



In the Matter of:

JOEL GOODING,

ARB CASE NO. 11-059

COMPLAINANT,

ALJ CASE NO. 2011-SOX-018

v.

DATE: December 12, 2011

ABB, LIMITED,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Joel Gooding, *pro se*, Berlin, Germany

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DISMISSING APPEAL

The Complainant, Joel Gooding, filed a complaint on September 24, 2010, alleging that the Respondent, ABB, Limited, retaliated against him in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).¹ On May 24, 2011, a Department of Labor Administrative Law Judge (ALJ) issued an Order of Dismissal (O.D.) in which he dismissed Gooding's complaint because he found that Gooding failed to timely file it.

¹ 18 U.S.C.A. § 1514A (Thomson/West Supp. 2010).

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.² To perfect a timely appeal from an administrative law judge's decision, a party must file a petition for review with the Board within ten business days of the date on which the judge issued his decision.³

Gooding filed a petition for review postmarked June 14, 2011. Gooding avers in his petition for review that he sent the petition by e-mail on June 13, 2011, but the Board has no record of receiving any such e-mail. In any event, ten business days from the date of the ALJ's O.D. expired on June 8, 2011.

Because it appeared that Gooding had filed his petition for review more than 10 business days from the date on which the ALJ issued his O.D., the Board issued an Order to Show Cause requiring Gooding to demonstrate why the Board should not dismiss his petition as untimely. Given that Gooding resides in Berlin, Germany, we gave him an extended period of forty days from the date of the order, June 29, 2011, in which to file his response. Further, the Board cautioned him that "If Gooding fails to timely respond to this Show Cause Order, the Board may dismiss his appeal without further notice." The Board also permitted ABB to file a reply to Gooding's response.

Gooding did not file a response to the show cause order on or before the 40th day from June 29, 2011, which was August 8, 2011. The Board received a response on August 26, 2011, which was dated August 15, 2011. ABB did not file a reply to Gooding's response.

DISCUSSION

As an initial matter we must determine whether to accept Gooding's untimely response to the Board's Show Cause Order. The response was due no later than August 8, 2011. Perhaps suspecting that the Board might not consider his response to be timely Gooding explained in the response:

I am filing this response on August 15, 2011 as a result of the following time calculations. The Order to Show Cause was issued on June 29, 2011 and the prescribed period of response was 40 days bringing the date of response to August 8, 2011. The Order to Show Cause was served by mail and so according to 29 C.F.R. Part 18.4 Time computations(c)(3), five days are to be added to the

² 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).

³ See 29 C.F.R. § 1980.110(a). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing.

prescribed period. Since August 13, 2011 fell on a Saturday the instruction of 29 C.F.R. Part 18.4(a) applies which gives the date of August 15, 2011.^[4]

Well-settled Board precedent establishes that the regulations to which Gooding cites are not applicable to Board proceedings.⁵ In affirming the Board's holding to this effect in *Ellison*, the Eleventh Circuit Court of Appeals wrote:

The regulation delimiting the scope of Part 18, however, states that Part 18 applies to proceedings before ALJs; nothing suggests that it applies to proceedings before the ARB. See 29 C.F.R. § 18.1. And, a separate provision in Part 18 suggests that its rules do not apply to procedures for appeals. See 29 C.F.R. § 18.58 (“The procedures for appeals shall be as provided by the statute or regulation under which hearing jurisdiction is conferred.”). See also *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12, slip op. at *2 (Dep’t of Labor Admin. Rev. Bd. May 14, 2003) (rejecting argument that an untimely petition for review was rendered timely by 29 C.F.R. § 18.4(c)(3)). While in certain contexts, the ARB “often looks to the Rules of Practice and Procedure for Administrative Hearings ... for guidance on procedural matters,” *Madonia v. Dominick’s Finer Foods, Inc.*, ARB No. 99-001, ALJ No. 98-STA-2, slip op. at *3 (Dep’t of Labor Admin. Rev. Bd. January 29, 1999), the ARB is not bound to do so, and it has never suggested that it would apply the procedures for administrative hearings to determine filing deadlines.^[6]

Even though the Board put Gooding on notice in the Order to Show Cause that the Board questioned his understanding of the requirement for a timely filing before the Board, and the Board gave him 40 days in which to file his response, he did not contact the Board to

⁴ Response to Show Cause Order at 1.

⁵ *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001, slip op. at 8 (ARB Nov. 17, 2010); *Ellison v. Washington Demilitarization Co.*, ARB No. 08-119, ALJ No. 2005-CAA-009, slip op. at 3-4 (ARB Mar, 16, 2009), *aff’d sub nom Ellison v. Dep’t of Labor*, 2010 WL 2490906, slip op. at *2 (June 17, 2010)(unpubl.).

⁶ 2010 WL 2490906, slip op. at *2 (June 17, 2010)(unpubl.). Furthermore as explained in greater detail, *infra* at 5, 29 C.F.R. § 18.4 is inapplicable to documents that must be filed within specified number of days of the date on which the order was issued, rather than on the date the order was served on the party.

confirm that his understanding was correct, and he waited until the very last day possible, even under his understanding of the applicable filing period, to file his response. Nevertheless, because dismissal of an appeal for a failure to timely file it is a serious sanction, we will consider Gooding's response to the Order to Show Cause.

As we noted in the Order to Show Cause, the SOX's limitations period is not jurisdictional and therefore is subject to equitable modification.⁷ In determining whether the Board should toll a statute of limitations, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. v. Marshall*.⁸ In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,⁹ 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."¹⁰ But the Board has determined that a petitioner's inability to satisfy one of these elements is not necessarily fatal to his claim.¹¹

Gooding bears the burden of justifying the application of equitable tolling principles.¹² But he has not invoked any of the grounds for equitable tolling in his response to the Show Cause Order. Instead, he maintains that he timely filed his petition for review. Gooding argues:

The ALJ's O.D. was issued on May 24, 2011 and the prescribed period of response was 10 business days bringing the date of response to June 8, 2011. The ALJ's O.D. was served by mail and so according to 29 C.F.R. Part 18.4 Time computations (c)(3), five days are to be added to

⁷ *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

⁸ 657 F.2d 16, 19-21 (3d Cir. 1981).

⁹ 15 U.S.C.A. § 2622 (West 2004).

¹⁰ *Marshall*, 657 F.2d at 20 (internal quotations omitted).

¹¹ *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 4 (ARB Aug. 31, 2005). *Cf. Marshall*, 657 F.2d at 20 ("We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate.").

¹² *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

the prescribed period which gives the date of June 13, 2011. . . . June 13, 2011 was a national holiday in Germany where I am residing and it was not possible to post a letter. For this reason I sent my Petition for Review by email on June 13, 2011 and posted the same by mail on June 14, 2011.^[13]

As we explained above, Gooding’s assumption that the Office of Administrative Law Judge rules of practice and procedure apply to cases before the Board is incorrect as established by Board precedent.¹⁴

Furthermore, 29 C.F.R. § 18.1 states that to “the extent that [section 18’s] rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, the latter is controlling.” Because 29 C.F.R. § 1980.110(a) clearly states that the limitations period for filing a petition with the Board begins on the date of the ALJ’s decision, section 18.4(c)(3)’s provision allowing for 5 extra days must be considered as inconsistent with the language of section 1980.110(a). Therefore, the limitations period of section 1980.110(a) controls.¹⁵

Finally even if the Part 18 rules were applicable to ARB proceedings, section 18.4(c)(3) specifically provides, “Whenever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party, and the pleading, notice or document is served upon said party by mail, five (5) days shall be added to the prescribed period.” But 29 C.F.R. § 1980.110(a) provides that “[a] petition must be filed within 10 business days of the date of the decision of the administrative law judge,” not within 10 days of the date upon which the decision was served upon “said party.” Thus, 29 C.F.R. § 18.4(c)(3), by its terms, is inapplicable to the filing of a petition for review.¹⁶

Gooding did not file a petition for review for review within 10 business days of the date on which the ALJ issued his decision. Therefore his petition was untimely and

¹³ Response to Show Cause Order at 1.

¹⁴ *Supra* at 3.

¹⁵ *See Prince*, ARB No. 10-079, slip op. at 9.

¹⁶ *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 4 (ARB May 14, 2003), *aff’d on different grounds sub nom Herchak v. U.S. Dep’t of Labor*, 125 Fed. Appx. 102 (9th Cir. 2005)(unpubl.). On appeal to the Ninth Circuit, Herchak did not raise the argument that the ALJ’s rule 18.4d(c)(3) governed the period for filing the petition for review.

subject to dismissal.¹⁷ Gooding has proffered no reason to excuse the timely filing.¹⁸ Accordingly, we **DISMISS** his petition for review.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

¹⁷ *Prince*, ARB No. 10-079, slip op. at 10, *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021 slip op. at 6 (ARB Sept. 30, 2010), *Herchak*, ARB No. 03-057, slip op. at 7.

¹⁸ Gooding stated in his response to the Order to Show Cause that he filed a petition for review with the Board on June 13, 2011, by e-mail. While the Board does accept petitions filed by e-mail, Gooding did not file his e-mail with the Board, but instead sent it to a general Department of Labor mailbox. Had Gooding timely filed this e-mailed petition by June 8, 2011, he could have argued that he was entitled to tolling under the exception for filing in the wrong forum, but the June 13th e-mail was not timely, so the exception is inapplicable.