



IN THE MATTER OF:

QINGMING SWINNEY,

ARB CASE NO. 15-044

COMPLAINANT,

ALJ CASE NOS. 2014-SOX-041

v.

DATE: June 11, 2015

FLUOR CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Qingming Swinney, *pro se*, Lewisville, Texas

For the Respondent:

Robert E. Sheeder, *Bracewell & Giuliani*, Dallas, Texas

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

FINAL ORDER DISMISSING PETITION FOR REVIEW

Complainant Qingming Swinney filed a petition on April 15, 2015, requesting the Administrative Review Board to review a Department of Labor Administrative Law Judge's decision in *Swinney v. Fluor Corp.*, ALJ No. 2014-SOX-041 (Mar. 31, 2015). The regulations governing appeals of decisions under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (Thomson/West Supp.

2014), such as this one, provide that a petition for review must be filed within ten business days of the date on which the administrative law judge issued his decision.¹

Swinney acknowledges that she did not timely file the petition, but requests the Board to accept it nevertheless. We find that, under the facts of this case, Swinney has failed to establish a sufficient basis for invoking tolling of the limitations period.

BACKGROUND

The Department of Labor Administrative Law Judge (ALJ) assigned to this case issued his Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint on March 31, 2015. This Decision and Order did not include a Notice of Appeal Rights, although such notices are generally included in final orders issued by the Department's ALJs. Swinney received the ALJ's decision on April 6, 2015. Under the regulations governing the filing of SOX petitions for review, a timely petition would have been due by April 14, 2015. Swinney filed her petition for review on April 15, 2015. Swinney asserts that it took her eight days "to learn about the opportunity for petition for review" and that she submitted the petition on the same day that she learned about it.²

DISCUSSION

Swinney failed to file a timely petition for review with the ARB. But the regulation establishing a ten-day limitations period for filing a petition for review with the Board is not jurisdictional and is, therefore, subject to equitable modification.³ Accordingly, we have held that it is within our discretion to consider an untimely filed petition for review.⁴

¹ 29 C.F.R. § 1980.110(a)(2014). See also Secretary's Order No. 2-2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,378 (Nov. 16, 2012).

² Letter to Board dated May 9, 2015 at 1.

³ 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 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).

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

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 or her 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.⁵ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Swinney's claim.⁶

Swinney bears the burden of justifying the application of equitable tolling principles.⁷ She has not specifically addressed any of the four grounds that the ARB has recognized, but argues that the ALJ's failure to include the Notice of Appeal Rights, as is the normal practice, is responsible for her failure to timely file because, "[i]t took [her] 8 days to learn about the opportunity for petition for review."

The fact that the ALJ did not include a notice of appeal rights is regrettable, but the ALJs are not required by statute or regulation to do so. Swinney has not explained what steps she took during the eight days before she filed to acquaint herself with her rights, nor how it was that she learned of them on April 15, 2015. Significantly, Respondent avers,

Additionally, while complainant insinuates that her ignorance of the law was due to her status as a *pro se* party, she has consulted with and has been represented by an attorney through this proceeding, including at her deposition. Accordingly, her failure to seek the advice of counsel immediately upon receipt of the ALJ's decision does not excuse the tardiness of her Petition.^[8]

Although Swinney replied to Fluor's response, she did not dispute that she had access to legal counsel or explain how she learned that she was entitled to file a petition for review. Accordingly, we hold that Swinney has not demonstrated exceptional circumstances, nor

⁵ *Woods v. Boeing-South Carolina*, ARB No.11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012).

⁶ *Id.*

⁷ *Id.* at 5.

⁸ Respondent Fluor Corporation's Response to Complainant's Untimely Petition for Review at 3.

any other grounds sufficient to invoke the extraordinary remedy of tolling of the limitations period.⁹

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

⁹ See *Bennett v. Director, Office of Workers' Comp. Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983) (“It has long been established that publication of regulations in the Federal Register has the legal effect of constructive notice of their contents to all who are affected thereby.” (citations omitted)).