



IN THE MATTER OF:

MICHAEL B. BROWN,

ARB CASE NO. 17-037

COMPLAINANT,

ALJ CASE NO. 2015-SOX-018

v.

DATE: May 17, 2017

**SYNOVUS FINANCIAL
CORP.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michael B. Brown, *pro se*, Columbus, Georgia

For the Respondent:

**Margaret Hutchins Campbell, Esq.; Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.; Atlanta, Georgia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge* and Leonard J. Howie III,
*Administrative Appeals Judge***

FINAL DECISION AND ORDER DISMISSING UNTIMELY APPEAL

On December 16, 2017, a Department of Labor Administrative Law Judge issued a Decision and Order—Granting Respondent’s Motion for Summary Decision and Order Dismissing Complaint (D. & O.) in this case arising under the employee protection provisions of

the of the Sarbanes-Oxley Act of 2002 (SOX).¹ On April 6, 2017, Complainant Michael B. Brown filed, with the Administrative Review Board, a Motion and Brief to Set Aside the Order Due to Fraud on the Court.

The Secretary of Labor has delegated to the Board the limited responsibility to act for the Secretary and issue final agency decisions in review or upon appeal of final decisions of Department of Labor Administrative Law Judges (and the Wage and Hour Administrator and his or her authorized representative).² To invoke the Board's authority to review a decision of an ALJ under the SOX's employee protection provisions, the party must file a petition for review within 14 days of the date of the ALJ's decision.³ Complainant has not filed a petition for review of an Administrative Law Judge's decision in this case. Instead he has filed a Motion and Brief to Set Aside the Order Due to Fraud on the Court. Brown has not cited to any authority that would permit the Board to consider such a motion. However, given Brown's pro se status, the Board will consider the Motion to constitute a petition for review of the ALJ's decision.

But, as such, Complainant filed his petition more than 14 days after the ALJ issued his D. & O. Nevertheless, the period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.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 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 defendant'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 Brown's claim.⁶

¹ 18 U.S.C.A. § 1514A (Thomson West Supp. 2016). SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2016).

² 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).

³ D. & O. at 29. *See also* 29 C.F.R. § 1980.110(a) (2016).

⁴ *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).

⁵ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

⁶ *Id.* at 4.

Brown bears the burden of justifying the application of equitable tolling principles.⁷ Accordingly, we ordered him to show cause why the Board should not dismiss his petition because he failed to timely file it. In response, Brown replies that ineffective assistance of counsel constituted an extraordinary way in which he was prevented from timely filing his petition. In support of this basis for equitable tolling, Brown avers that he was in contact with his counsel on several occasions after the ALJ issued his decision and that on the day the petition for review was due to be filed at the Board, his counsel assured him that it would be filed. Brown's contention is supported by a Declaration from his counsel, Marcus G. Keegan, stating that Keegan indicated to Brown on December 30, 2016, that he would file the petition, but that he failed to do so.⁸

The Board has consistently held that equitable tolling is generally not appropriate when a complainant is represented by counsel because counsel is "presumptively aware of whatever legal recourse may be available to [his or her] client."⁹ Thus, attorney error does not constitute an extraordinary factor because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."¹⁰ We do note that this appears to be particularly egregious conduct by the attorney in this case. He admitted that he told Brown on the day that the petition was due that he would file it and then failed to do so. But even if we made an exception for this extraordinarily serious breach of an attorney's obligation to his client, Brown still could not prevail on his claim for equitable tolling.

Brown admitted that he learned on January 14, 2017, that his attorney had failed to file the petition for review. Even if the period for filing had been tolled during the period Brown was unaware that Keegan had failed to file the petition as he said he would, once Brown was put on notice of this fact, the limitations period began to run anew. Nevertheless, Brown failed to file a petition for review within 14 days of the date that Keegan informed him that his attorney had not filed the petition. Brown states that he continued to attempt to work with Keegan after January 14th to "get as much information as he could from counsel" and that he filed a grievance with the State Bar of Georgia. But Brown has failed to establish any sufficient grounds for his failure to file a petition for review or to request additional time in which to do so, by January 28, 2017.

⁷ *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).

⁸ Declaration of Marcus G. Keegan, Exhibit B to Complainant's Response to the Order to Show Cause.

⁹ *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5 (ARB May 27, 2008)(quoting *Mitchell v. EG&G*, No. 1987-ERA-022, slip op. at 8 (Sec'y July 22, 1993)).

¹⁰ *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006).

Accordingly, as Brown has failed to file a timely petition for review or to demonstrate sufficient grounds to entitle him to equitable tolling, his petition is **DENIED** as untimely and this case is closed.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge