachusetts

For the Respondent:

Tracey E. Spruce, Esq., Ciampa & Associates, Boston, Massachusetts

FINAL DECISION AND ORDER DISMISSING APPEAL

On February 22, 2005, a Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision & Order Granting Summary Decision, Dismissing Complaint and Denying Request for Attorney's Fees (R. D. & O.) in this case arising under the Sarbanes-Oxley Act of 2002 (SOX).¹ A party seeking review of an administrative law judge's decision must file a petition for review with the Administrative Review Board within ten business days of the date of the Judge's decision.² The Complainant, Dr. Nataly Minkina, did not timely file her petition for review. The Board must determine whether Minkina's inability to obtain counsel to

¹ 18 U.S.C.A § 1514A (West 2002).

² 29 C.F.R. § 1980.110 (2004).

represent her and her mistaken belief that she had thirty days rather than ten business days in which to file her petition for review constitute extraordinary circumstances compelling the Board to toll the limitations period. We conclude that neither Minkina's inability to obtain counsel or her ignorance of the law is an extraordinary circumstance that justifies the tolling of the limitations period.

BACKGROUND

Dr. Minkina filed a complaint under SOX's whistleblower protection provisions³ with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Affiliated Physician's Group (APG), discriminated against her because she reported to OSHA an allegedly dangerous ventilation problem at her workplace.⁴ OSHA investigated the complaint and found that there was no merit to it. Minkina requested an administrative hearing before a Department of Labor Administrative Law Judge.⁵ Upon consideration of APG's motion for summary decision and Minkina's opposition to it, the ALJ concluded that there was no genuine issue of material fact and that APG was entitled to summary decision in its favor but not to an award of attorney's fees.⁶ Attached to the R. D. & O. is the following:

³ Title VIII of Sarbanes-Oxley is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 covers companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78l, and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such companies. Section 806 protects employees who provide information to a covered employer or a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation. 68 FR 31864 (May 28, 2003).

⁴ Minkina also filed a complaint under Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C.A. § 660(c)(West 1999) with OSHA alleging that APG retaliated against her because she reported ventilation problems in her workplace. OSHA found her complaint to be untimely and the ALJ did not consider the complaint because he concluded that the OSH Act "does not create any private right of action, and there is no provision in the OSH Act or its implementing regulations for a hearing on a Section 11(c) complaint before an administrative law judge." R. D. & O. at 1-2 n.1.

⁵ 29 C.F.R. § 1980.106.

⁶ R. D. & O. at 3-7.

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.⁷

Ten business days of the date of the ALJ’s R. D. & O. was March 8, 2005. Minkina filed her Petition for Review of the R. D. & O. on March 21, 2005. Accordingly, on March 25, 2005, the Board ordered Minkina to show cause why the Board should not dismiss her petition for review because she did not timely file it. Minkina filed a response to the Board’s order and APG replied to Minkina’s response urging the Board to dismiss her appeal as untimely.

DISCUSSION

The regulation that dictates the time limitations period for filing a petition for review of an administrative law judge’s decision and order under the SOX provides:

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

⁷ *Id.* at 8. The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under SOX. Secretary’s Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002).

⁸ 29 C.F.R. § 1980.110(a).

Continued . . .

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.⁹ Principles of equitable tolling guide the Board in determining whether to relax the limitations period in a particular case and accept an untimely petition.¹⁰ 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.¹¹

Minkina bears the burden of justifying the application of equitable modification principles.¹² She argues that she was prevented from asserting her rights because she was unable to find an attorney who would represent her and because she mistakenly believed

⁹ *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-16, slip op. at 3 (ARB Jan. 25, 2005); *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).

¹⁰ *Flood*, slip op. at 3-4; *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.

¹¹ *Hemingway*, slip op. at 4, citing *School Dist. v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981) (holding that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), that provided 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).

¹² *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). *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).

that she had thirty rather than ten days from the date of the ALJ's R. D. & O. to file her appeal. We do not find Minkina's arguments to be persuasive.

Minkina argues that she and her husband contacted a number of attorneys when she initiated the proceedings before the ALJ but she was unable to find a sufficiently experienced attorney who was willing to take her case. We conclude however that Minkina's inability to find counsel does not constitute an extraordinary event that precluded her from timely filing her appeal. The ALJ attached a Notice of Minkina's appeal rights to her decision and a careful reading of the Notice would have sufficiently informed Minkina of the steps she was required to take to file a timely appeal.

With regard to Minkina's claim that she found the instructions confusing, as we held in *Hemingway*, "we are unwilling in this case to depart from the general principle that 'ignorance of legal rights does not toll a statute of limitations.'"¹³ Minkina was obligated to carefully read the Notice and her failure to do so is not an extraordinary circumstance that excuses her failure to timely file her petition.¹⁴

The Board has recognized that the three *Marshall* elements are not necessarily exclusive,¹⁵ and Minkina's failure to satisfy one of these elements would not have necessarily been fatal to her claim if she had identified another factor that would justify tolling the limitations period. We find, however, that she has failed to do so.

Accordingly, we conclude that Minkina has not established that exceptional circumstances precluded her from timely filing a petition for review, and we **DISMISS** her appeal.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹³ *Hemingway* at 5, quoting *Larson v. American Wheel & Brake, Inc.*, 610 F.2d 506, 510 98th Cir. 1979). *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).

¹⁴ *Accord Flood* at 5.

¹⁵ *Gutierrez*, slip op. at 4.